JUDGE RICHARD D. SIMONS
NEW YORK STATE COURT OF APPEALS
(JANUARY 1983 - DECEMBER 1997)

The following oral history interview with Judge Richard D. Simons was conducted on April 4, 2003 (in New York City) and September 5, 2003 (in Rome, N.Y.). The interviewer was David E. McCraw, Counsel, The New York Times Company, who served as one of Judge Simons's clerks from 1992 to 1994.

Part One (April 4, 2003)

Interviewer: Let us begin with when you first came to the Court of Appeals. According to the press accounts at the time, you received the call the day before from Governor Cuomo.

Judge: That's right.

Interviewer: What do you recall about that?

Judge: Well, I had not taken the application very seriously. I had been rejected several times before because of Democratic governors, and I only applied in this instance because it was an election year and I thought possibly a Republican would win. So I wasn't really losing a lot of sleep over it. We were up skiing and we had some houseguests with us, one of whom didn't ski. I think it was a Saturday. She got a telephone call from the governor's office wanting to know if I would be home on Sunday. Well, she was all aflutter, and she couldn't wait for us to get back so she could tell us. We didn't expect to go home Sunday but we certainly did after that.

So we got home Sunday, and we sat there from about 10 o'clock in the morning until late that night and no telephone call came in. We were nervous wrecks by the time it finally did come in, and I think it was about 10:30 or 11:00 o'clock. The governor asked me if I would accept an appointment and of course I did accept it. And he asked me to come down to Albany the next morning for a press conference so we went down for that.

The weather as I recall was quite bad, and I called my mother, who lived in Niagara Falls, and she didn't feel she could travel. She was pretty old at that time. So I got down to Albany and met the governor and he said, "Where is your mother? I understand your mother's coming." And I said, "Well, she didn't feel she could travel." And he said, "I'll send a state helicopter up for her." And then shortly after that I got word that my sister had picked her up and was going to drive her down. So then he insisted that the helicopter would stop them on the Thruway so that they would be in time for the press conference. I said, "Governor, if you do that you'll scare them out of their wits." But they got there

eventually about the middle of the press conference.

And we met for a press conference in, I think they call it, the red room in the Capitol. There was the famous picture . . . it was on the front of The New York Times. . . where I look like a laughing hyena. I appeared with the governor and in the course of the questioning, a reporter asked a question – and I don't remember what the question was – he asked a question of me and I sort of stammered around trying to figure out if it was a loaded question. I tried to figure out how I should answer it, and Cuomo interrupted and said that "if Judge Simons is dumb enough to answer that question, I've picked the wrong man for the Court." And that's when the picture was taken, while I was laughing out of a sense of relief.

Interviewer: You ended up sitting that day?

Judge: I sat that day and had an enormous pile of records and briefs dumped in my lap by the time I got over to the Courthouse about 12:00 o'clock, I didn't have a chance to read any of it. So I got on the bench very much in the dark, and either the first case or one of the first cases was a case called *Avitzur v. Avitzur*, and it was about a rabbinical divorce. The whole record was full of Jewish terms – the Beth Torah or Beth Din, I guess – and all these terms that I had never heard before. And I sat there trying to make some sense of the argument and all this language that I was totally unfamiliar with and I thought, "I've made a terrible mistake. I don't belong here at all." But anyway we got through that first day all right.

Interviewer: Had you ever sat by designation?

Judge: No, I had not.

Interviewer: Had you ever argued in front of the Court of Appeals?

Judge: No, I had not. I had never been there before and I spent the first half hour or so looking around at the scenery trying to figure out what it was all about. I sat right next to Judge Fuchsberg on the bench and because of my background with him (which I will get into some other time, I guess), he was nervous. And I don't know if I was nervous, but he kept leaning over to me and asking me how I was going to vote on the cases. I couldn't figure out whether he was trying to be friendly or whether he didn't know what to do with a case and wanted some advice. But the newspaper reports made a great fuss about the two of us sitting next to each other on the bench.

Our chambers were next to each other, too, on the third floor. We were the only judges on the third floor. At about 10 o'clock that evening he came in very exercised and he said, "I've had nothing but telephone calls all day long about how you and I are going to have a lot of trouble working together." He said,

"Are we?" And I said, "Not as far as I'm concerned." He said okay and he turned around and stomped out. We never did have any great trouble working together. He was only there five or six months. He was a somewhat difficult man to work with but we didn't have any trouble over anything. I think we just sort of put it all behind us. But that was the extent of my first day.

Interviewer: Did you have clerks?

Judge: I had one clerk that I brought with me from the Fourth Department. She worked one day and she came in the next day and she said: "I'm out of here. Everybody down here is crazy . . .I'm not gonna do it." She was a very good clerk, and I said, "Please, stay. I'll let you go, but please stay until I can get some new clerks." She said, "No way, I'm gone, I'm out of here." She apparently spent the night with some of the other clerks, and they'd done nothing but talk cases all night long and she was fed up.

So I ended up without a clerk. I called Judge Mahoney who was the P.J. of the Third Department. I had known from my time there that that was sort of a farm league for Court of Appeals clerks. So I called him up and asked him if he could help me out and he said, yes, he would send over two or three for me to interview and he did. I think it was the very same day and I took Rich Reed and Dave Wukitsch, and he called up and he said, "I was willing to give you one, but I didn't think you were going to take my two best clerks." But he was fine.

Interviewer: What was the procedure at that point under Judge Cooke as far as assigning cases to judges to report on?

Judge: I think it was established by Chief Judge Breitel. In any event it had been and was the same as it was under Judge Wachtler. You had no idea what your assignment might be and were expected to be familiar with all of the cases during oral argument. Then after the Court recessed or adjourned for the day, the judges would go into the red room behind the robing room. There, the chief judge would be given a stack of cards, each card having the name of one case on it. The clerk would prepare the cards with the names of the cases, and then depending upon whose turn it was to go first in the rotation, each judge would draw a card in turn and whatever name appeared on the card was the case assignment. You were expected to study the case in depth that night, the next morning report it to the conference and then vote on the remaining cases argued the day before. It was tentative of course. Nobody ever stopped you if you wanted to change your vote, and people did occasionally. But that was the process for getting the cases moving and decisions made, so you knew who was going to write and where the burden lay for that.

Interviewer: Was it unnerving to walk in initially to the conferences?

Judge: Yes, it was. It was very formal in those days. I think in time it loosened up a

little bit, but when the case was called and the chief judge would call it, the reporting judge would report the case and report it in some detail, and then we started around the table with a junior judge voting first. Which was a little intimidating at least for the first few days. And then after everyone had voted maybe one way, for example, someone might say, "Well, I have a different view of it," and would state his or her position. Then after everybody had spoken and voted, we would divide the Court. How many are going with Judge So-and-So, the reporting judge, how many are going with Judge So-and-So, the dissenting judge, or perhaps he might be the majority.

Judge Fuchsberg resigned in the spring and Judge Kaye took his place. When she first got on the Court, the Court had a case that we had debated month after month, term after term, in the spring. I can't tell you the details of the case but it had something to do with billboards on Long Island and the federal highway law and the interplay with state law and so forth. The Court had divided three to three, and Judge Fuchsberg was no longer there, so Chief Judge Cooke would call the case up every term and we would go through the same thing. We knew everybody's arguments, we knew all the details, but no votes changed. So finally he said, "All right, we'll have to put it over to the fall until we get a new judge and the new judge can cast the deciding vote."

Well, the new judge was now-Chief Judge Kaye, and she had never been a judge before. She had been a very successful and able lawyer, but she had never been a judge and had no idea how these things worked. And she prepared that case. I think she could have recited the record word for word from memory, she had worked so hard. She knew everything about it, and Judge Cooke said, all right, we're going to discuss Jones against Smith or whatever it was. He said, "Judge Kaye, you have the first vote as the junior judge." She said, "Well, I'm to affirm." He said, "Fine, put it down four to three." And she sat there with her mouth wide open wondering what had happened to her. Of course we didn't care what her reasoning was at all; all we needed was a vote at that point.

Interviewer: It was more formal than you'd been used to in the Fourth Department?

Judge: Yes, considerably. There was no joking around, there were no side conversations or any by-play. You were there for business, and it worked very well, I must say. As time went on, particularly because Chief Judge Wachtler was such a humorist, if somebody had a joke, they'd interrupt a conference to tell a joke. It made it pleasant in many respects but sometimes things dragged out a little bit.

Interviewer: You may not recall the first two cases you ended up writing, but one is an Article 78 tax case and the second one is about Brooke Shields's photograph and it actually ends up with a three-judge dissent. Do you remember that first round of writing? Was it different from what you'd been used to in the Fourth Department?

Judge: No. I remember doing the tax case, *Mobil Oil*, I think, and as a new judge of course you're anxious to do something and make a splash, and I drew this darned case. Judge Bellacosa was the clerk at that time and said, "You've got to write an opinion . . . It's your first case. You have to write an opinion so you can get your name in the front of the book [the official reporter]." So that's how it became a written opinion but the substance of the case doesn't amount to much.

The Brooke Shields case was interesting because I don't know whether I drew that case or whether I took over the Court on it because the reporting judge was in the minority. I think I took over the Court on it. But it was a question of publication of pictures of Shields taken in a bathtub and her right of privacy.

My law clerks were very anxious for me to get the case so they could see all the exhibits. I don't remember that it came out during the argument that she was only 10 when the pictures were. It must have but it didn't sink in. Anyway, we get the exhibits and we open them up and here's this little 10-year-old girl in a bathtub. You couldn't see anything except her shoulders and her head.

Interviewer: Do you recall there being active disagreement when you had a four-three vote on that case, or was that dissent handled in a civil way?

Judge: No, I don't remember having any serious disputes. Sometimes you did, obviously, but I don't remember having any great debate over that case. People's perspective on things came out. I remember Judge Jasen wrote the dissent, and Judge Jasen was a man with – I want to say, with a conservative view of life – and he just thought it was very bad for a young girl.

Interviewer: And, I believe, her mother had signed a consent and the issue was whether she now as an adult was able to revoke the consent that her mother had given on her behalf when she was a girl.

Judge: Right.

Interviewer: Before you came to the Court, The New York Times talked about Judge Cooke's style. And the story said that, according to unnamed judges, "Judge Cooke seems reluctant to assume so active a role in Court conferences and oral arguments. The result is, the judges say, the Court often seems leaderless, its deliberations unstimulating, its decisions more fragmented than before."

Obviously you don't know what it was like before you became a judge but could you reflect on his leadership style?

Judge: I don't think I would have put it quite that strongly. He was not an aggressive

chief judge and I think he probably suffered from following Chief Judge Breitel, whom I knew but I had never served with. Judge Breitel was a very active, very persuasive and very much a leader in the Court. So I think by contrast, probably, Chief Judge Cooke suffered. He was quiet, he was dignified, he kept a conference well organized. He would rarely if ever try to talk anyone out of dissenting or writing separately, which was a view that I by and large approved. But some did not. They thought there should be major effort to get unanimity all the time. He was not particularly popular with some of the judges because he and Judge Jasen had been in a serious contest to see who would follow Chief Judge Breitel. The judges had sort of chosen up sides and the losers I think resented Judge Cooke because of it. He was the least senior judge on the Court and Judge Jasen was the most senior judge, and Judge Cooke prevailed over Judge Jasen.

Interviewer: Among the people who were there initially when you came, was there one that you recall as being more outspoken or more forceful than others?

Judge: Judge Jones was a very articulate man and spoke frequently and unhesitatingly expressed his views. He was not somebody that intimidated you or tried to dominate you or anything. Judge Fuchsberg was a kind of a loose cannon because you never could quite figure out where he was, and the fact that he may have voted to affirm didn't mean a thing because he might subsequently change to vote for a reversal and then he might go back to affirming. You just were not certain what he was doing all the time. But there were some good minds on the Court, Judge Wachtler had a good mind, Judge Meyer had a very good mind and, of course, Judge Kaye was excellent.

Interviewer: Before we get into particular cases, let's talk about your philosophy as a judge about judging and whether it changed over time. When you retired there was an article in the Law Journal where you're quoted as saying, "I guess I've been very fortunate. I don't seem to have these crises of conscience that many judges do. I don't say that critically of them because they certainly are very real, but I have for the most part been able to divorce my personal feelings from the cases." I was wondering if you could sort of expand on that as to the line between personal feelings and deciding cases and how you dealt with that.

Judge: Well, I think probably every judge . . . I mean, you don't come in as a cipher. You have some thoughts and some background and so forth. That necessarily makes you more open to some arguments than it does to others. Some judges would take a case, and every case became very, very important to them. I don't mean that they would fight, but the case, the result, would become very important to them, and so they worried their way through them. I don't remember very many cases where I did that. If I did do it on some – and I know I did do it on some – I pretty much left it at the office after the case was over. I just didn't carry it with me, which was a great boon to me because I know other judges just never forgot about certain cases.

Interviewer: When you got to the Court of Appeals, did you have a sense that there had been experiences you'd had either as a trial Court judge or at the Appellate Division that had been particularly influential in forming how you approached cases?

Judge: Yes, I had been on the Appellate Division for 12 years. So appellate work wasn't anything new to me. The procedures were new and different but the handling of the cases was just what I had been doing. It was no problem at all and so as far as the nature of the work and the nature of the problems and how you handled them, it was all just another day.

Interviewer: Then, over the time that you were at the Court of Appeals, did you notice your style changing in terms of how you approached cases, or had, by the time you got there, it pretty much formed itself?

Judge: I don't think, coming in as a stranger, you quite sense the importance of the Court. In the Appellate Division, you have a case, you decide it. You know, if we're wrong, the Court of Appeals will correct it. Well, it suddenly dawns on you when you get to the Court of Appeals that nobody's going to correct this. You better get it right because this is what lawyers are going to have to follow, and you don't want to make a mistake or do something foolish. So I think you take the work . . . I wouldn't say more seriously, because you certainly take it seriously when you're an Appellate Division judge, too, but you recognize that there's a little more gravity in what you're doing and that there is a little more responsibility involved.

Interviewer: It seems as if one of the things that comes up over and over in the decisions you wrote over the time you were at the Court of Appeals was a sense that the Court should – and I'm not using the word "conservative" – but should be restrained in what it does. Is that a fair comment on how you approached judging?

Judge: I think so. You never decide more than you need to. You never have dictum if you can avoid it and so on, and I think that that's pretty much the way that I've approached the cases. You decide the case in front of you, you don't try and anticipate what's going to happen in the future, and I think from a process point of view that would be conservative. When we got into this extensive discussion on the state Constitution, I think it was that sort of philosophy that was motivating me. Others had a much broader attitude about it – feeling that we want to expand the law.

Interviewer: Let's go back to a comment you made earlier about some judges being concerned about the result. It seems to me that one of the implications of what you're saying is that that there are times when you believe the law dictates a result that you personally or politically would disagree with.

Judge: Yes. I can think of many cases of that kind that philosophically I might not want

to go that way but if you believe in a separation of powers and if the Legislature does certain things and the Courts do certain things, you try to follow that. Also, there are a certain number of rules of law, but we used to call them "rules of thumb." There are certain things you don't do as a trial judge. You don't go around declaring laws unconstitutional as a trial judge. That's somebody else's job because you just create havoc if every trial judge is declaring laws unconstitutional. And there are rules like that. When you talk about state budgetary rules or fiscal rules, I would reach very hard to sustain a statute because I didn't want to destroy the public treasury. Obviously sometimes you can't, you have to strike it down, but there is that very important influence that leads you in that direction.

Interviewer: When you were first on the Appellate Division or during the years that you were coming through the Appellate Division were there judges either on the Appellate Division or the Court of Appeals who influenced the way you approached your work?

Judge: Yes, there were. There was a judge from Utica who served on the First Department and the Fourth Department. His name was Earl Bastow. A very excellent judge and he really in many ways was a mentor in the sense that he would be quick to tell me, you don't do this or you don't do that, and there is no question but that he helped direct some of my methods.

Interviewer: Let's talk about some particular cases. One of the cases that became subject to a lot of public attention early on was the Lemuel Smith death penalty case, which takes place and was heard in 1984. So you had been on the bench about a year at that point, or a little more than a year. What do you recall about the public circumstance surrounding the case when it was making its way through the Court of Appeals?

Judge: It involved the only section of the statutes that authorized capital punishment – if someone killed a peace officer or a prison guard. The other capital punishment sections for murder first degree had been stricken and had not been reenacted. So there was a good deal of interest in this because it was the only death penalty statute on the books, and Lemuel Smith was convicted of it when he killed, after he killed, a prison guard, a woman prison guard at Green Haven.

Interviewer: That's right. Donna Payton.

Judge: Donna Payton, yes. Interesting, the trial judge was Judge Rosenblatt, who is an associate judge on the Court now. He tried the case. So anyway this came up and there were a good many lawyers and amici that wanted to be heard so we set a special date for it so that we could have a whole afternoon of argument. William Kunstler argued on behalf of Lemuel Smith. Lemuel Smith was a bad man. He had been involved in many rapes and certainly in some other murders. So he was not a man who would attract sympathy from anyone, but Kunstler

represented him and argued the case. I think we allowed him an hour. We allowed him plenty of time, anyway. He at that time was very prominent because he had represented a lot of dissidents in civil disobedience cases and had a very fine reputation.

I don't remember being overly impressed by his argument, to tell you the truth, and the one thing that always sticks in my mind was the way he closed his argument. The last thing he said to the Court was: "Don't send my man to the electric chair just because he's ugly." It seemed to me like a very strange thing for a lawyer to say about his client. I have no idea whether Lemuel Smith was physically ugly but as far as his criminal record was concerned he certainly was not a very attractive man. But that was a case that the judges took very seriously, and I think some judges had a good deal of trouble with it.

Interviewer: Had you dealt with a death penalty case before?

Judge: Never had.

Interviewer: And that was the last one?

Judge: That was the last one, yes.

Interviewer: I think there may have been later cases involving death penalties in other states. There was one case out of Alabama or somewhere. There was a state conviction there that was an issue in New York.

Judge: Oh, yes. Do you want to hear the story on that?

Interviewer: Yes, we can. Why don't we hear that story?

Judge: The prisoner had been sentenced to death because he was a multiple felon. One of the convictions was in New York so he moved to vacate it.

The case came to us in the wrong way procedurally. Everything about it was wrong. So there was quite a lively discussion around the table as to whether we should set aside this conviction or what should we do, and finally Chief Judge Wachtler, in total frustration, said, "Now, who's going to write this? Mr. Defendant, you were innocent of that crime, but we have to keep our procedures pure. So I am sorry you will have to go to the death house." It brought everybody down in laughter and made us realize that we had lost perspective of, lost sight of, what we were doing. So I think we did vacate the conviction.

Interviewer: To move back to *Smith* . . .Were there procedures that were used in death penalty cases that differed from normal cases? I know you extended the time of argument beyond the usual.

Judge: It came up on a direct appeal for one thing, and we could review both facts and law. I think we allowed a lot of amicus briefs. We always received amicus briefs freely, but we never had quite so many. We might customarily have put a limit on them, except this was a death case. The judges wanted to give the case serious consideration and they wanted to have plenty of time to argue and plenty of time to review it, and all the input they could get.

Interviewer: And you ended up writing a three-judge dissent.

Judge: Yes, I did.

Interviewer: But the Court struck that part of, the last part of, the statute.

Judge: They did.

Interviewer: Do you recall the dynamics of the argument? Was there a lot of vote shifting?

Judge: No, there was very little vote shifting. I think that the thing fell into place very quickly. It was a long, long conference because there were many issues. There were not just the death penalty issues, and some of them were quite interesting issues, as I recall. I know I worked that case until 2:00, 3:00, 3:30 in the morning. And, as I recall, the conference took well over the morning, perhaps even longer. But there was not a lot of shifting back and forth. Just that there were a lot of things that had to be considered and considered carefully. I think probably the Court divided on the very first vote. The judges probably knew where they were going on the death penalty issue.

Interviewer: Had you, as a political matter, come to a conclusion about the death penalty before *Smith*, and did your own personal thoughts about the death penalty have any bearing, as you think back on it now, on how you decided the case?

Judge: I don't remember having any strong feelings about the death penalty one way or the other. I think, since the state reinstated it, I pretty much have come to the conclusion that I would not want to support it now. It raises a lot of questions. But at that time I don't remember having any great problem with it. It was a legislative decision. This is what the law was. I thought it was within the parameters of the Supreme Court decisions and so that's the way I wrote it. Others looked at it differently.

Interviewer: The vote ends up being Judge Jones, Wachtler, Meyer and Kaye on the majority and you and Judge Jasen and Judge Cooke on the dissent. I guess that from the outside the perception was that that also reflected the political leanings of the Court.

Judge: I think so except that you might question Chief Judge Cooke. I wouldn't have thought he was an overly conservative judge. But certainly Judge Jasen was.

Nobody knows what the perception of themselves is, but I suppose I fell into that category.

Interviewer: I know that when you were first appointed there was much made of the fact that there was a Democratic governor appointing a Republican.

Judge: Shortly after I was appointed Newsday did a feature article by a reporter who visited the courthouse for a whole week. He interviewed each judge in depth. The paper printed this article about the Court, and it was very good. One of the questions the reporter asked each judge was: Where do you place yourself on the political spectrum? Every judge on the Court considered himself a moderate.

Interviewer: You mentioned that Kunstler had argued on behalf of Lemuel Smith. It has raised a question in my mind of whom you recall from your time on the Court of Appeals as particularly effective advocates, lawyers who you thought distinguished themselves. And you mentioned that you did not think his argument at least that day was all that effective. As you think back now, are there attorneys that you think of as being particularly effective advocates?

Judge: About my remarks about Kunstler, some of the judges thought he was very effective. His style just was not particularly impressive to me. There were a lot of very good lawyers before the Court over the years, and I know you are going to ask me what their names are and I can't think of them. But there were some very, very fine advocates.

Interviewer: Let's talk about what I think it's probably been the most talked about area of Court of Appeals jurisprudence from the time you were there, which is the state Constitution. I guess the first time that you articulated the full theory of your view of the state constitutional law and how it fit in was in *P.J. Video* and that was a search and seizure case, as you recall.

Judge: Yes, it was.

Interviewer: What was the lead-up to that? You had decided a case about a year before called *Bigelow* on state constitutional grounds without really going into any sort of state constitutional analysis. Suddenly in *P.J. Video* there appeared this whole scheme for deciding state constitutional cases.

Judge: There had been a few cases over the years. *Sharrock v. Dell Buick* was one of the leading ones, where the Court fell back on the state Constitution and gave it an interpretation that differed from the federal Constitution. But, as you say, there hadn't really been any articulated basis of when we could do this. So when *P.J. Video* came before the Court we suppressed the evidence relying upon the federal Constitution. The Supreme Court reversed and said that the search didn't violate the federal Constitution and they sent it back to us, as they would do normally, and said consider the case in light of the state Constitution. And so it

came to me because I had written the original *P.J. Video* and the rule was that if you have lost in the Supreme Court you have a chance to write it again. And there was a feeling on the Court of . . .there ought to be some theory, there ought to be some rules that we follow here. And so there were suggestions that I try some out on *P.J. Video*. Some of the other states had done so. The one that comes to mind quickly is Oregon. There were probably others, too. It was a period in history when some of the states were trying to establish some rules on the subject, partly because of some dissatisfaction in the Supreme Court. But anyway, that's what happened. I wrote the decision on *P.J. Video* and we tried to adhere to that. But it wasn't totally successful. As a matter of fact it wasn't successful at all, because as time went on it became too constricting.

Interviewer: But let's step back, though. You mentioned there was a feeling in the Court and at the time you were writing *P.J. Video* about when the state Constitution should be relied on and what reasons would give rise to that reliance. Did you ever sense that others on the Court shared you concerns that there should be some parameters for when the state Constitution should apply?

Judge: Oh, I think so. Yes, I think very definitely. But I think probably the parameters that I set out were a little more restrictive than in the long run they chose to accept. And the tests I saw in *P.J. Video* I don't think were followed with any regularity afterwards. Maybe in a few cases, but not too much. At the time it seemed good but it didn't seem to work out.

Interviewer: As I understand it, there are really two aspects: One is what should be the standard for when the state Constitution differs; the other one is, should you decide the state constitutional issue or decide the federal constitutional issue, which becomes a bigger issue later on, for instance, in *Immuno*. But to put you back at the time when you were writing *P.J. Video*, did you sense that there was a consensus on the Court about that second issue, of when you turn to the state Constitution?

Judge: It was something that bothered us all along. Many lawyers would not raise the state Constitution. Many lawyers had no sense that here was a ground for relief. *P.J. Video* was a search-and-seizure case and, of course, the Fourth Amendment and Sections 2 of the state Constitution are exactly the same – as matter of fact, the state provisions were copied. So, if the Supreme Court said this doesn't violate the Fourth Amendment, why should we sit down and say the state Constitution doesn't mean the same thing as the federal Constitution does?

And so we tried to set up some rules: Here's when we will interpret the language differently. Otherwise we will follow the Supreme Court. Now, when do we do it? We tried to encourage people – we put all sorts of signals in decisions. We would write a decision that would say the validity of the provision under the state Constitution has not been raised; therefore, we don't reach it. We did everything we could to encourage lawyers to raise it, because we wanted to

develop the law. Eventually lawyers began to raise it more than they had in the past. So in time the issue was presented to us more and more. Now the second issue . . .

Interviewer: Yes, go ahead that would be good.

Judge: Well, *Immuno* was particularly unfortunate case to my way of thinking. It was a libel case, and I don't remember the details of it, but we had ruled on the basis of federal Constitution. It went up to the Supreme Court, and the Supreme Court did what they sometimes do. Instead of saying, "We reverse or we affirm or we decline jurisdiction," they sent it back to us and said consider this case in light of *Milkovich*, which was a recent Supreme Court decision. In other words, they said, "We want you to tell us what you think *Milkovich* means and then when it comes back to us we will refine our thinking." So to my way of thinking the Supreme Court had not given up the *Immuno* case. They wanted to rule on it. But when the case got back to us, the Court decided we'll put it on state constitutional grounds and then the Supreme Court can't look at it. So it never got back to the Supreme Court.

In some cases you would not decide a case on both grounds because once it is decided on the state grounds, the Supreme Court would not accept jurisdiction. Whatever they did was moot then, so they wouldn't accept it.

Interviewer: So the usual approach was to decide the case on the federal grounds so that the Supreme Court has a say on it if it chooses to, and then, if it came back, at that point the Court would make a state constitutional analysis.

Judge: I just didn't think we could divorce ourselves from reality that we were part of a judicial structure with the Supreme Court, and I don't think we should or could just say, "Well, this is what we are going to decide and even though there is a federal issue raised here we are going make sure that it doesn't get decided."

Interviewer: You were saying that in many of the cases the federal issue is the paramount issue.

Judge: Yes. In most cases that was the issue that the lawyers would argue. The state Constitution issue was just sort of a throw-in in case the federal issue didn't prevail. So I thought either we address the federal issue or we address the state issue, but we don't address them both and then cut off the federal issue from review by the Supreme Court. I would always keep the channel open to the Supreme Court because I think that was how the system was designed. They were the top Court; they had the last word. If we chose after they ruled not to follow, that would be something different. We could do that if we could find a principled reason not to follow, but other judges took the attitude, "Look we're a state Court; we have a state Constitution. We can decide it as we wish."

Interviewer: And *P.J. Video* was an example of the sequencing that you had in mind, and I guess in *Immuno*, one of the things that Judge Kaye said in the majority opinion is, why put the litigants through another round of appeals if we are going to decide it now? Was that a concern for you?

Judge: No. I think it was a legitimate criticism but it didn't bother me in *Immuno* because it seemed to me that this is really an aggravated case because the Supreme Court had taken this case, they had granted certiorari. To the extent that they had reviewed it, they said that "we would want to have you integrate *Milkovich* into this decision and then we will look at it again." So it was not a case where they just said, "Well, we're not going to consider it or we do decide it and we are going to go this way or that way." It was sort of in limbo where they were looking for our view of this case, but we refused to give it, and I thought that was unfortunate.

Interviewer: I think from the outside it became viewed over the course of the constitutional decisions that there was an issue with Judge Kaye on one side and you on the other. Is that a fair view of how this was being broken down? Was it truly an issue that you two seemed to care about more than others?

Judge: I think so. I think so. The other judges were not indifferent to it. They took an interest in it, but Judge Kaye and I were willing to go to the mats. And we had two distinct views. She was trying to get her view accepted and I was trying to get my view accepted, and we wrote many, many times against each other about it. I think her view prevailed and we finally got to the point where we thought, well, this is not worth the candle anymore and we sort of stopped doing it.

Interviewer: When you say her view prevailed, that going to the state Constitution first was acceptable. . .

Judge: I think that is the point that we struggled with, reduced to its simplest terms. My view was there's got to be a reason to say that the state Constitution will be interpreted differently than the Supreme Court interprets the federal Constitution. It became particularly obvious in search-and-seizure cases, because you had exactly the same provision. I just was of the view that we don't just thumb our noses at the Supreme Court. We are part of the same judicial system. That's stating it a little awkwardly. But, anyway, Judge Kaye's attitude was if we have a reason – I hesitate to characterize her view because I don't think I could do it accurately – but she took a far more liberal view than I did. It wouldn't bother her to say, "That's the way they look at it; we look at it differently." And I think that was the view that most judges accepted.

Interviewer: At one point she wrote in – I believe, this is in *Keta* and *Scott* – "However much we might consider ourselves dispensing justice strictly according to formula, at some point the decisions we make must come down to judgment as to whether a particular protection is adequate or sufficient." The idea being that you look at,

does this law make sense as a legal matter? And it is my understanding that your view was to try and find some deeper rationale than what your current judgment is.

Judge: Now this probably is not a perfect analogy but I looked at the national system or the federal system, whatever you want to call it . . . I looked at us, when we determined questions, as being somewhat like the Appellate Division. We weren't the last word. If the Appellate Division wrote a decision on some kind of law principle and the Court of Appeals reversed them, and then the same case came up again in front of the Appellate Division, they have to find a reason not to follow the Court of Appeals decision. I look at things pretty much the same way with the Supreme Court. If we just wrote a decision and the Supreme Court disagreed with us, then particularly when we are looking a constitutional provision that is word-for-word the same, there has to be a reason why we don't follow the Supreme Court. And it's not enough to just say we have our own Constitution. As I said, that is probably not a perfect analogy but that's the type of Court structure and seniority and so forth that I had in my mind and still do. I guess I have never been able to disabuse myself of it.

Interviewer: One of the things that is interesting to me is that, unlike many of the judges, you actually had experience as a trial judge and then you were on the Appellate Division, but in your time on the Court of Appeals you were known for what I think are seen as pretty heady abstract legal ideas. Choice of law and state constitutional analysis come to mind. When you were trial judge I assume those things weren't on the front burner.

Judge: Well, you know as a trial judge, to put it kind of crassly, you do what you are told. If the Appellate Division tells you this is the rule or the Court of Appeals tells you, you apply that rule, and I doubt there are very many instances where you will embellish the rule. But these are not matters of terrific consequence usually and so you are really handling the matters before you. The decisions have no precedential value so you are handling these decisions and trying to do the best you can to follow the settled law.

Interviewer: Did the debate create tension, the state constitutional debate?

Judge: No, I don't think so. We might lose our composure a little bit, but Judge Kaye and I are the closest of friends. We battled over this thing year in and year out, but it never left any lasting scars.

Interviewer: When people talk about this line of cases they actually focus on *Scott* and *Keta* as exposing dissention, if you recall that. Actually you didn't write in that case, Judge Bellacosa did, and you are part of a three-judge dissent. Judge Kaye wrote a concurrence, which said, as you may recall, "The dissent in this case is distinctive only in the tone of its expression, most especially the accusation that the Court's legal conclusions and analysis are the product of ideology, simply

the imposition of a personally preferred view of the constitutional universe."

Judge: What was that case?

Interviewer: It was two cases, *Scott* and *Keta*. Do you remember them as being the exception?

Judge: Very well. That is one of the few decisions I would take back if I could. Not that I disagree with the result because I agreed with the result but I did not agree with the writing at all. That case was argued at the time my wife was suffering from cancer, and we had tried, to the extent we could . . . we tried to adjust our schedule so I could stay in the Court and I could be home when she had to be hospitalized. We voted that case and the vote was as it came down, four to three. And Judge Bellacosa had the idea, I think, that there was a fourth vote to be had, that there was one that was floating out there. And he may have been right. I have no idea, but I know it was a consideration, and I didn't want to leave him when he had a chance to get a majority, and I didn't want to leave him anyway. I was satisfied with his result.

After we conferenced it, I went home. My wife was hospitalized and very seriously ill in the period that led to her death. So the writing came down, and I tried to absorb it and tried to maintain my position on the thing even though I was spending most of my time at the hospital. When I saw the nature of his writing, I tried to reach him a couple of times, but it was difficult when I was in the hospital and he was on the bench or in conference. So I asked my clerks to go see him and ask him if he wouldn't moderate his language. I don't remember what the report was but apparently they were unsuccessful. Now what I should have done was either get off the Court or concur in the result, and I was foolish not to do it, but it was one of those judgments you make and you're wrong.

Interviewer: In your view, it was simply an intellectual difference in the Court and four people thought that the state Constitution would come to a different result.

Judge: Yes.

Interviewer: I guess going back to your sense that Judge Kaye's view prevailed on these matters . . . Do you have a sense that that result is just a matter of changing personnel or that people found the state Constitution too appealing as a doctrine to work from?

Judge: Well, I think that there was just a feeling that they were not going to accept what they considered as artificial rules that would constrict their views. That was appropriate, if that is the way they felt, and I think by and large that view probably prevailed with many of them from the outset. I think it's gotten to the point now, and got to the point before I left the Court, where there just wasn't any great philosophical discussion of this question. We, the Court, just did what

we were going to do without trying to justify the difference. That is what it amounted to.

Interviewer: I want to shift focus just a little bit here because a lot of what we have talked about has been an idea that there should be judicial restraint, and the Legislature has a certain role, and voters have a certain role, and that judges shouldn't be leading the way to change the law, but interpreting the law. I think that captures some of it at least. The idea is that you should try the case in front of you and that precedent matters. Which always in my mind raises a question: What happened with *People v. Bing*, where you in effect, as I recall, led the Court away from *Bartolomeo*?

Judge: That's a whole story. When *Bartolomeo* was decided, I was on the Appellate Division, and the judges on that Court could not believe that the Court of Appeals had changed the existing rule by *Bartolomeo.* It was an incredible rule, we thought.

Interviewer: In *Bartolomeo* the rule has been set that if a suspect who had been arrested had an attorney in a prior matter, the right to counsel had attached even though the matter which he was being arrested for, the crime for which he was being accused, was different from the one in which he had an attorney in the past and that police questioning had to be done in accordance with his right to counsel at that point.

Judge: And the reason why my reaction on the Appellate Division was important was because Judge Hancock was on the Appellate Division with me at the time, and I knew exactly how he felt about it. And when I got on the Court of Appeals, I thought, "I think this is a bad rule and if I ever get a chance I am going to change it."

Interviewer: Taking a step at a time, what did you object to about the rule?

Judge: Well, it gave a premium to somebody who was a career criminal, but it seemed to me much too expansive a rule and not necessary really to protect, if a person in custody was given all the warnings and given the opportunity to remain silent, to call an attorney, and so on and so forth. I didn't see why you should look back in the background and see, "Oh, he had a lawyer here out in Ohio, he had a lawyer one time in Nassau County and therefore we can't talk to him." He might never even bring the matter up and the police would be unaware of it. Most of these things were found after the fact. The fellow would confess and then they would find out, "Oh, my God, he had a lawyer and he never bothered to tell us."

So I just didn't think it was a legitimate limitation in the police's rights. I was opposed to it and I wanted to get rid of it if I could. Now when that case, the *Bing* case, came up to us, it was a case where we could overrule *Bartolomeo* if we wanted. And I think our first vote around the table I was the only one who

was to overrule *Bartolomeo* because the others felt constrained by the decision. But I knew Judge Hancock didn't like the case. I knew Judge Wachtler had written a dissent saying it was a silly rule, and I knew that probably Judge Bellacosa agreed with Judge Wachtler.

Interviewer: Yes, I think so.

Judge: I could count four votes. So even though I was the only one who declared to overrule it, I stayed with my vote, with my position, and let the others wrestle with it. It was sort of fun.

Interviewer: And was the objection that you were hearing around the table was that precedent should be honored, or was there something more substantive, that the rule made sense?

Judge: I think both. There was a view that precedent should be honored and there were some judges who felt very strongly about the right to counsel and felt that it should be an expansive rule. So I think the two were intermingled.

Interviewer: So how does it unfold, as you recall, from being a single vote to writing the majority opinion?

Judge: As I recall sometime during the conferencing – and I think that we conferenced over some period of time – Judge Hancock came to me in chambers and said, "You know, I agree with you, and you know I'll vote with you," but he said, "I am not going be the first one to cave in." He said, "I think the others have got to declare themselves first." And I think if they had never caved in, I think he would have probably come along with me anyway. But I didn't see how Judge Wachtler could possibly not join me when he had written such a strong dissent in *Bartolomeo*, and the proof in the pudding was that he couldn't stay away.

Interviewer: And do you recall this being a case where the others were pretty dug in or, let me put it a different way, I guess, and that is, was it hard to pull over the other three votes you needed?

Judge: No. I don't think it was hard to pull them over. It's just that it took time because any judge resists overruling of precedent, particularly one that's as new as *Bartolomeo* was, and I think they were reluctant to do it, even though sympathetically they might agree with me and did agree with me. But if the Court was going to divide, they were going to be on that side of the case, because that represented their true feelings. I think that became apparent to all of them, sort of at once, that while Hancock was still out, and Judge Bellacosa, we knew Bellacosa would vote with Wachtler, and so I think it all tumbled into place at once.

Interviewer: In Judge Kaye's dissent, she writes that the Court's opinion portrays *Bartolomeo*

as an "aberrant decision, not worthy of precedential respect, a decision without a principled basis or even a rationale until it was invested with one seven years later." Was your sense that *Bartolomeo* had been wrong from the beginning?

Judge: Yes. It had caused a great deal of difficulty. We got cases where *Bartolomeo* was implicated. It got to the point where we were almost trying to see how thin we could slice the baloney to save convictions. The decision was very difficult to apply in a reasonable fashion and in many cases caused us a lot of trouble. That I think was one of the motivations to it: If the rule won't work for you, well, you better get rid of the rule.

Interviewer: Do you recall at any other time when you wrote an opinion that directly knocked out a recent precedent?

Judge: No, I don't. The classic example was one that Chief Judge Breitel wrote in which the Court overruled a decision, the very next term or, if not, the next term after that. I think it was *People v. Hobson*. He wrote at some length about the reason for following precedent and he wrote very lucidly as he always did. I know he described the first decision that they were overruling. He said that was just an "errant footstep" and I always thought that was very good language. The Court had a responsibility to correct the errant footstep.

Interviewer: One of the other points that Judge Kaye makes in her dissent is that not only is it extremely rare to walk away from a precedent like that but to do so in a divided Court. Where you concerned that you were changing the law on a 4-3 vote without 6-1 or 5-2 at least?

Judge: I was not. I suppose that's an argument that is entitled to be considered. But I had the view of *Bartolomeo* was wrong and that we should correct it. So that's how I rationalized it. It didn't worry me a bit.

Interviewer: Although, from what we talked about earlier, I guess you had the concern that a year later it would be overturned again.

Judge: Oh, that's sort of the process. It makes you look like you are result-oriented, brings all sorts of questions about the legitimacy of process and everything else. Those are things you want to avoid.

Interviewer: When a decision like that came down, it has a huge impact on certain constituencies, from prosecutors to public defenders. During the time that you were at the Court, were you hearing from people after a decision? Do people write letters?

Judge: The only letter I ever got while I was on the Court was after *O'Connor*. Judging from the handwriting, it was obviously a letter from a little old lady. Her hand was very wavy. She said, "Judge Simons, my father was Judge John O'Brien,

and my grandfather was Judge Dennis O'Brien" – both on the Court of Appeals – and she said, "They would be proud of you." That's all she wrote.

Interviewer: Let's take a sidestep here for a second, because talking about carrying votes and so forth, one of the questions I think that comes up is how the Court operated while you were there. Is there politicking, vote counting? Did that change from the Cooke years to the Wachler years and the Kaye years? Is there overt politicking outside of conference?

Judge: No. There may sometimes be discussions between individual judges, although you try to avoid it. Your differences ought to be discussed in front of everybody so that they all can consider them, but of course you are all human and if you see somebody in the hall, you say, "Well, are you coming along with me on this case?" So to that extent, it does happen, but I think it is something that the judges try to avoid and do so successfully for the most part.

Interviewer: And in terms of when you are writing a decision like *Bing*, how much compromise goes into the writing itself to try to keep all of your votes?

Judge: Well, it varies. It can be a great deal, it can be none at all, and it just depends. I don't remember in *Bing* any particular changes. But even if you have an unanimous Court, a judge may call you up and say, "I don't agree with what you said in the third paragraph" or whatever, and "you have got to give me some help there, I can't go along with it." It is perfectly well understood, and you do try and accommodate your colleagues. You shouldn't allow them to feel that they are compelled to vote for something they don't agree with.

Interviewer: The other aspect of how a decision is made, I guess, is the impact of what's going on in the newspapers and publicly. When you have a case like *Smith*, where there is a very newsworthy issue and impassioned feeling, did you go out of your way to avoid reading about what people were saying about the death penalty?

Judge: No. I don't. There was a great deal of publicity about the fact that this was a precedental case, an important case. I don't remember pros or cons being discussed very much and I wouldn't have paid much attention if they were. I mean, I might have read them out of interest. It wouldn't have much effect on me.

Interviewer: And, another question about how a decision gets to be made. There's also a lot discussion about whether oral argument is important or not in Court. By the time you came onto the bench you would have had access to the briefs, and should have had the benefit of whatever your clerks had to say about the cases. The oral argument becomes makeweight at that point, or did you find it helpful?

Judge: I found it helpful because it was usually a confirmation of your views: Now that

I hear it discussed in detail it was what I thought all along. But in some cases the argument may change your mind. Now I don't mean to say that happened every day, but I have gone on the bench many times thinking, "Well, I am going to affirm this case; it seems to fall together very well." And then I would hear an argument that would be very persuasive and, if it didn't change my vote, it would at least make me go back and look at the case again. There are some arguments that were just a waste of time, of course. But a good advocate can definitely contribute to a case.

Interviewer: Did you come out of the bench with a set of questions you wanted to ask, or was it more a matter of waiting for it to develop as you heard the argument?

Judge: I never did that. Some of the judges wanted to be engaged and they would actually have their clerks prepare questions so that they could ask them and so forth. If a question came up in my mind, I would ask.

Interviewer: Let's turn back to some of the cases and one of the cases that received an enormous amount of attention at the time is *O'Connor*, in which the question was raised as to when a hospital could and should end life support and on what basis that decision should be made. What's your recollection of the argument in that case as it was coming up in the Court of Appeals?

Judge: I don't remember there being anything particularly unusual in the argument. There certainly was something unusual in the way it was conferenced because it was a case that caused a great deal of difficulty with the Court. But I don't remember any of the oral arguments particularly as doing more than just expressing the opposing views.

Interviewer: What was the legal debate, as you recall the conference?

Judge: I think Chief Judge Wachter had written *Storar*. He also wrote *Eichner*, involving the priest. He felt very strongly about this and he had had some background with it, from those cases. I had voted in the Appellate Division on *Storar* and voted to allow the mother to make the decision on life support. That decision was reversed by the Court of Appeals. So I think the two of us came to *O'Connor* with somewhat different views that had been formed by our past. As it was written, it was a case that philosophically people had trouble with. You either felt this way or you didn't and your background and your religion and your training and everything else make you lean in one direction. I don't think anybody had a closed mind, but I think they all had difficulty with it. We all had difficulty with it. And so it became very contentious in conference.

Interviewer: Let's just start with the facts. Mrs. O'Connor was an elderly woman who had worked at the hospital.

Judge: She was a licensed practical nurse.

Interviewer: Her daughters had argued that it was her intention that extraordinary measures should not be taken to keep her alive. The majority comes out saying that the evidence in that record wasn't sufficient to authorize the decision to end support.

Judge: Right.

Interviewer: And what was your view on the case?

Judge: As I pointed out in the dissent, I think the evidence was much stronger than the majority made it. But their rule was, as I understood it – and re-reading it, it sounds that way to me – a person who expresses the view that they don't want life support has got to particularize the particular problem, they have got to foresee it. I mean, if it involves taking off food and water, they have got to say, "Now don't give me any food and water." If it involves a respirator, something like that, they have to say, "I don't want a respirator." And unless they foresee that and anticipate it, as I read the majority opinion, then you can't turn off life support. I think the opinion had a positive effect because it was after that opinion was written that the Legislature allowed for health care proxies and living wills. So I think from that point of view their ruling had good effect because I think the Legislature addressed it.

Interviewer: And what was the standard that you were looking for?

Judge: We talked about burden and proof, whether it should be clear and convincing or a preponderance or whatever, and I was not particularly concerned about that. But the standard that I wanted, if someone has said ahead of time, "I don't want to be kept alive artificially," and if you could establish that, that was enough. They didn't have to say, "Well, now if I get cancer, I don't want to be kept alive" or "if I have this, I don't want to be kept alive." I just didn't think the particularity that the majority required was necessary. If I don't want to be kept alive I don't want to be kept alive – it doesn't matter whether I am suffering from cancer or heart condition or anything else.

Interviewer: When a question comes up in a case like this, how do you avoid deciding that in a very personal way?

Judge: I don't suppose you can. At one point Judge Wachtler and I were really at odds, and the conferencing got kind of heated. After the conference was over someone asked the chief judge why I was so adamant in my position. I think he said, without any thought behind it, that I was adamant because I had gone through this with my mother when she died. And that came back to me through the law clerk network, which you know so well. And that made me very angry.

In the first place, I had voted this way on *Storar* when it was in the Appellate Division, long before my mother died. And so I confronted him with it and told

him it was unfair to be spreading that sort of thing and trying to pry votes away from me by using it. And he said, "Well, actually I have got to admit I am a little influenced by my mother's condition." You couldn't help but personalize, when you see this happened in a family or that was similar to what happened in a family.

Interviewer: In part it's hard, I think, now, fifteen years removed the decision and with the advent of living wills and all those sorts of legal devices, to recall how emotional this discussion was. Let's start with the Karen Quinlan case. Of course you mentioned *Storar*. In *Storar*, as I recall, the difference was that was someone who had not had the capacity to express his desires.

Judge: Yes. It was a mental defect. I don't remember the exact thing but the plaintiff had a very, very low capacity. He had an IQ of a 2- or 3-year-old. He was middle-aged. He was suffering terribly from this cancer condition. So his mother tried to speak for him. I am not critical of that decision by the Court of Appeals. I voted the other way in the Appellate Division, but the Court's rule on reversal was a reasonable limitation to put on it. If you want to come to the conclusion that this fellow couldn't speak so we are not going to let someone decide for him, that is certainly a reasonable point of view. I didn't look at it that way, but that is certainly a reasonable point of view. What seemed different to me was Mrs. O'Connor expressed herself. She declared her wishes, she was knowledgeable, she had worked in a hospital. She knew how these things worked. Now why shouldn't she have been allowed to have her will prevail? That is the way I looked the case.

Interviewer: Did you also push the majority on what you saw as a hedging on the facts, because you spent a significant amount of time in the dissent saying, she's not just an elderly person who is sick?

Judge: I did spend a lot of time on the facts, because I thought they were tailoring the record. Maybe that's unfair criticism, but they didn't read it the way I did, and, as you know, the Court of Appeals can't change the facts. They take the facts as they are found by the Courts below, and the Courts below had granted this relief. So they found that she knew what she was talking about. So I thought the majority was reaching too far.

Interviewer: In this particular case, you had a very extended dissent. And I was wondering if you recall the circumstances of writing that. Was it something you felt very motivated about or impassioned by?

Judge: Oh, a lot, yes. I felt strongly enough to take my position, but then the discussions and the conferencing progressed and the positions began emerging and some of the viewpoints began to be expressed, and some viewpoints didn't come to the surface until you got into it. At some point then I got a little bit more involved in it emotionally, and obviously in a case of that consequence you

write and re-write and re-write until you have just about exhausted your supply of pencils.

Interviewer: You get to circulate it to the Court before it's published.

Judge: Yes.

Interviewer: And do you remember a significant push-back from the majority about it?

Judge: No.

Interviewer: Then, I guess about two years later another variation of this shows up in *Fosmire v. Nicoleau* in little different circumstances. But one of the interesting things was to see that you again separate from the majority, but in this particular case advocating that the state does have an interest in these cases of refusal of medical treatment. Do you recall the circumstances in *Fosmire*, how it differed from *O'Connor*?

Judge: Mrs. Nicoleau was a Jehovah's Witness, and she, I think, had a Caesarian section and began to hemorrhage. So the doctors wanted to transfuse her, but as part of her religion as a Jehovah's Witness she could not take blood. She couldn't be transfused; it was against her beliefs. The case was moot, I think, by the time it got to us, but we decided to take it on so that we could resolve the question. She did survive; they gave her blood. So as the case developed, Chief Judge Wachtler took the position that her right was very, very broad if not absolute and that the state could not interfere with the expression of that right. Now there is no question that she knew what she was doing here and there was no question about what she wanted done. So to that extent it differed from *O'Connor*.

I didn't look at it that broadly, and I don't know exactly what the answer is today, as I look at it. But there are other considerations than, I think, just an absolute right to say, "No, I don't want this." It's not a case of perpetuating a life that is pretty much ended. This is a case of taking a healthy woman who has every expectation of recovering and being productive and going on, and I think the considerations are a little different then. I didn't actually reach this qualitative level of what would sustain a state interest over her personal interests, because I knew Judge Hancock was going to write on that. He told me he was going to write on that. And I said, "I think there is a consideration here about freedom of religion," and he said, "Do you want to write that?" And I said, "All right, I'll write that," so I wrote that. But I think I concurred in his writing.

Interviewer: You ultimately concurred. In the decision you say that the risk of death from treatment is modest, and blood transfusion is proven, uncomplicated means of treatment and that therefore this has a different lineup of interests when the state is asserting an interest [than in the earlier cases]. But you ultimately come to the point that because her objections are religiously based, there is a constitutional

issue here and that should allow her to assert her right. What was your sense at the time? Did the debate that had taken place on *O'Connor* continue to illuminate the discussion when you get to *Fosmire*, or did people see two very different situations?

Judge: I think we looked at it as a different case, but there is a certain amount of overlay there because you couldn't take *O'Connor* out of your mind. That had been perhaps the most controversial case we had all year, and the mostly heavily debated case we had all year. So, I think it was something that people probably factored in, but it wasn't directly controlling in any way.

Interviewer: Did you get the sense that other members of the Court were surprised by your opinion in *Fosmire*?

Judge: No, I didn't. I think I was sort of surprised by the chief judge's opinion more than he was surprised by mine. Nobody said anything to me. Was that a 5-2 decision? How did it work?

Interviewer: Well, there were two concurrences.

Judge: Yes.

Interviewer: Yes. To just step back for a second to *O'Connor*, were you surprised when you got to the conference in *O'Connor* in how impassioned people were about it and how divided the Court was?

Judge: It was not something you could be neutral on. I mean, in a lot of cases, as Judge Cardozo used to say, "It doesn't make any difference whether I vote to affirm or reverse. The world isn't going to change." But this case – everyone had an opinion. Some were strongly held, some were not so strongly held, but it was not a case that you were indifferent to. And so I think, yes, it probably is what provoked the lively discussion. As I say, some cases are . . . "you want to reverse? Fine, I'll reverse. I don't see any great principles at stake here." Or some cases, they're so clear, the result is so clearly indicated that you can't get that riled up.

Interviewer: After these cases, when your wife was seriously ill and ultimately died, did it ever cause you to reflect on these decisions, whether you needed to reaffirm what you had said or to call into question what you had said?

Judge: Certainly not to call into question. But my wife died when she was suffering from cancer because the nurses gave her the wrong chemotherapy. The dose was eventually fatal, and she went through a lot of very bad times. And so the thought in her mind was "I'm not going to recover from this." And so you had an *O'Connor* situation.

Interviewer: And, I guess my question was, Out of that experience did you feel that you had been right in *O'Connor*?

Judge: Certainly did. I mean, I'm sure that Mrs. O'Connor's children, having lived through this experience, felt very strongly. And as I say, I knew, and my wife knew, she was never going to recover from the cancer. She was going to be deaf and partially blind for the remaining time she had. The decision to end treatment was not a hard decision to accept.

Interviewer: Stepping back again, when you were a trial judge upstate in a small city, did knowing the litigants or walking down the street and seeing people have any effect on the way you acted as a judge and conducted yourself in deciding cases that isn't true for when you're at the Court of Appeals listening to lawyers making legal argument?

Judge: No, I don't think I knew that many litigants even in a small town. Many of the cases that came before me I wouldn't know the people. And if I did know them, and if that was something that was going to bother me, I would recuse myself and give the case to somebody else. I don't . . . I can't remember ever recusing myself. The personal contact that develops is with the lawyers. You get to know all the lawyers. You get to know them well. You like some of them; you don't like some of them. You know some of them are bright, and you know some of them are not. And so that is something you are aware of more than the litigants themselves.

Interviewer: Judging is a job. Is the Court of Appeals the most satisfying of the three levels?

Judge: That's the ultimate.

Interviewer: And why is that? What makes it different from, say, the Appellate Division?

Judge: Generally speaking, it's not always true, but generally speaking, your colleagues are a little more sophisticated; the cases you have are a little more interesting. It's just the prestige of the position on the Court, I think, that makes you feel that this is something that is very satisfying. As a trial judge, you have a lot of personal contact with the lawyers and that was something I've missed a lot. I enjoyed the environment; I enjoyed some of the humor and some of the circumstances of what developed during a trial. And I missed that when I went on the Appellate Division. But there are different satisfactions in different places.

Interviewer: One of the things that is said a lot about the Court of Appeals over a long period of time is that it's a collegial body. Is that an accurate perception, and was it something that people worked at?

Judge: Yes, it's accurate. The judges get along, and people will frequently say, how can

you live with this person after you wrote such a terrible dissent against him or vice versa. But these disagreements are not problems and you live with them because you have to live with them. You're there in close contact with your colleagues for two weeks, and that's just one case out of many. The next case you have you may be on the same side, or you may need that vote to make a majority. So you're going to try and be civil about it, and I think most of the judges realize it could be a very unhappy Court and a very unhappy time if you have somebody that doesn't fit that sort of mold. And there are some who don't. There are times when there will be a member of the Court who's very difficult to get along with, and everybody just hunkers down when that happens.

Interviewer: The tradition of the judges eating dinner together was certainly in full swing in the 1990s. Had that been true when you first came in the '80s?

Judge: Yes. If there was a local judge . . . I remember when Judge Levine came on the Court, he lived in Schenectady, and he would rarely join us. Judge Bellacosa, on the other hand, lived in Albany, and he would frequently – not always but almost always – he'd have dinner with us even though his home was maybe ten minutes away. And I think, by and large, well, I know, it was that way when I came on the Court, and I know it stayed pretty much that way all the time I was there.

Interviewer: And was that something that sort of forced collegiality or fostered collegiality?

Judge: Yes, I think we all enjoyed it, and I think we all looked forward to it. It was a chance to relax and maybe approach somebody. When everybody else is around earlier in the day, how can you possibly do that? You weren't out of line at dinner because every judge was there.

Interviewer: Right.

Judge: And so it was a relaxing time. And I think that the judges felt it was valuable.

Interviewer: Did you talk business?

Judge: Sometimes. Not a great deal, but sometimes we talk a little bit, and not in any great depth. But somebody would say, "You know, I'm having trouble getting by this point" or "I can't resolve that point. How did the rest of you handle that?" Or something like that. It might be as simple as that.

Interviewer: And did the schedule of the Court change over time? I know that, again, looking at the period when I'm familiar with, the early '90s, when you were in Albany it tended to be sort of an all-day and into-the-night type workday. Was that something that had been true when you first got there under Judge Cooke as well?

Judge: When I first got there the burden was tremendous. We had a much heavier case

load because we didn't have certiorari power.

Interviewer: Right.

Judge: We had all these appeals as a matter of right. A one-judge dissent would bring a case up as a matter of right; a reversal would bring a case up as a matter of right. We got an awful lot of meaningless cases, but we had to deal with them. We couldn't ignore them. So that was very burdensome. I can remember leaving Albany at maybe 5, 6 o'clock Friday night and turning right around 9 o'clock Sunday morning and going back. It was very tiring. You worked late at night and got up early in the morning.

I've forgotten what year, but there was a year when they amended the Constitution and they added certiorari power, and that did two things. First of all, it lightened the load considerably. And, secondly, it allowed us to choose cases that were important and of some interest. Not some silly damned thing about the rent stabilization law or something like that. We'd get all these – I mean, rent stabilization law is about as far removed from the law, it can't possibly be resolved with legal principles. And we'd had all these cases come up, and it was something.

Interviewer: Was there a period when you first came that you first felt that you were being sort of indoctrinated in the traditions of the Court? Is there sort of an attempt by the other judges to say, "Here's how we do things"?

Judge: Yes. There is some, but it seems to me it was very brief. As I mentioned, the procedure in conference was quite different, and I can't remember people saying much to me the first day or two. It didn't take much more than that. But I remember the chief saying to me, "You'll get your chance. Just be quiet." Something like that because I would, in the course of a discussion, jump in and respond to somebody. Really rather simple things, but other than that I don't remember.

Interviewer: We talked earlier about Judge Cooke's leadership and approach, and I'd like to shift momentarily and talk about Judge Wachtler as chief judge and how that differed from, how his style differed from, Judge Cooke as far as leading the conference.

Judge: Well they were entirely different personalities. Judge Cooke was somewhat of a passive personality. Judge Wachtler was just the opposite. He was a very aggressive personality, and he was very hands on. He wouldn't hesitate to challenge you. Judge Cooke might take the position that if that's your view, I don't agree with it, but if that's your view, fine. Judge Wachtler would challenge you and say, "You know, I don't see how you can reconcile this with such and such a case," and so on and so forth. He would debate with you. I guess that's the right word.

So he was much more a hands-on judge, and he had certain rules, if you want to call them that, that he believed in. And for the most part I thought they were absolutely appropriate. If we were construing a statute, and four people said that statute meant this, seven people say the statute means this, because a dissent is meaningless. If the Legislature doesn't agree with us, let them rewrite the statute. And he had things like that where he would shape the Court with a purpose. So he was much more active as a chief judge, and he was very entertaining. He always had some jokes and some stories to tell.

Interviewer: Was he better at getting his way?

Judge: I don't think so. The noticeable thing, when Judge Bellacosa came on the Court, the two frequently voted together, which the other judges found unfortunate because you immediately start with two votes against you.

Interviewer: They'd be the first and last vote . . .

Judge: Yes, the first and last vote against you.

Interviewer: . . . when Judge Bellacosa was the new judge, right?

Judge: Right.

Interviewer: Yes. They never accused you and Hancock of that?

Judge: No, not to my face. Actually Hancock and I, I don't know if I'd say frequently, but it wasn't uncommon for us to disagree.

Interviewer: One of the things that was said about the Wachtler Court – this is from a 1990 article in the New York Times – Norman Siegel of the New York Civil Liberties Union is quoted as saying, "The Court has taken on Wachtler's personality. It's cordial, pragmatic and intelligent."

Judge: I don't have any quarrel with that.

Interviewer: But the idea of pragmatic . . . I mean, was your sense that during the Wachtler years, and even before and after, was your sense that the Court was interested in what I would call common sense decisions? That it was a Court that wasn't interested in great legal theories? Or is that an unfair assessment?

Judge: It's a little bit unfair because we were interested in legal theories. But Wachtler would be very . . . It's like the case of the *habeas corpus* we talked about earlier. He'd be very quick to stop everybody who'd gotten lost in the woods and say: "What are we doing here? You know, this doesn't make any sense." Well, we might agree and we might not. In our view it might make sense. But he would

force us to step back and reexamine it from a practical point of view, and I think he did that often.

Interviewer: What about criticism that the Court was pro-defendant? That comes up later, I guess. Does that strike you as unfair?

Judge: Yes. If you looked at the numbers, it's just not justified because the numbers would show that the affirmances far outnumber the reversals.

Interviewer: Affirmance for the prosecution.

Judge: Yes, for the prosecution. But that's the nature of criminal law. I think each of us would get somewhere around, I would guess, about 400 leave applications a year. And if I granted four or five that was a lot. So there are 395 convictions that have been affirmed before they even got out of my chambers. But then on top of it when you've got the cases on the calendar because of some significant point that needed to be resolved, the numbers would show that most of them were affirmed. But it's the nature of the business. If you're going to reverse a murderer's conviction it's going to get a lot of headlines. But there's no point in writing a news story about an affirmance.

Interviewer: Right.

Judge: So the public sees the reversals and not the other, and they get the idea that these are a bunch of liberals.

Interviewer: One of the earlier cases from your time in Court was a case called *In the Matter of William Weber vs. Stony Brook Hospital*. An unusual case because of a very short decision, but dealing with another one of those medical issues. What do you recall about the case?

Judge: Well, it was a very sad case because it involved a couple that had a baby born with spina bifida, and they had had to make a decision on what treatment they wanted to pursue, whether to take a very aggressive course and do surgery, or whether to follow a conservative course and see how she recovered without extensive treatment. It was a very difficult decision for them, and they had gone through some effort to get a balanced view of the situation. They talked to clergymen, doctors, family. Apparently there were people in the hospital, the nursing staff in the hospital, who reported this type of thing to the – I don't know if they were the Right-to-Lifers, but people of that persuasion. And so this man Weber came in. He was a lawyer from the state of Vermont. Didn't even come from New York. And he instituted this battery of cases to try and compel the parents to treat this child. The thing went through the Courts very very quickly because obviously it was a matter of importance and had to be decided quickly. And when it got up to our Court it seems to me we may have even convened specially to hear it. I'm not sure.

Interviewer: To put some facts on that . . . The baby was born on October 11, and the Court of Appeals decision was October 28.

Judge: Yes.

Interviewer: So it's seventeen days . . .

Judge: Yes.

Interviewer: . . . the whole thing transpires.

Judge: Yes. And this fellow Weber — was that his name?

Interviewer: Yes, that's right.

Judge: He was a zealot. And he made this argument that was very vituperative and very aggressive and just completely turned the Court against him. I was just outraged at the attitude he took, to say nothing of why he should even be in the case getting Court orders and so forth. He had no standing. So, anyway, we heard the case, and then retired. And Judge Jones drew it, and he wrote a little *per curiam* opinion. He was perhaps the hottest of all of us. He was just outraged by the thing. And he wrote an opinion that almost burned the page up, the paper. Everybody was so – they agreed with him a hundred percent – but some of us said, "You just can't, you just can't write it this way."

Interviewer: And its anger was directed at Mr. Weber?

Judge: At Mr. Weber. Yes. And so he stayed – we all went out to dinner. It was time for dinner. And he stayed through dinner, and he rewrote it, and wrote the decision that's in the books now, which is hardly restrained as you read it. You can tell the attitude. But it was very early on when I got on the Court, and I remember we sat there until fairly late at night debating it. Not that we had any trouble with the result but how we wanted to handle it. The unfortunate thing was that after that man Weber lost in our Court he brought an action in federal Court and just put these people through hell. Just put them through hell.

Interviewer: I mean, the decision concludes with: "There are overtones to this proceeding which we find distressing. Confronted with the anguish over the birth of a child with severe physical disorders, these parents, in consequence of judicial procedures for which there is no precedent or authority, have been subjected in the last two weeks to litigation through all three levels of our State's Court system. We find no justification for resort to or entertainment of these proceedings." And it was heard – it appears that it was heard and decided within two days.

Judge: I would have said the same day, but I may be wrong. It seemed to me that we did it very quickly. But if that's what the book says, I guess it was two days.

Interviewer: And he had lost throughout the Court system?

Judge: He had a trial judge's order that was just groundless.

Interviewer: I see. Okay.

Judge: And that was vacated by the Appellate Division. And we may have taken it because we wanted to put an end to it.

Interviewer: Reached out procedurally?

Judge: Yes. I don't remember how it got to our Court. I suppose he would have had an appeal as a right having a reversal in effect.

Interviewer: Right. But at the Court of Appeals there was a unified Court throughout.

Judge: There was never any disagreement among any of us. It seems to me that – I have a vague recollection, and I'm not sure of this – but it seemed to me that Judge Cooke – he was chief judge then – it seemed to me he wanted to put in some material about the proper procedure, which we touched on very quickly there. I think he wanted a little bit more. We decided, no, this covers the territory, and let's get it down.

Interviewer: It's interesting that in the short period it took the case to get to the Court of Appeals it managed to have an amicus from the Spina Bifida Association and, of course, the state was involved as well. Let's move to a couple of decisions that dealt with public office holders, one involving Justice Greenfield of state Supreme Court and one involving Fred Orenstein, the legislator. You filed single dissents in both cases. *Greenfield* was a case which the commission, the judicial commission, had brought a disciplinary proceeding against Justice Greenfield for delay. What do you remember about how the deliberations took place in that case?

Judge: Well, Judge Greenfield was a respected judge. He was intelligent; he was a hard worker. His problem was that he took on more work than he could ever handle. And he apparently would search out the work because he wanted to be involved in important litigation. So there were a number of cases, I think there were eight or nine, where the delay was extraordinary. Some of them ran up to eight or nine years' delay without decisions. And so the Commission on Judicial Conduct charged him under some provision of the code. I don't remember what it was, but misconduct based upon his delay in rendering decisions. Well, the majority took the position that this was not a disciplinary matter, this is an administrative matter, and he shouldn't be disciplined. The administrator should . . . I don't

know, I guess they thought the administrator should be disciplined for not making Greenfield go faster.

Interviewer: They treated it as docket management.

Judge: Yes. And these litigants, some of them had gone into Court with Article 78s two, three times. I could understand that the delay in many cases could be nothing more than docket management. It wouldn't be misconduct. But it seemed to me that this went far beyond the pale. And I thought the commission had jurisdiction. The majority said the commission didn't have jurisdiction over it.

Interviewer: This is a case where . . . I mean, in the course of the decision and in the course of dissent, there are very few cases cited. You are essentially acting in a role of a judge who does not apply law as much as . . .

Judge: Right.

Interviewer: . . . understand what's the just result here. In writing this were you surprised to find that you were alone?

Judge: I was dumbfounded. I couldn't believe I was alone, and I kept just, sort of, as the days went by and so forth . . . I thought, well, some of these people will fall away and join me. And no one ever did. I couldn't believe it.

Interviewer: Had you known Justice Greenfield?

Judge: I had met him and spoken with him, but I didn't know him well. I think the New York City judges had a very high opinion of him, and that had some influence on them, I'm sure. And he was a good judge. There wasn't any question he was a good judge. But that was sort of a mitigation factor not . . .

Interviewer: Right. It was the length of the delay . . .

Judge: Yes.

Interviewer: . . . not that there was delay.

Judge: Yes.

Interviewer: As I recall from the decision, the attorneys had in fact been trying to prompt him repeatedly in some of these long cases.

Judge: It was unconscionable. I mean, lawyers are helpless if they can't reach the judge. They even brought Article 78s, and I think in a couple cases they allowed the withdrawal of the 78 because he promised that he would decide the case, and

then he didn't do it. A lawyer certainly doesn't want to start an Article 78 against a judge.

Interviewer: At one point you write in your dissent, "If there is one thing that the parties appearing in Court are entitled to ask the judicial system it is the matters submitted to Court will be decided. If they are not, the litigants are helpless. They cannot fire the judge or obtain a substitute. Even a bad decision is better than none at all because at least it can be corrected on appeal." Were you angry with the Court? Were you angry that they couldn't see it?

Judge: I was angry. I thought it was a terrible reflection on the judiciary that they would . . . it reminded me in a way of the reaction to the *Fuchsberg* decision. To many people, many judges, they were inclined to shun me because I had pointed out that the emperor didn't have any clothes on. You know, "you shouldn't treat one of the brethren this way. We'll take care of it in our way, but don't do this publicly." And I think there was a little bit of that attitude. "We'll take care of it. No, don't write a lot of stuff on it."

Interviewer: Right. It seems that in several of the decisions, this one, and where you wrote in the *Fuchsberg* case and in *Orenstein*, you did seem to put a premium in your decisions on proper conduct by public officials.

Judge: You know, you're a public official. You're taking the public's money to do their work, to do their job and to solve their problems. It seems the least you owe them is to do a job properly and do it the best you can. You might not be a genius and you might make mistakes, but at least you can give them the benefit of industry and sincerity. I just saw no excuse for this type of conduct . . . I mean, this could have been solved. He could have transferred these cases. He could have decided them. I couldn't find it in my heart to forgive him anything, frankly. I thought he was wrong. And Orenstein, the same thing . . .

Interviewer: Right, that was different, too . . . You were saying it was sort of the same principle . . .

Judge: Well, he's a public servant, he's a legislator, and here he is using public funds to increase the Democratic majority in the Senate so he could be majority leader. It was outrageous. It wasn't some sophisticated or close question. There was just no question what he was doing, using public funds to support his own party.

Interviewer: As I recall that case, there were two pieces to it – one was having no-show workers, which he claimed had shown up, and the second was having publicly paid employees who did nothing but political work.

Judge: Yes, we all agreed on the no-shows. The majority and I agreed on the no-shows. The disagreement came on employees that were put on the payroll of candidates. I think you could have argued, although it wouldn't have influenced me, but if

you were talking about a sitting senator and you put somebody on their payroll, you might say, "Well, he's performing senatorial duties." But, some of these people were trying to unseat incumbents and some of them were assigned to authorities, the waste authority or the tunnel authority or something, where they had absolutely no credentials for the job and never did do anything. They were just on another payroll, that's all, and so again, I couldn't quite believe that I was all alone on that one either.

Interviewer: You write in the second paragraph of the dissent, "I would have thought the use of public funds to finance the election campaigns of the candidates of one party and defeat candidates of the opposition was so clearly unlawful that it was not worth discussion." But, apparently there was discussion.

Judge: That particular sentence, some of the judges tried to talk me into taking that out, that one sentence. And, at one point, I finally said, "Oh, the heck with it, stop bothering me, I'll take it out," and then when I got back home, I looked at it and I thought, why should I take it out? That's the whole crux of the case, and so I put it back in and a couple of judges were outraged, I think, that I had done that.

Interviewer: And their point was that there was no statute that clearly made it unlawful?

Judge: Uh huh.

Interviewer: I think people wonder when there's a decision like this involving a high-ranking political figure who has influence on the budget of the Court and so forth. Did those kind of considerations ever enter in your mind, not whether you're influenced, but how it will appear?

Judge: They were never voiced to me by any of the judges.

Interviewer: You know, one of the things that you talk a lot about in the state constitutional cases is the legitimacy of the Court, and the public perception of the Court. And does that factor in in a case like *Orenstein*, that we're applying the law no matter who you are?

Judge: Yes, there are certain responsibilities that go with the office. If you want the office, you've got to accept the responsibilities.

Interview: Because it ends up, I guess, in all three of those cases, *Orenstein, Greenfield*, and *Fuchsberg*, you end up a fairly lonely voice.

Judge: It would make you doubt your own judgment.

Interview: Let's move forward several years and one of the decisions that becomes controversial in the area of criminal law is the case of *Antommarchi* from 1992. And, in that case, the Court held that the defendant had been denied improperly

the right to be present when a judge was questioning a prospective juror. What are your recollections about *Antommarchi* and what follows?

Judge: Well, the interesting thing about it was I don't think anybody thought the right to be present was the important issue in the case. I think most of us focused on reasonable doubt instructions, I think it was the second point, I forget now, but I think whatever the second point was, I think we all thought that was a delicate question. And I really didn't give the right to be present much thought. After the case was decided, it created so much outcry, I began to look at it and think, well, perhaps I had pushed it a little far, but I never had any idea that I was not following the law. I was telling you earlier about running into a criminal Court judge down here and after the case came down, he gave me holy hell for having it decided that way. And I said, "Well, I don't understand what you're complaining about." I said, "That's been the law for years." And he said, "I know, but nobody ever paid any attention to it until you wrote that decision."

Interviewer: And in fact there had been a decision I believe that had just come down, *People v. Velasco*, where the principle had been articulated. It wasn't as it you were consciously making new law at that point, right?

Judge: I didn't think I was.

Interviewer: And actually the other issue in the case dealt with the instruction on reasonable doubt, which is dealt with at some length in the decision. Surely, after that decision came down, you became aware that the prosecution thought it was a problem?

Judge: Yes, there was a lot of reaction to it from the prosecutors. It became very unpopular and I don't know what's happened to it since. I don't know whether it's been tempered, or as is the usual course of action in cases like that where you may have stretched a point too far, or applied it to extreme a case, to try and back off of it a little the next time you get a case, because it isn't working.

Interviewer: I believe there was a round of litigation about the retroactive application of it.

Judge: I think there was, yes.

Interviewer: Because I believe the press coverage immediately focused on all the bad guys who were going be filing appeals.

Judge: Yes, I think we did have a decision, that it wasn't retroactive.

Interviewer: Right, right, but, it was not the kind of … let me put this a different way … is this a decision that becomes potentially one of those in the category of being one the Court walks away from?

Judge: I don't know. The principle that defendants have the right to be present is certainly well established. The difficulty here was the factual situation that there was a conference at the bench, which theoretically was private, and he was excluded from that. And the feeling was "my goodness, can't the judge talk to jurors or to counsel privately at the bench? So the problem was in *Antommarchi*, "no, he can't if we were discussing the qualifications or the bias of a potential juror." He's got a right to be there. I still don't think there's anything particularly wrong with that principle, but it sure did cause a lot of trouble.

Interviewer: When you look back at decisions, are there ones that – and you talked a little bit about in *Keta* and *Scott* – are there decisions that you look back and you regret the side you ended up on? Or did that not happen?

Judge: Not too many. I think I would take another look at *Antommarchi* if I were deciding it today, but I don't have any apologies for it. I am just looking down the list here that we've decided we're going talk about and I can't see any that I would change. I wouldn't have changed that decision in *Scott* and *Keta*, but that's not the way I would write the decision. But the others? There are always a few cases over the course of a career as long as mine that you sort of wish you had taken the day off on, but I honestly can't think of too many of them.

Interviewer: When you first came to the Court of Appeals, having been an Appellate Division judge for many many years, did you have a sense that you wanted to – that there were issues that you really wanted to sink your teeth in, things you wanted to change about the Court of Appeals?

Judge: No, I don't think I did. There were cases like *Bartolomeo* that we talked about earlier and there may have been some others, although I can't put my finger on them, where I thought they were bad decisions. And you very quickly realize when you get to the Court that you're a new boy on the block and that you have certain responsibility to follow precedent, so you don't strike out to try and change the world. And I don't remember having any particular cases or decisions that I thought we should restructure, but I did about *Bartolomeo*, I will say.

Interviewer: One of the things that comes up in the aftermath, is after *Antommarchi* is that at the very end of the time you were at the Court, Governor Pataki and some of his people began criticizing the Court for being pro-defendant and I think people were somewhat surprised that you spoke out publicly about the criticism. What do you recall about deciding to do that and what your thoughts were at the time?

Judge: I think it was in response to a question, probably from a Times reporter, I don't know, but the governor's comments were very offensive, because they were pure demagoguery. His facts were so far from accurate, he was calling us a Court who had run amok and he was basing it on some decisions 10 or 12 years old. We didn't decide them. He proposed some legislation which was transparently

unconstitutional – there wasn't a chance in the world he'd ever get it through the Legislature or past the Court if it ever did get through the Legislature. Of course it died, never went anywhere.

So it was very offensive to just be a sitting duck and have to take that in the newspaper. Because he was giving it to us almost every day. And I don't recall what provoked a question, but somebody, some reporter, called, as I said, I think it was from the Times, he called me and asked me. And I responded by saying the governor has got to realize we're not on his team. We're not working for the police, we're supposed to be neutrals here. It was politically popular to take shots at the Court. But it eventually died down.

Interviewer: Did your colleagues on the Court have any reaction once the comment was published?

Judge: Oh, they all agreed with me. And as time went on I think many, if not all, of the judges at one time or another expressed themselves, and normally judges don't do that. You sort of suffer in silence because there is no point in getting into a public dispute with people, but this went to such extremes that I think all of us felt very offended.

Interviewer: The governor at one point had said – this is from roughly '96, '97 – "The people of New York deserve a Court that is concerned with the rights of victims, not just criminals. If there was any question remaining that the Court of Appeals had become a citadel of technicalities today's ruling should erase all that doubt." That was after a decision called *People v. Maher*.

Judge: I don't remember that case. We had a couple of hard decisions so he had a big target to shoot at. But, you know, the Court doesn't get any pleasure out of turning murderers loose, you do what you have to do, and that apparently was one of them, I don't remember now.

Interviewer: Right, and the quote that is attributed to you in response to that was, "I don't want to speculate on the motivation for it, but there's no reason to criticize the Court for enforcing or applying statutes the same way we've applied them for years – without change or criticism by the Legislature up until the last year or so." It goes on to quote you that over the long term it could have a "very debilitating effect" on the Court as an institution. "The Courts rely upon the respect that the public has for them and the respect that they give our decisions. If somebody is misconstruing our decisions and telling the public over and over again that we're pandering to criminals, it certainly could weaken the Court." The story says you "said the remedy for political leaders who do not like the decisions is to change the law."

Judge: Yes, that was part of what was so angering. He cited a lot of cases that we

weren't responsible for because we were applying statutes. And he miscited cases. He said we had done this when we hadn't done that, and so on and so forth. So it just incited us to fight back because it was unfair.

Interviewer: As a general matter, it seemed to me up to that point you had sort of gone out of your way not to get caught up in …

Judge: I never talked outside.

Interviewer: Was there ever any contact with the governor or his people directly over the issue that you had?

Judge: Not by me. Things came back to me about my tenure on the Court. Whether they were accurate or true or not, I don't know.

Interviewer: Is there any other decision that you want to touch on that we haven't touched on yet?

Judge: The only one I noticed on the list that we haven't talked about is *O'Brien*, the equitable distribution case. I became very, very popular in New York with all the women, divorced women.

Interviewer: That held that . . . The partnership case?

Judge: A professional license was property to be distributed upon divorce. And I have no reservations about that decision. It has sort of changed the practice of matrimonial law now because, the trial judges tell me, that the cases now are almost entirely accountants arguing about the value of assets. From that point of view, I feel it's unfortunate, and the questions can become quite esoteric, I guess, when you get into it.

Interviewer: Let me turn very briefly to one other topic that I skipped over, and that is – I think I have this right – when you first came to the Court, there were still judges that had been elected? Is that right?

Judge: Yes.

Interviewer: Fuchsberg I believe had been elected …

Judge: Fuchsberg had been elected. Cooke had been elected. Jones, Wachtler, Meyer, everybody, I think.

Interviewer: Okay.

Judge: No, Meyer had been appointed, I'm sorry. He had lost the election.

Interviewer: He had lost the election in ’72.

Judge: Yes, and he had been appointed. He and I were the only appointees.

Interviewer: And so over the course of time you went from a bench that had been almost entirely elected, except for the newest members, to one that was completely appointed, and you went through the process yourself. What are your reflections on that, and you of course had been involved in politics many years earlier. The move to appointment was a good thing or a bad thing, or the jury’s still out?

Judge: No, I think it is a good thing. I remember going in front of the commission one time, and a woman asking me how I felt about elected and appointed judges. And my answer was, well, if it hadn’t been for elected judges, I never would have been selected a trial judge, because I was only 36 years old, and nobody would have appointed me at that age, but on the other hand if they hadn’t had appointed judges for the Court of Appeals, I never would be on the Court of Appeals because I had been away from politics so long I had no political influence. And, I think, the way the election processes work now, it’s gotten pretty much out of hand. Judges are being required to spend enormous sums of money, which puts them in debt to the people they raise it from, which is almost entirely lawyers. And I think that’s unfortunate.

On a statewide level, the elective process doesn’t make any sense at all. For a judge to run an election campaign statewide where people don’t even know what the Court of Appeals is, and could not care less who the judicial candidates are, there’s no sensible reason to do it. I think that the merit selection process has worked reasonably well. It hasn’t been foolproof, but we’ve had some . . . Judge Kaye would be a perfect example: She’s an outstanding judge. She could never have gotten on the Court of Appeals by the electoral process. Absolutely, a person who had no interest in the political operations at all but a very distinguished lawyer, and so she was fortunate enough to be appointed and has made a great contribution. And there are others where you could say the same thing. So, while it hasn’t been perfect, I think it’s far better than the electoral process. At least at the Court of Appeals level.

Part Two (September 5, 2003)

Interviewer: Judge, I wanted to turn your attention to a time period before your were on the Court of Appeals, when you served on the Court of Judiciary that heard the case of Jacob Fuchsberg, an associate judge of the Court of Appeals, and that would have been in late 1977, with a decision rendered in early 1978. How did you come to be on that particular court?

Judge: Well, under the law at that time the chief judge of the Court of Appeals, Judge Breitel, appointed a judge from each Appellate Division, and then he appointed a chairman. I was chosen from the Fourth Department.

Interviewer: Had you served on similar courts in the past?

Judge: Yes. I had done two or three of them, I guess. I was also on another one after *Fuchsberg* was over.

Interviewer: And it is true, I imagine, that there had been significant amount of publicity about Judge Fuchsberg before the appointment?

Judge: Yes.

Interviewer: What do you recall of what the charges were in that case?

Judge: Well, it was at the time of New York City's financial troubles, and the city and the state Legislature were trying to devise a number of ways to borrow money to tide the city over so that they could avoid bankruptcy. And they issued a number of instruments to do that, bond anticipation notes, revenue anticipation notes, I can't remember them all. But it turned out that Judge Fuchsberg was investing in these instruments. And, of course, it was clear that they were very questionable instruments and that sooner or later there were going to be cases before the Court of Appeals testing the legality of them. And in fact there were several cases before the Court of Appeals while he was sitting on it and he owned city instruments at that time.

His position was that he had recused himself so that there was no conflict of interest, no unethical conduct. But, in fact, I think he sat on a couple of cases. I'm not sure from my recollection but I think he did sit on a couple of them while he owned instruments. He did recuse himself on several. But that is not always a fool-proof system of keeping insulated from what the decisions of the Court are going to be and there was a counter-problem, which made it look very questionable, of how he had been manipulating these instruments even though he had recused himself on the

cases.

Interviewer: In the end, the majority comes back with a decision that says, in terms of Judge Fuchsberg investing and not recusing himself, that was wrong, that he should have diverted his investments into other instruments and he should have stopped rolling over those instruments when they reached their maturity. But the majority concluded that there wasn't a need to remove him or have further proceedings.

You issued a dissent in that case. What do you recall of your thinking about the dissent and what majority had come up with?

Judge: Well, there was quite a difference in philosophy or approach, however you want to call it, in approaching the case. Some of the judges, I think, felt that even if things weren't perfect, it was better to smooth this thing over because it created a lot of bad publicity for the courts. I think some of them…I know some of them took the position that…well, I know one of them took the position there wasn't anything wrong, which was sort of shocking. And some of them took the position that there was nothing to be gained by removing this judge, and the proceedings to do so would last a long time. If it ever went to trial, there would be a great deal of publicity that would tie up both sides and probably he wouldn't be removed anyway. They never actually preferred charges. They just said that…I have forgotten how it was worded but the effect of it was if these charges were true he would be censured. That's about the way it ended up.

Interviewer: The process you suggest in your dissent is the model of the grand jury, to the extent the court was functioning as a grand jury determining probable cause.

Judge: Right.

Interviewer And, am I correct that you felt that finding should have been made?

Judge: They should not have cut off the process.

Interviewer: They should have proceeded?

Judge: Yes. He really never had a chance to respond to the charges, although there wasn't much question about them. Then there was a second group of charges in which he had used law professors to write his opinions, which was grossly improper. Nevertheless, he had done it. The strange thing about it was the way that charge arose after the original charges.

After the original charges had been filed and after the Court on the Judiciary convened, Judge Breitel's daughter, who is an attorney – a prominent attorney in New York City – was taking the train up to Albany

to argue a case before the Court of Appeals…No, I think she was going to the Appellate Division. I don't remember, but she was coming up on legal business and she ran into a professor. And so she sat down with him on the train to visit and she said, "Why are you going up there?" And he said, "Well, I've written this opinion for Judge Fuchsberg on such and such case and I am taking it up for him so that he can circulate it to the other judges."

She couldn't believe it and of course probably told her father. And so supplemental charges were preferred against Judge Fuchsberg. The other very strange thing about that was that none of the professors realized they had done anything wrong. They thought it was perfectly all right. I'm sure Fuchsberg knew it was wrong.

And it subsequently happened that when Judge Jones was at some affair he ran into a professor who, according to Judge Jones's story, told him he had a copy of Judge Jones's proposed opinion and told how he was going to answer it. He said, "I am writing the dissent for Judge Fuchsberg and here is the approach we are going to take." Judge Jones couldn't believe it. They were all prominent professors and after they found out what had happened they were very nervous. Their names never became public.

Interviewer: And as I remember from the opinion there was both drafting being done by professors of decisions that appeared under Judge Fuchsberg's name, as well as sharing, as in the Jones case, of drafts of opinions having been written by other judges. And your conclusion was that that even though the rule banning that sort of thing was inexplicit in nature and was fairly new that there was actually a long judicial prohibition about sharing outside the Court's sanctity, if you will.

Judge: Yes. I don't know what the response would have been if he had said to the Court and to the lawyers, "I'm going to have Professor So and So consider this case, I think he is a worldwide or a national authority on this subject, and I want him to consider it." I think that probably would have been wrong, too, unless the attorneys could have engaged in some sort of dialogue with the professor. But to not tell them so they never had a chance to respond to arguments that the professor may have made and for him not to have ever heard the oral arguments…it was certainly wrong.

Interviewer: Were the proceedings contentious within the court?

Judge: No. I think the judges got along surprisingly well. I think some of them had trouble with my thinking on it. But they were certainly very cordial to me. Judge Suozzi lived on Long Island, and he always gave me a ride to La Guardia when we finished proceedings. And it was funny because he had a habit. I don't know if you have seen the Atlanta Braves baseball coach Leo Mazzoni; he has a habit of bouncing up and down on his seat

like that. And Judge Suozzi did too. I like him very much, but we disagreed. We would talk about the case as we drove out to La Guardia, which was about a half hour, three-quarters of an hour ride and the more we would get into the case the more he'd be bouncing up and down. By the time we got to La Guardia he was bouncing up and down and hardly touching the seat.

Interviewer: And he actually ended up disagreeing with the majority as to whether some of the transactions were improper.

Judge Yes, he had a feeling that many of these were perfectly appropriate. That was just the view he took.

Interviewer: One of the other things of note here is that the counsel for the court were Judge Tyler, Rudy Giuliani as his associate, and Dick Parsons as another associate on the case. What do you recall of Giuliani from those days?

Judge: Not very much. Tyler, of course, had been a former U.S. attorney general or deputy, I guess . . . I've forgotten, and a district judge. He had come from the Utica area. I had not known him before, but we have that in common. And he asked if he could bring in these young lawyers to help because he was obviously very heavily scheduled, and he brought in Giuliani and Parsons and a third man whose name probably appears in the report, but I can't think of it now. I think they did a lot of the legwork but they spoke very rarely. Tyler did most of the talking. The way the thing was structured, we met several times for him to report.

Once we were organized, we hired them and then their job was to go out and investigate these things. And periodically we would meet with them and they would report on "here's what we found" and "here's our analysis of it" and "we think this is serious or not so serious" or what have you. And for the most part, Harold Tyler did all the talking. Occasionally he might talk to Giuliani or Parsons. They were both very able people.

Interviewer: As I understand it, you didn't take testimony as such.

Judge: No.

Interviewer: The court didn't.

Judge: No. All the work was done by investigators, and I think they had statements, although I don't recall ever seeing them. But I'm sure they had them from various witnesses, and we could have had them if we wanted, but we had no reason to doubt what they were telling us. It was all pretty much admitted.

Interviewer: Did you have the impression that – I'll put it a different way – were you

surprised with the result?

Judge: I thought we would go through some formal disposition of the charges. I thought the evidence was very, very strong from what I'd heard of it. As far as the practical concerns, perhaps I didn't weigh those as thoroughly as I should have, but to me I thought the evidence was very strong, and I thought there was a serious question whether he should continue on the Court. So, yeah, I guess I was surprised that the others took the view "let's get out of this as quickly as we can without any damage to the public reputation."

Interviewer: Was your sense that Tyler was pushing for stronger discipline?

Judge: I don't know. I've often wondered because he was editing the opinions as we wrote them. He was editing, just to make sure they were factually correct, and he called me one time and offered one or two corrections that he thought were factual errors. And he said, "I got to tell you, Judge, we have a very strong split opinion among the three of us as to how this should go." But I never knew whether he was for me or against me, or whether Giuliani was for me or against or anything else. But apparently, there was someone in the three young fellows and Tyler who thought that I was right. Their vote wouldn't have counted anyway, and others thought I was wrong . . . so.

Interviewer: One of the things that comes across in your opinion is that the cumulative nature of this had an impact on your thinking – the number of investments involved, the number of incidences with professors, you even bring up that Fuchsberg's home chambers shared a reception area with a law office – and that as a result of all this, the next step should be a proceeding where he could defend himself and testimony could be heard. Was it your sense that – is it fair to say that your sense was that you didn't see these as isolated ethical lapses but part of some larger pattern of fitness?

Judge: We had more than enough on our plate in front of us to pretty clearly demonstrate his type of thinking and his standards, I thought. He had been disciplined, as I understood it, in the past by the bar association when he was a practicing lawyer. I don't know that that's true, that's just something I've been told, but his reputation certainly was not the best and there was a pattern of insensitivity to a judge's ethical responsibilities.

Interviewer: Did his lawyers make presentations directly to the court?

Judge: Yes. We got to a point, and may have been a little unclear on the procedure, because they sort of jerry-built this procedure to get to a result that they thought appropriate. I'm not critical of that except that I would have had a different result. They let Tyler speak. We sat in the First Department courtroom. Tyler spoke as a prosecuting attorney might and

Judge Desmond represented Fuchsberg, former Judge Desmond, and I think [Herbert] Wachtel spoke [for him], too. I don't know exactly why both of them would have spoken but it made no difference; we were perfectly willing to hear whatever they had to say, and after that we sat down and conferenced the case. Are we going to go to charges, are we going to censure, what are we going to do? And there was strong feeling that there wasn't anything to be served by going to charges. There weren't enough votes around the table to remove him, so what was the purpose of it?

Interviewer: The charge from Judge Breitel comes in early September. You complete your work by January of '78. Were there multiple sessions between those dates?

Judge: Yes. We met, I can't tell you how many times, I went to New York several times. I guess I really don't have any idea how many off the top of my head, but we did meet several times. Then we went down for the oral argument and then we conferenced the case after that, and it took us quite a while to write the case. I know it took me a long time to write it. These were not simple questions. You're dealing with fairly esoteric instruments. The public climate of the time was that everybody doubted whether these instruments were valid. So you could buy a $100 bond, for example, for $25, $35, and if you knew the Court of Appeals was going to say that that was a valid instrument, you could go out and buy all you wanted for $25 and the very next day they're going to be worth $100. That's what he was doing.

Interviewer: There were two cases with the heading of *Flushing Bank*, the first one declaring unconstitutional the moratorium, the second one following a remitter as to what the payout schedule was going to be once the moratorium was gone, and he sits on the first *Flushing*, doesn't sit on the second, but invests between those two dates. One of the things you point out is that there's at least the likelihood or the possibility of having inside information of what the Court was up to by having sat on the first case.

Judge: Well, see, I don't think it would be possible to participate in a – I mean these were very, very serious things. They were worked on very thoroughly and people had very fixed ideas and so forth, and I didn't think it was possible to participate in a conference without getting some idea that Judge So and So is going to uphold these, Judge So and So is going to strike them down, and so forth. So, even without knowing exact results of the case that might come up in the future, you certainly would get a feel for the Court that no one else could possibly have.

Interviewer: At the end of your dissent, you make two points about appellate courts, which I would like you to reflect on, and about courts in general. One of which is that many times the public can't understand why a court comes

out the way it does and many times the arguments are so close that it's impossible to say that the right argument has won but that it is important that people believe in the courts and that the courts have integrity. You thought the *Fuchsberg* case raised that issue for people?

Judge: I thought on the face of it, it was pretty clear that this guy had done something wrong. The public, even those of us involved in it, might not have sense of how serious it was or whether it was really culpable but it was culpable at least, and observers could look at the Court and say, "You know, he may have been innocent but there is some stuff I read about him, this judge sitting up there. There's some stuff I read that raises a question in my mind about the integrity of the Court." And I didn't think the highest court in the state should have to withstand that sort of criticism. They really have to be like Caesar's wife; they have to be above question.

Interviewer: The other point you make is that – it goes to the nature of appellate courts – and you write: "There is another aspect which bears upon the public interest heavily, albeit indirectly, and should be considered also. Laymen, indeed made judges, who have not had the opportunity to work on an appellate court, may not understand fully the collegial aspects of such institutions. The judges live and work together closely on matters affecting the lives and fortunes of thousands of the state's citizens." You then go on later to say that "when mutual respect and trust among the judges is lost, there is serious injury to the decision-making process and the effectiveness of the Court may be crippled." Now, 25 years later, having gone to the Court of Appeals since you wrote those words, do they still ring true for you?

Judge: Oh, absolutely. You got to know where your fellow judges were coming from, and if you have confidence that they are being honest – they, in your mind, may be misguided or mistaken – but if they are honestly taking a position, then you're in a position to reason with them and perhaps see that they have something that you hadn't thought of and so forth. If you think that so-and-so is taking a position because he's a friend of somebody or for some extraneous or improper purpose, you just can't trust them and you can't trust their reasoning. It weakens the Court because you're sort of immediately saying, "I don't know, he may be right, but he's going to vote for that guy anyway, so I'm not going to bother to go behind what he has to say." Well, the Court loses something if that gets to be a practice on the Court. Everybody should be in a position to contribute and to contribute without their motives being suspect.

Interviewer: What do you recall of the reaction to the decision and to your dissent after it was made public?

Judge: I don't remember anyone ever saying they agreed with me, to tell the truth. I had a lot of people, a lot of judges – I don't know about laymen,

but a lot of judges – took the attitude of, "Why did you do this to a member of the club? We're all in the same boat together; now you've made us all look bad. Why did you do this?" And for a time, I really felt quite badly about it but as time went on, people would come to me very quietly and say, "Boy, you really had something." So I got over that feeling that I was spitting against the wind. When Governor Cuomo was a lieutenant governor, Governor Carey assigned different applications [for the Court of Appeals] to different people on his staff to review and to recommend to him after reading the opinions what they thought. Governor Cuomo told me after I got on of the Court that when he was lieutenant governor he had received my file to study and that the *Fuchsberg* case, of course, was part of it. I don't know whether he said it directly or implied it but someone said to me afterwards, "That's why you got on the Court because Cuomo approved of that." And after I got on the Court, of course, the judges were free to speak to me, and, among the sitting judges, Judge Fuchsberg was not popular, and many of the sitting judges complimented me on the dissent but they would not have said anything publicly.

Interviewer: Was it ever a subject of conversation directly between you and Judge Fuchsberg?

Judge: Yes. When I got appointed, his chambers were right next to mine. In those days the two junior judges were on the third floor. But Judge Fuchsberg liked his chambers on the third floor so he didn't move and I as the new judge was on the third floor with him. And, of course, the minute I got appointed the newspapers were all over him and they were all over me, and I don't remember saying anything particularly about it to the newspapers or anybody else but Judge Fuchsberg got very nervous about it. And he came into my chambers one night after being apparently pestered by some newspaper man and he was quite angry and he said to me, "I want to know right now, are you and I going to have any trouble working on this Court together?" And I said, "Not as far as I'm concerned," And he said, "Well, then not as far as I'm concerned either."

Fuchsberg was a difficult guy to work with, though. He only stayed about six months after I got on the Court. In the first place, he would change his position on cases so you never knew if he was with you. You never knew whether you had a majority because he was liable to drop off the next day. He was not a man who felt bound by the record. You would suddenly find dissents written with facts in them that you'd never heard before, and you just had to take the time to get them out of his writing.

Interviewer: Let's turn to again another event that goes beyond deciding cases and obviously is extremely significant in the history of the Court of Appeals, and that is the resignation of Judge Wachtler. What do you recall of the

weekend when he's arrested in 1992?

Judge: I had been widowed that spring so my kids, all of whom had left home, were not clear whether I was in Albany or whether I was in Rome, and so my answering machine would always take their calls. I could return them and find out what the difficulties were or what the situation was. And the week before Judge Wachtler was arrested, a close friend who was, as it turned out, fatally ill was in Rochester in a hospital and her sister and I were with her as death approached. And after she died, realizing that I hadn't talked to the kids or checked in in a long time, I went out and called home to see whether I could pick up any messages. Whereas I might usually have the answering machine say "you have one or two messages" it came on and said "you have 19 or 21 messages."

The first one, as I recall, was from Matt Crosson, the chief administrator of the courts. All he said was "I got to talk to you right away. Please call me immediately" and he left me a telephone number. And the next one was from Don Sheraw, the clerk of the Court, who said, "I got to talk to you right away, please call me, here's my office number, here's my home telephone number" and on and on. I went through several calls from Crosson and several from Sheraw, a couple from the governor's office, a couple from the Office of Criminal Justice and I didn't know what on earth was going on.

Finally, I think it was about – I kid Matt Crosson about this – because finally about the thirteenth or fourteenth message, he came on for the third or fourth time and he said, "Judge, I'm sitting here and I realize that you may be wondering what this is all about." He said, "I have to talk to you because the chief judge has been arrested by the FBI." And that's all he said. So joking, I said to him afterwards, you know, you really put my mind at ease when you told me what it was about.

Well, I called him and I called Don Sheraw and told him to get the Court together, which was a problem because Judge Bellacosa was in New Orleans and they were scattered all over. But, anyway, we set up a court session for Monday. This was a Saturday, I believe. I think I may have talked to one or two of the judges – I don't remember.

Interviewer: Had there been anything that you observed in the months leading up to the arrest that raised concerns about Judge Wachtler with you?

Judge: No, I had no idea there was anything wrong. I knew he was going out with this woman – we all did. I had no idea there was anything medically wrong. People asked afterwards, "Did you know that he was bipolar – that he was sick?" I never sensed it. I remember him complaining about getting headaches, but we all complained about getting headaches and certainly the chief judge with all his problems had plenty of reason to get

headaches. So I never thought anything about him one way or the other but . . .

Interviewer: His conduct hadn't been erratic?

Judge: I hadn't seen anything. He was a man who maintained an overwhelming schedule. He would think nothing of flying to Seattle for a Sunday speech and coming back and presiding in Court Monday morning. He is an excellent speaker – one of the very best I have ever heard. So he was very much in demand all over the country. And he did it and he enjoyed it.

Interviewer: Let's go back to the chronology. You arranged for a court session on Monday or for a meeting of the judges on Monday?

Judge: Right. Another interesting little sidelight was when I left Rochester, my attitude, when I found out what was going on after I spoke to Sheraw and Matt Crosson, was this is a Court problem. It's not a problem for the governor; it's a problem for the Court. So I did not call the governor. And on the way home, I said, "Oh, my God, I should at least have extended the courtesy of returning his call." So I stopped at a Thruway station and called him and apologized. And his response was "I never called you," but I had had three or four calls on my machine from the governor's office and certainly nobody there called me without his permission.

Interviewer: Right.

Judge: And then he said, "Now here is the way I think you ought to handle it," and I said, "Well, thanks, we will take that into consideration." But it was not something he should have gotten involved in and he didn't.

So in any event, over the weekend, I just was very uncertain how do we handle this. And I came to the conclusion that Judge Wachtler couldn't stay on the Court. This couldn't go on with him under indictment and the Court trying to function – and there wasn't any way in which he could be suspended.

I called the retired judges for advice. I know I called Judge Jones, and I know I called Judge Cooke. I'm not sure whether I called Judge Meyer. I think those were the only living retired judges. But I called them and told them that this is the sense that I had of the situation, that we would have to insist that he resign, and both Judge Jones and Judge Cooke agreed immediately that the Court couldn't continue with him as chief judge. When we met on Monday the first matter was to elect an acting chief judge, I guess. Nobody knew what to do – we never had anything like this before.

Interviewer: Getting communication to and from Judge Wachtler was obviously difficult.

Judge: The first thing we did was to decide as a Court and I said, this was my sense, obviously. I was not declaring that this had to happen but this was my sense of things. I don't recall there being any dissent – I don't remember there being a great deal of discussion about it – we all felt a sense of Judge Bellacosa's position because Wachtler was probably his closest friend, and we were all a little bit nervous. I didn't want Bellacosa to think that I was going out of my way to harm Wachtler. But, anyway, we came to the conclusion that he had to resign.

His lawyer was a man named [Charles] Stillman – a very fine criminal lawyer and, as I learned, a very decent guy. I don't know how I found out who was representing him but, anyway, when the conference broke up I called Stillman and I told him what the Court's position was and he said he would be meeting with the chief judge that day some time. And, I think, he said he was meeting with him shortly, in half an hour or so. So I said, all right, I would wait to hear from him. There wasn't any bad faith on his part – I just don't remember just what it was – but there were delays and I was getting nervous about it, and the press had insisted on a press conference that night, Monday night. Stillman called me back later that day, and he said the chief judge has agreed he will resign, but he said, "I've got to have some time here to protect my client to see what happens to his pension and so on." So I said, all right, I will wait to hear from you before we say anything formally.

So we met with the press that night in the lawyers' lounge in the Court of Appeals, and I have the feeling they went after me pretty good. Maybe they didn't, but I was in a position where I knew what was going to happen and knew it was going to be satisfactory but I couldn't say anything – and they kept asking me, "Shouldn't I get rid of him, shouldn't I do this, shouldn't I do that?" Well, I did what had to be done. But I couldn't in good faith say so when Stillman was still working on the case. So I don't think the press conference was satisfactory to anybody, but the Court was all there – we were all there – and nobody else spoke.

The next day I called Stillman up and I wanted to know what the story was, and he said, "I don't have an answer for you yet," and I said, "OK, I understand your position but I want you to know this: We're not going to wait forever – we either have to get an answer today or tomorrow, or we are going to announce it." And he said, "That's perfectly all right." He said, "I will probably get back to you today." I may have the days wrong, but this is about the way it went. Later in the day he called me and he said the chief judge wanted to talk with me, and he [the chief judge] was very emotional. He was very apologetic and so ashamed of himself.

Interviewer: Was he still incarcerated at that point?

Judge: I think they had an anklet on him as I recall – they must have, because he was in Stillman's office.

Interviewer: I see.

Judge: And he asked the judges to forgive him – it was an emotional time.

Interviewer: So he resigned.

Judge: He said, "I'll resign. You'll have my letter or the governor will have my letter and you will have a copy of it right away." We wanted to make sure we beat the governor to the press because we wanted it to be clear that the Court had cleansed its own house and not that the governor had taken part in it. And I don't recall faxes going back and forth but certainly we would not have done it without his [Wachtler's] consent. We announced immediately that he had resigned, and I think we beat the governor by about half an hour or something like that.

Interviewer: And as the charges in the case against Judge Wachtler became more public over those days, did you find yourself in disbelief?

Judge: Gee, I don't know. We knew he was fooling around with this woman. He had actually brought her to Court functions, so the fact that he was involved with her was no great surprise. There was a side to Judge Wachtler that was sometimes difficult to understand. He didn't take defeat very well and so I guess maybe it was believable. I just don't remember one way or the other. I could say this: that Judge Wachtler was extremely popular with judges in this state. He had spent a great deal of time meeting with them and listening to their problems and so forth. He was very well liked and after this happened I started going around to the state to meet with the different judges, and they were in total disbelief. They just couldn't accept the fact that it had happened at all, and it was devastating to some of the trial judges – the idea that this had happened. So, yes, it was quite a shock to the system.

Interviewer: What do you recall of the dynamics among the judges at the Court following Wachtler's departure?

Judge: Well, I think the sense of circling the wagons and pulling together was unique and outstanding. I mean, there was no – I had to act as a chief judge after that – and surely there was no lack of cooperation. The judges just bent over backwards to try and make my life as easy as they could and to try and protect the reputation of the Court.

I referred a little earlier to Judge Bellacosa because it really stunned him. Obviously it was very difficult for him. The judges wanted me to move

into the chief judge's chair, and I didn't want to do that because I didn't want him to have any sense that I was trying to preempt Wachtler's position. And I never did move into his chair at conference but they got very angry with me because I wouldn't take the center chair on the bench when the Court was in session. And, strangely enough, the one I remember most was Judge Smith, who was a very, very quiet fellow, and he just insisted that I had to take the center seat, that it would look ridiculous – and I agree with him now – it would look ridiculous to have an empty chair in the middle of the bench. We went on from there, and actually the Court functioned well, and everybody did their job.

Interviewer: After the conversation with Judge Wachtler from Stillman's office, was he still in communication with you or did the Court go on without his input?

Judge: I think he wrote me a letter asking for my forgiveness. I know I got letters from him – not immediately, but, as time went on, periodically I would get letters and cards from him. There wasn't much I could offer him. He obviously missed the Court and wished he could be a part of it, but he couldn't. There was just no way he could be a part of the Court, and I tried not to be cruel but I didn't want to encourage him into thinking we were going to invite him to parties and things like that because we weren't.

But I corresponded with him for a little while. I don't know, I probably didn't write more than two or three letters to him but after a while I just stopped doing it. He came at different times to state bar functions and things like that. I remember at the sesquicentennial – I don't remember what year that was – but he came to those ceremonies. He was very well liked and people missed him as a personality but there was a certain amount of discomfort.

Interviewer: What was it like dealing with courthouse employees in the aftermath of Judge Wachtler's resignation?

Judge: Well, the staff was almost dysfunctional. They couldn't believe it and the sense of sadness was perceptible – you were there at the time. I think you probably sensed it, too. But I think we came through it all right.

Interviewer: During that period you also applied to be the chief judge, as did Judge Kaye. Did that cause any tension?

Judge: No. That was another thing: I didn't want anybody to think I was trying to preempt something, and so at one point I said to the Court in conversation, "I'm going to apply for chief judge," and I said, "Every one of you should, too. I think the governor should have the widest possible group to select from so there can be no question of any . . . " I was sort of concerned about the governor getting into the act a little bit. He really didn't but he wished he could. He and Wachtler were not friends.

Wachtler had sued over the court budget, as you recall, and there was a great deal of bitterness there and so that's why I was trying to make sure it didn't look like the governor was trying to get his licks in.

But, anyway, I said to everybody, "I think we should all apply," and some of them right away said they had no interest in it at all and they weren't going to. Judge Kaye, I remember, she said, "I will have to think about it," and I thought it was entirely appropriate that she should apply. She was certainly one of the strong judges on the Court and she was next to me in seniority. She certainly should have and she called me sometime afterwards and she said, "I am going to," and I said that's fine. We have always been good friends.

Interviewer: What do you recall from that period when you were acting chief judge? Were there things that surprised you about what was involved in doing the chief judge's role?

Judge: The administrative work was very burdensome. I don't particularly like administrative work anyway. An it was quite burdensome even though the administrative staff was very good. One of the first things I had to deal with was this lawsuit because it was a festering sore between the governor and the court system; you can't imagine how deep this animosity got between the two of them. The chief administrator and the governor's counsel could hardly talk to each other, there was so much animosity.

I remember one time they got into a dispute about something. Liz Moore was the governor's counsel. She wrote a perfectly all right letter – something to the effect that "you have accused me of such and such." And Matt Crosson wrote a five-page letter saying she was crazy and she was delusional and everything. And then he said to me, "I am going to send this letter to Liz Moore and I am going to put an end to this right now," and I said, "Well, should I see it?" He said, "I don't think so," but a few minutes later he faxed it and said, "On second thought I think you ought to see it." So he faxed it – and here was this long letter. So I called him up and said, "Matt, why don't you just write a letter and say, 'I didn't say that; if you took it that way, I apologize. I didn't mean it that way.' "

He said, "What else?" I said, "Nothing else." And that's what he did.

I had him send me all the papers on this lawsuit, but it was reaching a point where we had to pursue it further or do something else. And I read all of them and I studied them, and I called him up and I said, "Why don't you put down the lawsuit, why don't you discontinue it?" Which is what they did. So that was all.

Interviewer: Is there something inevitable about the tension on budgetary issues the way that system is set up?

Judge: Well, it is of interest obviously, but I don't think we have ever had any great trouble and I can't recall the details between Cuomo and Wachtler but the governor had to submit the budget to the Legislature as it was received by him. Wachtler had the idea that we are an independent branch of government, and the other branches had no right to cut down our budgets and they had to accept them as written. That didn't go over very well.

Judge Kaye has certainly had wonderful cooperation with the Legislature. Her budgets are accepted almost routinely. I remember a time when Chief Judge Breitel, after he retired, said he had never had the Legislature question his budgets after he had put them in, aside from trivial minor corrections.

Interviewer: Again, during this period that you were the acting chief judge, did you try to change anything about the way conference was run or the internal dynamics of the Court?

Judge: No, I don't think it was up to me to do that. I was temporary, obviously, and unless there was something that needed to be altered because of the circumstances, I didn't see it as my function to change anything.

Interviewer: Did you change the way you acted in conference?

Judge: Well, I had to preside, obviously, but I don't remember anything other than that. I think we all tried to present a picture of business going on, and going on routinely and without discord and without disharmony. There might have been times when I said, "Can't we smooth this off a little bit" where before we might have been a little sharp and would never have had any trouble. But I don't even remember that being a problem. I think everybody sensed the work we were doing and why we had to do it.

Interviewer: In retrospect, do you think the institution was harmed by the Wachtler incident?

Judge: Well, it didn't do us any good; that's for sure. I ran into people since then and the only thing they know about the Court of Appeals is that the chief judge was arrested on a sex charge – of course, it wasn't a sex charge but that is the way it was perceived by many people. But I think the institution weathered it very well – I think they certainly did.

Interviewer: And, in looking back, are there things that you would have done differently now with the benefit of hindsight?

Judge: No, I don't know that I did all that much. I presided, that's all. I spoke for the Court, that's all. I do remember an article written in the newspaper, The New York Times. At some point in the interview I said something about our sympathy to Judge Wachtler's family for this very

difficult situation, and this woman wrote this column and said what a chauvinist I was because I didn't express any sympathy for the victim at all; all I cared about Wachtler and his family. Well, OK, I wish I had had enough familiarity working with reporters, so that I was more balanced in my remarks.

Interviewer: Just to finish that thought. You wish you had enough familiarity with reporters . . . ?

Judge: I wish I were a little bit more experienced. I was pretty nervous during this period of time worrying that I wouldn't make a misstep or say the wrong thing or do the wrong thing. If I had been in a position like that more often I would have thought about what was not expressed for the victim.

Interviewer: Was there any legal fallout as a result of Wachtler leaving in terms of cases that came back or had to be reworked since they had been in his chambers?

Judge: We didn't have any trouble with pending cases. I think we must have reassigned them. I just don't recall exactly how we handled them, but they weren't a problem. They were handled by the judges of the Court. We had some applications to vacate criminal judgments since he had participated in them. We didn't grant any of those but we got some *habeas* applications and things like that.

Interviewer: I would like you to reflect a little bit on Wachtler's contribution to the Court. Obviously the way the resignation happened will indelibly change the way history looks at that. If it hadn't happened that way, if it hadn't come to this sort of resignation and infamy, what do you think would have been history's judgment of his time on Court? What was his contribution? What was his hallmark?

Judge: Well, he was a very strong personality, a very attractive personality, and I think he conveyed that to people outside the Court and the public generally. He was also a good judge. He was a very sound judge. I think he had a tendency to overwork himself, but I don't think it was reflected in his work. There was a good deal of speculation near the end, before he got into this trouble, that he would run for governor. He would have been a very formidable candidate for governor. They talked about him running against Governor Cuomo and he would have been a very formidable candidate and might very well have been elected. I think he was that well regarded. And he would have been a good governor. He was an intelligent man, strong forceful personality, and I think that's the way his work will be remembered.

Interviewer: When Judge Kaye became the chief judge, did the dynamics of the Court

change? Did the procedure of the Court change?

Judge: No, not appreciably. I think there was certain amount of tension during Wachtler's tenure on a personality level, I guess; and that of course evaporated when he left. So Judge Kaye had the benefit of that but the procedures as such didn't change. The only noticeable thing I would think about Judge Kaye and Judge Wachtler is that Judge Kaye is more consensus-minded. If you took the position with Judge Wachtler that you were to dissent, go ahead and dissent. That was it. Judge Kaye would say, "Can't you agree with it or can't we moderate this a little bit or something?" She tried to build a consensus in the Court. The feelings when Wachtler was chief judge were relatively strong on different sides of different questions so he probably could not have done it even if he tried, and he didn't try very often.

Interviewer: Did you think of yourself during your time at the Court of Appeals as a consensus builder as a judge?

Judge: No. I don't think that would have been how people would judge me. I don't know exactly how I would have assessed myself but not as a consensus builder.

Interviewer: How in your own mind did you decide, for instance, when a dissent was warranted as opposed to simply throwing in and going along with the majority?

Judge: I think in most cases it is a matter of principle. Either on the basis of the law or on the basis of the result, I cannot accept this. I mean, in many cases, there is no point to dissent and it's a waste of time to dissent. If you are construing a statute and say the statute means such and such, there is no point in sitting there and saying, "No, it doesn't mean such and such" because if you are wrong, or if the Court is wrong, the Legislature will change it. Those are remedies. You don't have to write a dissent and say the Court made a terrible mistake or something like that. So there is just a certain number of cases where it's wasted effort and serves no valid purpose, but there are cases where rightly or wrongly a judge feels that I have to be heard on this – I can't go along with what they are saying. So you have the right to dissent.

Interviewer: When you wrote dissents were you thinking that you may ultimately change the Court around before it actually came to a decision?

Judge: There were cases when I thought I could, and I can remember one case where I did. I don't know that I did it very often, I don't know if I ever did it again. You hope that you will lead them to light but it doesn't happen very often.

Interviewer: Sometimes people think the idea that pushing it off to the Legislature, saying that the Legislature can change the statute, is actually cynical because the Legislature is never going to act to do that in many cases, that they are not going to be able to focus on the law and that it is up to the courts, especially the highest court in the state, to in effect make the decision as to what those laws mean. You seem to resist that.

Judge: Well, I think there are different types of statutes. If you have a procedural statute where something has to be done in such and such a time or whatever, and you take the view that this is what the Legislature meant. If we are right, leave it there. That's the sort of thing that comes up commonly.

Now you get into areas that involve policy. The one that comes to mind is adoptions by unmarried couples; and the statutes – there were two or three, as I recall – could reasonably be interpreted different ways. And I think because of the inflammatory nature of the problem you knew that the Legislature was not going to address this problem – they are not going to cause any more fires than they have to. So some of the judges would take the position that this is a remedy that should be available. We are the ones that are going to have to give it. There is much to be said for that position. I think you have to have a healthy respect for the separation of powers but there are certainly times when you know there isn't going to be any remedy in the Legislature and perhaps the desire for a remedy is very, very strong so you look at it that way.

Interviewer: Looking back were there cases that you liked to have and cases you regretted having or didn't have the same flavor for?

Judge: Well as far as regretting having them, I had some people ask me just recently if I would work on a nursing home case – the rate of recovery from Medicaid or something. You had to interpret the statute as to what sort of return the nursing homes would get under the statute. They wanted to know if I thought the Court would review it, and I said, "Not in a million years until it absolutely had to because that's a mechanical, artificial, uninteresting case."

Interviewer: There are cases like that: It's difficult work, and you have to do it.

Judge: Interesting cases come in all shapes and forms and don't necessarily involve one particular subject matter.

Interviewer: Looking back and going back to the practice of law even, after you were off the bench, what are the things that you think have changed about the way law is practiced from the time you were a young lawyer to now?

Judge: There is a tremendous difference. I know when I first came into the law firm here they said, "Would you like to do this or would you like to do

that?" My response was "I wouldn't dare to." If you take estates and tax law, I had some of that on the Court, but certainly not federal tax law. Things like that I have no familiarity with at all. Wills and things like that. The procedural aspects, the forms that have to be filed, are so much greater than when I was first practicing law. I don't even know what they all are and so there is a great difference in that. It took me a while to get used to the difference, but I finally realize that 35 years can make a big difference.

Interviewer: Are you still a believer in the legal system as a way of resolving problems?

Judge: Absolutely. We have problems in the system unquestionably. The delays, the difficulties with some of our judges and so forth impair the effectiveness of the courts and they should be addressed. The chief judge is doing her utmost to address them. But the bottom line, our system is the best way to do it.

Interviewer: The last question. Thinking back, what do you think of as the greatest strength of the Court of Appeals and are there any things that you would like to change about the way the Court of Appeals functions and the way the judiciary functions in the state?

Judge: I thought I worked with some extremely able judges, men and women of great ability and insight and wisdom. I thought the Court of Appeals staff was outstanding. I worked in two other appellate courts and their staff was certainly good, a very credible staff. I thought the Court of Appeals staff was in a class all by itself. The way they operated, their knowledge and ability, was outstanding.

Interviewer: Thinking back, do you think there is a change that will benefit the Court?

Judge: We made a change and I can't give you the year – we became what was known as a certiorari court where we elected the cases that we would hear. There are relatively few appeals as of right now and that was a very important change. We used to have appeals of right that were absolutely – there was no purpose or point in their being in Court of Appeals. The illustration that comes to mind is rent control cases in New York. Rent control is a local law. They didn't have it outside New York City. So it had no meaning statewide. It would be a rare rent control law in which you didn't have at least one Appellate Division judge [dissenting] and so automatically there was an appeal as of right. There was no coherence in the rent control law. There was no way you could develop rules of what would be applicable in all situations and so forth. They are almost all ad hoc situations. There was no rhyme or reason to it, and I think they were a waste of time. The courts have more important things to do. So that certainly is an illustration of a substantial and measurable change where

we determined our own calendar. It appears that the Court has become quite selective in their cases, giving them more consideration.

Interviewer: When you look at other judges you worked with, what qualities in your mind make a good judge?

Judge: Well, there have been an awful lot of people who have been trying to define that. Certainly intelligence is one. Honesty, patience, industry. . . I said to some people one time that I thought courage was very important. They thought that was ridiculous because they thought that was not part of a judge's job. Well, I can tell you this: Some decisions don't come easily.