

## INTERVIEW 6 (MARCH 19, 2015)

MCCREERY: We spent our last oral history interview session talking about your career as a justice of the California Court of Appeal. I believe you've uncovered some things from that time and others that you'd like to bring up before we get onto other things today. What were those?

WERDEGAR: Thank you for giving me the opportunity to cycle back a little bit. Going way back, I mentioned with respect to my studies at George Washington University some of the professors I remembered. I did mention Monroe Freedman, and I think I mentioned that he was a guru in ethics. I didn't study ethics from him.

Regrettably, in the meantime since we spoke, he passed away. I saw this obituary in the *New York Times* on March 4, 2015, and I realized from what they wrote about him what an incredible man he was. Of course, as a student — he was my law review adviser/professor — I didn't have the full benefit of all that he was, nor could I have appreciated it at that time. But I'll just give you a flavor. This obituary says:

Monroe Freedman, a dominant figure in legal ethics, whose work helped chart the course of lawyers' behavior in the late twentieth century and beyond, passed on. His book, *Understanding Lawyers' Ethics*, is assigned in law schools throughout the country.

"He invented legal ethics as a serious academic subject," said Alan Dershowitz, the Harvard Law School professor. "He was a gleeful jurisprudential provocateur — ."

And so it goes, and there's a photograph of him. So I wanted to expand a little bit on my privilege in having known him and my regret that I didn't experience the fullness of all that he was.

The other thing I wanted to go back to: As I had mentioned, an important part of my background is that I did author the *California Misdemeanor Procedure Benchbook* published by the California Continuing Education of the Bar, and I did this under the auspices of what was then the California College of Trial Judges.

Let's see, how many pages do we have here? It's about 400 pages, indexed and subheaded, about how to try a misdemeanor case. At that time, by the way, there were municipal courts, and misdemeanors were tried

in municipal courts. This book was on the desk of every municipal court judge in the state at that time.

What I want to add to that is I came across this beautiful leather-bound book entitled, *Appellate Court Opinions, a Syllabus*, prepared by B. E. Witkin of the San Francisco Bar. Engraved in gold on the leather cover is my name at the bottom, Kathryn Mickle Werdegar.

Why is this significant? It is significant because when I turn the couple of pages in the beginning I find this absolutely delightful inscription: “To Kay, from another law writer. Bernie Witkin.” Of course, I treasure that, and how generous he was. But it is an item of historic interest. That was my return to matters we’d spoken about earlier.

MCCREERY: How well did you know Professor Witkin?

WERDEGAR: We were socially acquainted. Perhaps I mentioned it earlier. I had encountered him when I was working for the California College of Trial Judges writing the misdemeanor procedure benchbook. We were, in a collegial way, affable acquaintances.

My husband had a bachelor brother, a psychiatrist, at that time. Bernie Witkin’s wife at that time — I don’t believe it was Alba — had a single daughter, and so we were invited to dinner at their home, my husband and I and my husband’s brother and the particular young lady. Yes, we saw Bernie in his home, and we became of course more acquainted then.

He opened the door to this room. I don’t think it was a vault, but he showed me where he had all his three-by-five cards, way before computers, everything that he would put in his book and organize and categorize. It was in file drawers on three-by-five cards.

Bernie Witkin was known to be a cut-up, if you will, amusing. We did have the pleasure of seeing him put something on his head and balance it and walk around. He had a great personality, and they were very hospitable.

After that, I don’t think any romance was forthcoming from the dinner. [Laughter] But after that I would see him at professional functions. He was just a very gregarious, outgoing man and, of course, brilliant. I think it’s true that he did not graduate from law school. I think it’s possible that he went to Boalt Hall, now Berkeley Law, but didn’t finish. But perhaps you’ll fact-check me on that. I think it’s an interesting fact if it’s true.

MCCREERY: How usual was it for a leather-bound compendium of appellate court opinions to be prepared?

WERDEGAR: I think not at all, and to have my name on it. I've never heard of another. He doesn't actually have opinions in here. It's about writing, and preparing for the oral argument, and questioning by counsel, and how justices operate, and what came out of certain appellate justice seminars, and mechanics of drafting. And what about concurring and dissenting opinions. So it wasn't actual opinions. It was on how to do it or how it is done.

MCCREERY: Thank you. Anything else that you'd like to add?

WERDEGAR: No.

MCCREERY: Unless there's anything further you'd like to say about your years as a justice of the Court of Appeal, perhaps we'll think about moving into the transition period. Anything to add there?

WERDEGAR: Did I mention that when I was on the Court of Appeal and my colleagues were Justice Ming Chin and Bob Merrill — that we had one of the first DNA cases? It was assigned to Justice Chin. And to think back, how we were trying to figure out what DNA was in the sense of evidence in trials and how it could be accurately analyzed. Was it usable validly as evidence? It would be new scientific evidence.

We used to have long meetings, and with staff people, to try to get ourselves up to speed. I think I mentioned earlier that we all got educated on the subject, but Justice Chin has continued to be a scientifically knowledgeable and interested justice. No, there's nothing else I care to add.

MCCREERY: That reminds me, though, to ask you what sort of presence Justice Chin was on your panel? What style did he display, as you recall it now?

WERDEGAR: He was who he is. Agreeable and engaged and so on. And Justice Merrill, who spoke at my hearing that I'll be telling you about, was a real gentleman.

Justice Clint White, I think I described, could be very big-hearted and a fine person, but he also could be totally distracted, maybe not even knowing who was the plaintiff or the defendant arguing before us, I think because he just wasn't paying attention. I think I mentioned I was probably a challenge to him for the reasons of how I present and who I am. But he

was good-natured, and I'm glad I had the opportunity to serve with him. Again, I might have mentioned that in his day he was supposed to be a superb trial attorney.

MCCREERY: How did you learn that Justice Panelli would soon retire from the California Supreme Court?

WERDEGAR: I actually don't remember. I don't remember if he told me personally or if it was announced in the paper.

MCCREERY: Did you speak to him personally about it at some other time?

WERDEGAR: No, I can't remember that I did. I have no memory of that.

MCCREERY: But somehow you learned that news.

WERDEGAR: Oh, of course. That's always big news, when a justice retires.

MCCREERY: What was the first you heard from the governor?

WERDEGAR: When it came time, when Justice Panelli stepped down, we could very well have had conversations, but I have no memory of that. You don't apply to the Supreme Court. But I was invited to apply, as were some others.

MCCREERY: What form did that invitation take?

WERDEGAR: I don't remember. It's so long ago. Maybe one of Governor Wilson's staff people called, or maybe somebody from his administration asked somebody close to me to tell me to apply. I don't know how it was done.

MCCREERY: What was your response upon getting that invitation?

WERDEGAR: I was thrilled, of course. It's a lot of work, these applications, but you're motivated to do it. You have to supply fifty — or you have the opportunity to supply — something like fifty references, and I believe you have to list all the cases — depending on where you're coming from when you're invited — but in my case probably a list of Court of Appeal cases that I had authored. That's what I recall.

MCCREERY: After you prepared the application materials and submitted them, what happened next?

WERDEGAR: You wait. [Laughter] There were other candidates. At that time — every time is different — certainly recent history is different — but at that time it was published, the governor's office, I guess, chose to publish

who the governor was considering, and there were four of us. It was myself and Art Scotland and Ming Chin and Janice Brown.

Art Scotland was on the Third District Court of Appeal. Ming Chin was my colleague on the First District, Division Three, and Janice Brown had been legal affairs secretary, and was I think at that time, to Governor Wilson.

MCCREERY: Actually, the news accounts of the time mention two other candidates.

WERDEGAR: Oh. Who were they?

MCCREERY: Reuben Ortega of the Court of Appeal in Los Angeles and then Patricia Bamattre-Manoukian from San Jose.

WERDEGAR: Oh, well. That part of it I don't remember. They published quite a lot, it seems. So there you are, out there with all these people and everybody discussing what your chances might be. Other times, most recently, the governor just puts out a name and the commission evaluates them and it happens.

But for whatever reasons — either that's how it was done or maybe a particular governor wants to showcase who he's thinking about. Even though only one of those people is going to get it, maybe politically the governor, any governor, thinks, "I'm looking at all these people."

MCCREERY: Since you've mentioned that all the names were out there, what sort of response did you get from your own circle and beyond on being named as a candidate?

WERDEGAR: It's always a privilege to be named as a candidate, and I was thrilled. I don't remember any particular — of course, people close to me that liked me or admired me would be hoping that it would happen. That's all I remember.

MCCREERY: How long did the waiting endure?

WERDEGAR: It seemed like forever, and I can't tell you in detail. I don't know when the names went out. If you have news clippings on that, that would show that date, and I think the call came maybe a month before the hearing.

MCCREERY: In early May you were selected, early May of 1994.

WERDEGAR: Oh, I was? After the governor selects his candidate, then the “Jenny” Commission, which you heard about for the Court of Appeal, Judicial Nominees Evaluation committee of the State Bar, does its investigation, and that takes a lot of time. They send out these forms, and the candidate has to meet with them and be interviewed. You say I was named in May? And I was confirmed June 4, 1994.

MCCREERY: So it was about one month between the two.

WERDEGAR: Yes. I do remember when I got the call. I was in my office, and I received a message from the governor’s office to please call the governor. Of course, I didn’t know if the governor was going to say he was sorry or he was going to say congratulations.

But I had an appointment to meet a young friend of my son for lunch who wanted to talk to me about law school. So I had to go to lunch. I couldn’t return the call immediately. I suffered through that lunch knowing there was a call that I had to make when I got back.

I did make the call, and the governor was put on the line. He said, “It’s been a difficult decision, but I’m very happy to say” — this is a paraphrase, of course — “to say that I am nominating you to serve on the California Supreme Court.”

MCCREERY: What other interaction had you had with him on the subject, if any, up until that call?

WERDEGAR: Oh, I was interviewed by him. He was in San Francisco and doing some other things, and we had an appointment. Although we knew each other, at the interview you would never know that. It was a very formal interview.

MCCREERY: Who else was present, do you recall?

WERDEGAR: Nobody. I forget the questions. Whatever the answers were, it must have satisfied him.

MCCREERY: What were your first moves after getting that phone call affirming that you were the selection?

WERDEGAR: I probably told Justice Panelli. I certainly told my husband, and I probably told Justice Panelli. Then you just try to settle down.

Oh, and I think I couldn't make it public. I had to keep it a secret. But there was some preparation I had to do that was secret that I had to enlist the confidence and assistance of my judicial assistant at the time, Pam Hitchcock. But these details after twenty years are not as fresh as they would have been at the time.

MCCREERY: The accounts of that time do say that it did take Governor Wilson a while to make his selection. Justice Panelli had announced the previous September that he would leave, and then he did leave the end of January so there was quite a gap in there.

WERDEGAR: Oh, is that right?

MCCREERY: He was running for reelection, though, in this year that we're talking about now, 1994.

WERDEGAR: I guess it did take a long time.

MCCREERY: He was describing you in public at that time as being a brilliant legal scholar, but he also emphasized that he viewed you as someone who had the ability to build consensus and to play in some sense a conciliatory role.

WERDEGAR: Is this before I was appointed? Oh.

MCCREERY: I wonder how you thought about the way that he was characterizing you?

WERDEGAR: I had to be deeply grateful and hopeful. I don't know the circumstances that you're referring to that, before I was nominated, he had occasion to speak about me. I have no recollection of that.

MCCREERY: I'm sorry. Let me clarify. After he had made public that he had chosen you. "Here's why I chose her." That sort of thing.

WERDEGAR: Oh, well yes. How generous of him. But of course he wanted to support his chosen candidate, and I had to be only grateful.

MCCREERY: I'm interested in the "conciliatory" characterization, and so on.

WERDEGAR: That's his characterization. I think he was extrapolating from what he knew about my personality. I'm not a confrontational, aggressive person.

MCCREERY: You mentioned the Commission on Judicial Nominees Evaluation. What were the next steps in your process?

WERDEGAR: Waiting. [Laughter]

MCCREERY: Yet again! [Laughter]

WERDEGAR: The commission interviews you. They send out their letters. They interview you. I have no recollection of how that went. I don't even know if they tell you what evaluation they're giving the governor.

So you wait, and once all that information came to the governor he made his announcement.

MCCREERY: And their evaluation was — ?

WERDEGAR: "Well qualified."

MCCREERY: As it had been for the Court of Appeal, if I recall correctly.

WERDEGAR: I think so. Let me say that, for the commission at that time this was a growth experience because, as I mentioned in reference to my Court of Appeal appointment, I was not in any way the traditional candidate for any of these positions. The traditional candidate, of course, would be a male, and it would be a male who had most typically certainly sat on a Court of Appeal, but had been a litigating attorney, perhaps a D.A.

I mentioned previously, in more recent times the bar and the executive office has acknowledged that there are many other paths to follow in the law. But at that time they'd never seen a candidate like me for a number of different reasons. So for the Jenny Commission to give me in both instances a "well qualified" ranking was — I don't want to say generous of them because I think I deserved it, but it showed flexibility and appreciation on their part of something that they hadn't seen before but they could recognize the potential and the worthiness.

MCCREERY: On the previous appointment, the Court of Appeal, you learned later about the role of a woman in making some recognition of the fact that you had taken a different path.

WERDEGAR: You mean a member of the commission? The chair of the three-person commission was Ann Ravel, and she was most supportive and most approving and enthusiastic about the appointment. But I wouldn't say that it was she alone.



The head of my next commission, the one we're talking about, was Ron Albers. I believe he's a superior court judge now. He was, I believe, a public defender at the time.

MCCREERY: Who else did you have this time?

WERDEGAR: I don't remember.

MCCREERY: How did it go from there?

WERDEGAR: Then came my confirmation hearing. But I want to say that when Governor Wilson did appoint me, and ultimately I was confirmed, I became the 108th justice of the California Supreme Court, the third woman to be appointed to the court. Rose Bird had been the first, and Justice Joyce Kennard, who was on the court appointed by Governor Deukmejian, was the second.

I also — I love this bit of history — became the first staff attorney to be appointed to the seat of the Supreme Court justice she had served. Justice Panelli's name is on the plaque, and right under it is my name. I love that bit of history.

A final bit of history is I was the first daughter of a former Supreme Court clerk to be appointed to the Supreme Court. I would say daughter or son. My father, unfortunately, didn't live to see me be any kind of a judge, but he knew that I had excelled in law school and was doing legal matters.

MCCREERY: That's a few firsts — or seconds or thirds, certainly. But it makes the point that it was not a common thing.

WERDEGAR: No. Then came my confirmation hearing.

MCCREERY: Let me ask you to describe that in some detail, if you would be so kind.

WERDEGAR: Thank you, Laura. The Commission on Judicial Appointments, of course, is always comprised of the chief justice, who was Malcolm Lucas, who presides, and the attorney general, who once again was Dan Lungren, and then the senior-most presiding justice of the Court of Appeal in the state, and that was Robert Puglia from Sacramento.

The persons I had speak on my behalf were Professor Jesse Choper, former dean of Boalt Hall; and Chief Judge of the Northern District of California Thelton Henderson, my former classmate; and attorney Vicki De Goff, who was a past president of the appellate judges institute of the

state; Roger Poore, an attorney and a neighbor; and Justice Robert Merrill, who was my colleague on the First District, Division Three.

Three themes were sounded at this hearing, and I want to speak about them because they are a true reflection of the times. From my chosen speakers, the ones I've just named, the themes were my excellent academic record and my varied experience in the law; the fact that I was a woman, which was news in those days; and that I had successfully balanced family and career. Those were their themes. From the two judicial appointment commissioners who spoke, Attorney General Lungren and Justice Puglia, the theme was the death penalty. I'd like to expand on this. This was 1994, and a woman achieving high-profile success in the law was unusual, not unprecedented but certainly unusual. A woman doing so who was also married and had raised a family was very unusual at that time.

Vicki De Goff, who — everybody spoke first about my qualifications, but I want to quote what some of them said on some of these points. Vicki De Goff said that my confirmation “would send a message to all disadvantaged groups that with hard work and perseverance excellence can prevail,” and that my confirmation “is important to continue to shatter the glass ceiling that has prevented qualified women from rising to the highest levels.” She went on to say that I had “managed a balance between personal and professional roles that many women strive to achieve.”

Then Judge Thelton Henderson, my law school classmate, related that, as both of us were minorities in our law school class — he was one of two African Americans — what a class for Boalt — and I was one of two women — that later when we compared notes about law school, he said, “We often had similar perceptions of the law school experience and our place in it.”

He didn't specify what those perceptions are, but it was a perception of an outsider and that others were somehow smarter and knew more than we did. It was a wonderful experience, as we spoke about it to each other in these after years, “Oh, that's how I felt.” For different reasons, but the same result.

He also repeated a favorite saying of his that he graciously has said many times, something that was current at the time that we were in law school. “The number one man in the class is a woman.” Does that not tell you about the times?

Roger Poore, our neighbor and an attorney, sounded the theme of my being a supportive wife and a devoted mother, and present at the soccer games, and home to cook dinner, and a good neighbor and, according to Roger, seemingly effortlessly. It wasn't, but nevertheless continuing to have a professional life.

Robert Merrill, who was my colleague on the First District, Division Three, is a widely admired and really kind man, a true gentleman. He first was extremely generous about my service with him as a colleague. I just reviewed the videotape of this confirmation hearing, and I was really touched — Bob Merrill is not with us anymore — by how generous he was.

He said, "When you are a colleague on a court, you know you have no place to hide. Everyone knows what your capabilities are and if you're carrying your weight." He was extremely generous.

But on the point that I'm developing now, I want to quote to you what he said. After he'd commented generously on my judicial abilities, he turned to the personal aspect, and I want to quote him.

He said, "Something very significant is taking place here today. Over the years, Justice Werdegar has moved forward to this pinnacle of achievement while she has been deeply involved as a wife and mother. She has set a tremendous example to young women who desire to pursue a legal career and also to raise a family." From Bob Merrill that was extremely kind. He was the father of daughters, and I think he had a particular sensitivity.

Later the president of California Women Lawyers was quoted in the same vein. She said, "Werdegar's career trajectory provides hope to many young women lawyers struggling with motherhood and careers. We were intrigued — " I think she means the women lawyers organization, " — by the fact that she managed to reach the pinnacle of her profession with a husband and children. She appears to be a great role model because she's been able to balance a very successful career with family and raising children."

I think it was maybe Roger who referenced that family. My husband might have been health director of San Francisco at — no, he was up in Governor Wilson's office, but he had previously been health director of San Francisco. Our two sons were Stanford graduates, and one was just finishing up a Marshall scholarship at the University of London. That was one of the themes, two of them, my capability and my balance.

MCCREERY: It does sound as if the family connection was a very strong theme, mentioned by several people.

WERDEGAR: Oh, it was.

MCCREERY: How did you feel upon hearing that?

WERDEGAR: I appreciated it because, as I've told you earlier, as I pursued my career, following a path open to me, not the classic downtown law firm path, it was always my intention and effort that my family wouldn't suffer in any way, wouldn't be disadvantaged. That was those days. I was the only mother that I was aware of working, and my husband had many demands on him so a great deal of my energy was put to not inconveniencing my family.

I was gratified that people appreciated that. They remarked on it because at that time it was extremely unusual. Yes. So I appreciated it.

MCCREERY: But then, you're saying, the tone of the hearing changed a bit when others spoke?

WERDEGAR: Then came the time for the commission. The candidate makes a little statement. It was, "I'm privileged, and I appreciate this, and I'd be happy to answer any questions the commission has."

Attorney General Lungren spoke first. To set, again, the historical framework here, this was a time when "tough on crime" was the political slogan for success and the concern of the populace. This was June. In November the Three Strikes law would be enacted by initiative measure.

Only eight or seven years before, what's known as the Rose Bird Court had been ousted by the voters in that they didn't retain Chief Justice Rose Bird, Justice Grodin, and Justice Reynoso. Why? Because the public that voted was of the impression that those judges, who were on the ballot, would never enforce the death penalty.

It was a new death penalty, fairly new. It had been reenacted in 1977. I can't say — I wasn't among them. But the law had many aspects that a court has to sort out, whatever. But the perception was that they just would not enforce the death penalty. And they didn't affirm, they reversed, almost every death judgment that came before them.

MCCREERY: Pardon me. When you say you can't say, you were not among them, I'm not sure what you mean.

WERDEGAR: I mean I don't know what the reasoning of the court at that time was. That's what I meant. I wasn't here, but the bottom line was that they were reversing every penalty that came their way. Or if there are some exceptions, they would have been few. So they were not retained, and it was after a very — this is unusual in our judicial and political system, for judges to be attacked, and they were. So everybody knew at that time who Rose Bird was, and they voted "no" on her retention.

That sets the stage for eight years later when I am at the podium hoping to be confirmed to be a justice of the California Supreme Court. Attorney General Lungren started by stating, which is true, "The public has no understanding of why our capital cases take so long."

He asked me what I thought about delays caused in capital cases from pre-trial writs, and what did I think about the undue length of capital case briefs. Of course, on the Court of Appeal we didn't deal with capital cases, but I had been a Supreme Court staff attorney for six years, and I was well acquainted with them. So I responded, as to pre-trial writs, that they might actually save time, in that if there's some error that the writ brings to the attention of the court, it might save a later reversal, and I wasn't aware, actually, that they were a big factor. And insofar as capital case briefs, I certainly wished they were shorter, and maybe somebody would like to put a limit on them? [Laughter] He was finished then.

Justice Puglia started by saying that, although he had sat on many confirmation hearings — because he would be the senior judge for the Third District Court of Appeal — he thought it was fair to say that this was his "maiden voyage." Next he observed that this was the only part of the process of appointing and selecting Supreme Court justices that was open to the public, and for that reason he wanted to ask me about the death penalty.

He made reference to recent history, about which he "need say no more." Of course, he was speaking of Rose Bird and the others who the voters had failed to retain. Then he spent a full ten minutes asking me again and again if I appreciated that the death penalty was the law of the land. Did I think a different standard of review, a higher standard, applied to death penalty cases than to other cases? And what would I do if I had an epiphany that led me to believe imposition of the death penalty was contrary to my conscience?

“Will you be bound by the Constitution and not by your conscience?” he asked. “Can you now say publicly to the people of California that you will be bound by the sovereign will of the people?”

He referenced United States Supreme Court Justice Blackmun, who just that year had written that he “would no longer tinker with the machinery of death,” and henceforth would not uphold the death penalty. And he remarked, “This Supreme Court justice so said, even though no law had changed since he took his seat on the court.”

The hearing concluded. I, of course, responded to those questions.

MCCREERY: May I ask how you did respond to those?

WERDEGAR: It would be interesting to see the video. Of course, I had no idea it was coming my way. Those kinds of questions in that kind of hearing was unprecedented. Usually it’s a love feast.

I said that I fully understood the import of the United States Constitution and the Constitution of the State of California and my obligation to abide by the law.

He kept saying, “What if you have an epiphany?”

I said, “I can’t imagine that circumstance, and I fully understand that my obligation is to abide by the law of California as it has been definitively interpreted.” In different ways, I affirmed that I understood my obligation.

It’s interesting, afterwards either Attorney General Lungren or Justice Puglia — but it must have been Justice Puglia given the intensity of his questioning to me — who said, “You’re a tough nut to crack.”

By the way, a headline in the *San Francisco Chronicle* said, “Close friend of governor grilled on the death penalty.” Justice Puglia was concerned, I can only infer, that I was going to be another Rose Bird or Justice Blackmun.

That was my confirmation hearing. It does tell what the issues of the day were, what the sociology of the time was — woman, mother, wife — and the politics of the time, death penalty.

MCCREERY: That’s right. I seem to recall that right around that time there were national polls, even, describing support for the death penalty by the public being at an all-time high, more or less.

WERDEGAR: Oh. In California it’s always been steady. It has diminished a little bit on this last initiative, when the emphasis was on the economics

of it rather than the morality, but I think in California — it has diminished nationwide, but in California I think it's pretty firm.

MCCREERY: Given that the handling of the death penalty cases is a significant difference on the Supreme Court, as opposed to the Court of Appeal, how appropriate is it to bring these things up to you or any candidate?

WERDEGAR: It's a fine line. Of course, we don't handle them on the Court of Appeal at all. He wasn't directly asking me how would I rule on a death case, but he certainly didn't want to see any epiphany, any change of conscience that would lead me to distance myself from applying the death penalty.

That is sort of a fine line. I didn't actually look at it that way, but it was. But we got through it.

MCCREERY: What acquaintance did you have with Justice Puglia before this time?

WERDEGAR: None. Some after, but none. So then Governor Wilson swore me in.

MCCREERY: Can you describe the vote by the panel?

WERDEGAR: Justice Lucas, who is a great poker face, didn't say a word. "Any more questions?" My recollection is that they left the bench to confer privately. When they returned Attorney General Lungren, before they voted, said, "I would just like to add one thing." He leaned forward, and he said, "Any concerns that we had at your last hearing that your lack of trial court experience would be an impediment to your service has been fully dispelled by your service these last three years." That was nice. I guess he wanted to end on a high note.

Then Chief Justice Lucas said, "Are we ready to vote? All those in favor?"

"Aye."

"Aye."

It was done.

MCCREERY: And it was unanimous?

WERDEGAR: I think so. Nobody said no. Let's put it that way.

MCCREERY: You've quoted extensively from the others who spoke there. May I ask you to reflect a little bit more on your own thoughts and experience of that hearing? What a roller coaster it was, in a sense.

WERDEGAR: It was. Looking back, I was extremely grateful to the articulate and generous, supportive and perceptive people who spoke on my behalf. At the time I felt that I had been singled out for a hearing that was, let me say, unique. But it was a happy day. It was a great celebration. And I was now a member of the California Supreme Court. I was grilled by Robert Puglia, who was perceived to be a fine fellow. But that day he had that concern.

MCCREERY: Luckily you were "a tough nut to crack." [Laughter]

WERDEGAR: Can you imagine? I thought, "What are you saying? Are you trying to crack me?"

MCCREERY: What a thing to say. Let's get on to the swearing in and the celebration aspects, please.

WERDEGAR: Governor Wilson, who had not been present at the hearing — he later said he wished he had been, but they were touring him through the court, somehow, so he didn't experience this — but he came and he gave a speech on how pleased and proud he was of his nominee. Then he repeated something, a statement of his that has become quite well known.

In fact, if people that have been with me in my various career steps remember nothing else, they remember Governor Wilson's statement that, "Kay stood out in our class. At the beginning of law school everybody wanted to carry her books. After the grades came out, everybody wanted to copy her notes." [Laughter]

It's a cute statement, and he just made it up on his way to my first confirmation, and people remember that.

MCCREERY: It's true it has appeared in print many times since then.

WERDEGAR: Yes. Well, he's got a clever way about him, and a wit. We celebrated that night with the governor and his wife and a few close friends, and that was the completion of that. The next Monday found me on an airplane to oral argument in Los Angeles.





WITH GOVERNOR PETE WILSON — JUSTICE KATHRYN MICKLE WERDEGAR SIGNING THE OATH OF OFFICE FOR THE CALIFORNIA SUPREME COURT, JUNE 3, 1994.

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MCCREERY: You must have known something about that schedule being in place, but it really is no time at all. What preparation did you have to even look at case materials for that, first of all, before you left home? Anything at all?

WERDEGAR: None. You don't get them until you're sworn in. Actually, I think this time, after one of our new justices was nominated but not the confirmation hearing, I think that justice was given all sorts of materials.



CONGRATULATIONS AFTER SIGNING THE OATH — JUSTICE  
KATHRYN MICKLER WERDEGAR WITH (L.-R.) GOVERNOR PETE  
WILSON, HUSBAND DAVID WERDEGAR, M.D., AND SONS  
MAURICE AND MATTHEW, JUNE 3, 1994.

But not in my case. So you've been sworn in. This is one of the highlights of your life. It's a Friday. Then I get these two massive what we call benchbooks with all the case materials and background materials. I don't think I settled down much that weekend, but I carried these enormous benchbooks with me on the plane to Los Angeles.

We have two days, so there would have been twelve cases. As you know, each one is an hour or, if it's — in those days — if it was a death penalty it would be an hour and a half. The attorneys argued. "Cause submitted." The next case comes up. "Cause submitted." The next case. It's exhausting, even now, the constant —

But I must have had a lot of adrenalin working because I stayed up. I thought that I was supposed to be on top of this. Of course, that's ridiculous. But that's what I thought, and so I stayed up every night and I went through these materials. I actually, when we took the bench on Tuesday and Wednesday —

Reading a newspaper report recently, it said, “Werdegar looks like a veteran in first high court appearance.” It went on to say in quotes some of the questions I had asked, and I thought, “Oh, well.” I must have prepared. But adrenalin —

MCCREERY: Will do that, yes.

WERDEGAR: Scott Graham, who was the reporter, wrote, “The idea that the new Justice Werdegar may not be assertive enough for the high court,” an idea he admitted that he himself had advanced, “may be way off the mark.” So I did get off to a strong start.

MCCREERY: I’d like to go through that first oral argument week in more detail. Just to follow up, though, on the festivities of Friday and so on, this is a much more visible type of appointment, shall we say, than that to the Court of Appeal.

WERDEGAR: Oh, yes.

MCCREERY: So there was, of course, a lot of attention in the press. And did you not participate in a press conference at some point in all of that? Do you recall much about appearing yourself?

WERDEGAR: When the governor named me, now that you mention it, I was in Sacramento and we went — I think he announced the nomination to the press and I was there. I had to take the podium in the press room of the governor’s office. I didn’t make a speech, but I think I answered questions or thanked him. The question was, how long would I serve? There were probably many questions. I expressed an intention, which I have fulfilled, to serve for a very good long time. [Laughter] That’s all. I wasn’t interviewed or anything after that. Of course, the press was full of it.

And there was — I don’t know when it appeared, but — Belva Davis has a Friday program, “This Week in Northern California.” It couldn’t have been that Friday. I don’t think so. But I have a tape of it, when she had her roundtable. I happen now to know Belva Davis, and my husband knows her very well, but at the time I didn’t know her at all.

She’s sitting there, and she’s interviewing all these people. “Who is this Kathryn Werdegar? How do you think she’ll be?” It was the topic of the day.

MCCREERY: People were very curious, weren’t they? Who is Justice Werdegar?

WERDEGAR: I've told my new colleagues, every twitch of your eyebrow or any sneeze, and they're trying to discern: How are you going to be? Where are you going to land? That's what they do.

Yes, people were interested. In my case, perhaps more because I had no public profile at all. As you say, the Court of Appeal is much lower key and I just had not been in any way involved in politics or in political organizations. I had been a housewife in Marin raising my family, keeping my head down and trying to do my work. People, understandably, just couldn't figure out who I was or how I would be. A lot of curiosity.

MCCREERY: As you say, you had essentially no break at all. You spent your weekend studying. And as it happened, the first oral argument week of this newly constituted court was in Los Angeles, one of the few times a year you're away from San Francisco.

WERDEGAR: Yes. And of course I had never been in the Los Angeles courthouse, which is in the Ronald Reagan building, where the Second District Court of Appeal sits. There's a wing for the Supreme Court. Each justice has an office, just a normal office. We're in a wing separate from the Second District Court of Appeal justices — which has many divisions. I think it's eight.

But it's around a corridor, and there are a lot of gray doors there. Some went to the restroom, which, by the way, did not say women or men. They were coeducational. There were two of them. Much later in my tenure, when I think we had three women, I said, "Isn't it time to put a label on men and women?"

Here comes the first oral argument, and I'm brand new. On the Court of Appeal when our division was going to take the bench, we had bailiffs, and a bailiff — it was a nice tradition — would come and collect us and walk us to the courtroom. A nice tradition.

Now I'm on the Supreme Court in a building I've never been in before. I've only been sworn in three days before. I have my robe on. I'm waiting to be collected. I wait, and all of a sudden I realize it's very quiet. I step out of my office. Nobody's there, so it dawns on me that, oh, everybody must have gone to court. Where's court?

There was a bridge from our wing that went across an atrium to an area more adjacent to one of the Second District divisions, and there was the

elevator. I got into the elevator and pushed a button. Remember, I'd never been there before in my life. The elevator goes down and the door opens, and I'm looking at an enormous warehouse room of boxes and files.

At that moment comes forward, I don't know why but thank goodness, a justice of the Court of Appeal. He looks at me, and he looks at me again. He says, "You're lost."

I was so embarrassed. He escorted me to the appropriate floor for my first oral argument.

MCCREERY: How common was it for new justices to be left on their own in these new settings? Do you know?

WERDEGAR: I don't know, but I think not at all. But not a justice came to my hearing either.

MCCREERY: Once you found the correct location, what transpired in that room? Paint a picture of it, if you can remember.

WERDEGAR: We stand outside the courtroom in an anteroom. We gather, and then we're all there. Of course, you have to learn where you sit because, just as at conference, you sit in order. But because we sit in three different courtrooms, a given judge might be on the right or on the left as you enter. But I was doubtless told where I sat.

We entered, and oral argument proceeded. As I recall and as the paper reported, I must have — I was very energized and believing that I had to be on top of everything, and I guess I was.

MCCREERY: You participated actively?

WERDEGAR: So they tell me. I had prepared. I don't remember it being as active as that paper reported, but it sounds right.

MCCREERY: What stood out to you, if anything at all, about the quality of the advocacy or the types of cases? In other words, what difference were you seeing from what you were accustomed to on the Court of Appeal?

WERDEGAR: One major difference, of course, is the duration of the argument. On the Court of Appeal, I think it varies case to case, but you never hear a case as long as an hour. You might give each side ten or fifteen minutes. And on the Court of Appeal you never sit for two straight days, three hours in the morning and three hours in the afternoon, and then the next morning three hours and three hours.

One thing I remember is — it's still the case, and it was the case then — you get up from the bench after your morning argument, and you go back to the conference room, and you conference on the cases you've heard. There's no postponing a conference. So you go around the table and the presumptive authoring judge speaks of what his position is. People agree or don't agree or you discuss the issues. You take as long as it takes, and then you speak to the next case.

In those days and for a long time, we'd get off the bench at twelve. Oral argument would resume at one-thirty. We're in Los Angeles. In those days after you finish the conference, it was up to you to go get lunch. You'd scramble down to the cafeteria, if you could find it — which, of course, it was through one of those gray doors and down steps — and you'd try to grab some yogurt or jello and race back up, and you'd sit down for argument at one-thirty.

We actually used to do that in this building as well, although since we live here you could anticipate it and maybe bring a yogurt from home or something. But that was just bizarre, and we did it in Sacramento, too. But this gets ahead of my story.

And these gray doors. I did not have a minder. I did not have someone who was holding my hand and saying, "This is where we go. Come." So I'd try to find the cafeteria and then try to find my way back. You'd be gobbling. I do remember that.

MCCREERY: Then you would resume for the afternoon, and then?

WERDEGAR: You'd conference again, and then you would be on your own. You'd go back to your hotel, which I always did, or if you had acquaintances or events down there you would attend to them. Most of us do not like to have events at night if we have oral argument the next day, even though there are still some organizations that invite us. But it's just very tiring, and you have to concentrate and be alert. You're alert on one case, and you may not even be finished in your own mind dealing with the issues that come up, and [clap!] you're onto the next case and you have to switch.

Sometimes I'll go to an event, a bar event of some kind, and I'm asked, "What arguments did you hear today?"

"I don't know." [Laughter] Of course I knew at the time, but it just becomes a blur — that's an exaggeration but it's sort of like that.

MCCREERY: One unusual feature of your start was also that you went to Los Angeles for an oral argument week as the very first thing. In other words, you did not meet as a group with your fellow panel members before that. Given that, and given as you've just said that none of them other than Chief Justice Lucas in his official role had attended your confirmation hearing, what do you recall about interactions with them during that week, off the bench?

WERDEGAR: There were none. Of course, there were at conference, but there was no opportunity at all. You get up. It's nine o'clock on the bench, in conference, grab a bite to eat, and you're on the bench again, and you go back to your hotel. It would be my first interaction at conference.

MCCREERY: What else do you recall about that first week down there? Anything to add?

WERDEGAR: It was awkward. The physical arrangements for the judges have so improved. Then we had bailiffs. Speaking for myself, if I had to fly down — I can't remember the details, but — I would be accompanied by a bailiff, but I was carrying my own benchbooks as well as my suitcase.

We'd get to L.A., this particular bailiff and I — an endearing chap, but then we would climb, the bailiff and I, onto a shuttle bus that would take us to the rental car. Then I'd stand there while he got the rental car. Then he would drive me to my hotel.

Some time after I was on the court, I think under Ronald George, the CHP made a proposal to assume these kinds of responsibilities for the Supreme Court. It's much more professional.

But I do remember. And my particular bailiff had a bad back, so I'm putting my benchbooks up in the overhead bin, and I'm trying to keep everything together. [Laughter] These benchbooks are huge. But that's how it was. It's so much more professional now. I mean, really. Getting off the plane dragging your suitcase and holding your benchbooks, waiting for the shuttle bus to get to the rental car.

MCCREERY: Yet another challenge of trial by fire, shall we say? [Laughter]

WERDEGAR: That's all I knew. You go with all that you know. No lunch. [Laughter]

MCCREERY: Describe, if you would, coming back to San Francisco. You had a chambers to set up, you had staff needs, you had colleagues to meet and get to know. How do you remember those initial times, once you were back in town?

WERDEGAR: Let me first tell you, remind us, where we were. We were at Marathon Plaza. As a bit of history if I haven't mentioned it before, after the 1989 Loma Prieta earthquake when I was a staff attorney here, down at the end of this fourth-floor corridor in a little sunny room, after that earthquake the staff was allowed fifteen minutes the next day to come in and get their things, and that was the end of it.

The court had to find a place to move, and a committee of the court — I think Justice Panelli was a part of that — chose Marathon Plaza, I believe it was 303 Marathon Plaza.

One of my staff attorneys reminded me that when the court moved from this building in 1989, and I was a staff attorney at that time, to Marathon Plaza, the culture of the court changed because previously, in this building, staffs were not clustered among their own. They were intermingled. Justices were side by side, and there was a lot of informal exchange.

When we went to Marathon Plaza, the way it was configured was kind of a pod situation where the judge would have his attorneys in the same geographic space, and then there would be another, seven times.

When we came back, which — I'm getting ahead of my story because I started out at Marathon Plaza, but when we came back there was a decision to be made. Do we want the more free-flowing, free exchange "proximity with your colleagues" model? Or do we want the cluster model, which provides the justice easy access to her staff and privacy as you discuss matters, as well?

The court decided on what we have now, which is the more pod configuration. I love it in the sense that I have my staff nearby. I'm always walking out to talk to my staff, and they're all clustered there. Formerly, before the Marathon Plaza move, your staff would be scattered all over but that also meant they were scattered among each other. There really were advantages to that, but the advantages to this system are obvious as well.

You speak of my first settling in. Justice Panelli had three attorneys when he left, and two of them are with me to this day. That's Greg Curtis and Kaye Reeves. The other young woman I would have kept, but Justice



Paul Haerle had been appointed to the Court of Appeal and she had worked with Justice Haerle in private practice.

When I came on I told her that if she wanted to apply to Justice Haerle I would certainly understand. She said, “No, no, no.” But in short order she realized — he was brand new at the Court of Appeal then — that she wanted to, and I fully understood that.

I took on a former annual of Justice Panelli’s that I had known when I was his staff attorney and I had supervised. Then I had some central staff people cycle in.

Oh, I brought on my Court of Appeal attorney, Jason Marks. He’s been with me since I was first appointed to the Court of Appeal. I had no staff, of course, when I was appointed to the Court of Appeal. In those days Court of Appeal justices had two attorneys. His judge had just retired. It was Harry Low.

The principal attorney, Lee Johns, of the Court of Appeal at that time, who was very kind to me, suggested to Jason that he might want to apply to this new judge, this unknown person. Jason had been looking into maybe going on now to private appellate practice, but he said to Lee Johns, “I don’t want to go to another judge who’s just going to retire in a few years.” [Laughter]

I interviewed Jason. I was so fortunate to have him. I said, “I understand you’re interested in perhaps pursuing private practice, and if something works for you there that’s fine. If it doesn’t, I want you to know that I’d like to bring you on.” Jason came on, and so it’s been twenty-three years with Jason. He’s a Boalt graduate and has a good sense of humor. Most of my staff have a good sense of humor in different ways. It’s wonderful.

So that was Jason, Kaye, Greg. Paul Lufkin, who was the annual from Justice Panelli. It’s very stressful choosing your staff because it’s so important. It’s all very well to say, “This is probationary.” But once you’ve taken someone on, it’s very hard.

I can’t remember who my initial fifth was. But I now have Jason, Kaye, Greg. Paul works now for civil central staff. I have Larry Lee, who had worked for Chief Justice Lucas, and Keith Evans-Orville, who had been a staff attorney on the Court of Appeal. I say without reservation they are as smart a staff — probably the best staff altogether — but as smart as any staff



WITH CHAMBERS STAFF — (L.-R.) GREG CURTIS, JUSTICE KATHRYN MICKLE WERDEGAR, KEITH EVANS-ORVILLE, KAYE REEVES, LARRY LEE, JASON MARKS, PAULINE STAFNE, AND JULIE PARTRIDGE — AT RETIREMENT RECEPTION FOR JUSTICE WERDEGAR, CALIFORNIA SUPREME COURT, AUGUST 2, 2017.

on this court. And people, I think, largely agree that I have a terrific staff. That's what makes your work possible.

MCCREERY: In general, what were you looking for in hiring these people or bringing them from elsewhere?

WERDEGAR: I do believe that people who have excelled in law school — that it tells. And of course if they'd had prior clerkship experience. The ideal candidate to me would be someone who was very high in their law school class and who had done other clerkships so that they had an idea — whatever kind of clerkships — and ideally had had some private practice experience. Not every one of my attorneys has that private practice experience, but most of them have some outside experience.

That's it for me. Of course, you hope their personality will be a good fit, and you insist that they don't have any agenda or any philosophical bent — at least I do. Maybe in some other instances justices want people who are in sync with their view of the world, but that wasn't the case with me and it's all worked out exactly that way. Objective, smart, amusing, hardworking. They have to be self-motivators. They absolutely have to be.

MCCREERY: How did you think about assigning work to them and dividing up the duties among a larger staff, as you now had?

WERDEGAR: Greg Curtis was Justice Panelli's head of chambers. Of course, he had to adjust. I'm so different than Justice Panelli, and a superb staff attorney will adjust. So Greg was in place, and an experienced head of chambers is invaluable because they know so much insofar as procedures and how things work and the history of the court and where things are and what the rules are.

Insofar as distributing work, my staff does it themselves. They take the cases they want. There are so many CEQA cases in front of the court now — do you know what that is, the California Environmental Quality Act? — that if maybe one of my attorneys has gone through two or three of those he either might say, "I'm tired," or he might say, "I have a head start on this because I've just recently worked on a related issue."

It's entirely up to them. On occasion, rarely — I've been here twenty years — I will ask a particular attorney to handle a particular case. But usually they'll just take them right in order. I don't think there's any sense that someone is not carrying their load or is cherry-picking cases. I could not stay here for a great length of time if staff wasn't fair and diligent and open-minded and capable.

MCCREERY: Thinking back, then, to that very initial time when you made your selection of staff, what else was there about the actual physical arrangement at Marathon Plaza that's worth noting?

WERDEGAR: I can't remember. They made a courtroom there. I remember my chambers.

But when we came back here, as we were planning to come back here, this building was more of a shell. They hadn't filled in the rooms, and they hadn't assigned the rooms. I do remember coming to look at this building and its shell, and you were able to pick your chambers in order of seniority.

At that time, the chief took his office up on the fifth floor, and Stanley Mosk got second choice. He went way down to the other end, which was as big as the chief's. Then Justice Kennard and Justice Baxter took the other two offices, so that was the so-called corridor of power.

Then I had the next choice, so I had first choice on this floor. I was tempted to take the chambers way down at the other end which, when I

was a staff attorney here, had encompassed the little office where I had been a staff attorney. [Laughter] I liked the idea that I would now be in a chambers there. But the architect persuaded me that this had the best view. It has a beautiful view of City Hall and Civic Center Plaza. So I chose this.

MCCREERY: May I ask your own views on the pros and cons of the pods, where the justice is with the staff, versus justices being near one another to invite interaction there?

WERDEGAR: It's a tradeoff. It really is. Now, upstairs, we have the chief still, the new chief — new compared to Ron George — and we have the younger members of the court. Justice Liu took Stanley Mosk's. Once you have your office you don't want to change. I've had opportunities to change, but it's just too — at least none of us has to this point.

So now it's Justices Liu, Cuéllar, and Kruger so it's not the so-called corridor of power, it's the junior corridor. I wish that I were up there and I could stroll around and talk to other judges. There is a real tradeoff. On the other hand, if I've got something on my mind I don't want to go upstairs and down a corridor to find the staff attorney that I want to talk to.

So it's a real tradeoff. And some judges are more amenable to talking to each other than others.

MCCREERY: You've kindly mentioned the names of your new colleagues here in passing, as we're talking about office locations. But let's speak more about this group you were joining. First of all, how were you received?

WERDEGAR: I would say that I was mostly greeted cordially, not entirely by everybody, but mostly greeted cordially. My assessment: I felt they were more welcoming, mostly, than the Court of Appeal had been, and I felt that they had prepared themselves, that they saw it coming. Besides, it's a smaller group.

When I say they'd seen it coming, it takes me back to the time it was. I was Governor Wilson's appointment to the Court of Appeal. He was still the governor. They anticipated, perhaps, that it would be another woman and that I would be the appointee. This was the first time in the history of the California Supreme Court there would be two women. At that time I don't think other courts had that many women. In the intervening twenty years it's a totally different story.

So I think they were prepared. And they were cordial.

MCCREERY: You had, of course, worked here at the Supreme Court as a staff attorney yourself, and you described that you didn't have particular strong interactions with those who were justices at that time. Let me ask you which of them you had any personal acquaintance or friendship or committee assignments with? Whom among them did you know?

WERDEGAR: Stepping back to having been a staff attorney, staff attorneys usually do not interact with the other justices. But Ron George was on the court at that time, and he and I became very well acquainted when he was appointed as an associate justice of this court and very soon around that time I had been appointed to the Court of Appeal. He was wonderfully welcoming, as he is, open and helpful.

MCCREERY: He was, of course, the other appointee of Governor Wilson at that time.

WERDEGAR: Yes, of course. That was a big help, and we were friends. The other judges were — I didn't have personal interactions with them. Because you're appointed to the same court doesn't mean that you all see each other otherwise. And I came to a court where people did know each other. Chief Justice Lucas, Justice Arabian, Justice Baxter, and some others who had left, Justice Eagleson, Justice Kaufman. They all had a pre-existing relationship through the Deukmejian administration. They all knew each other. Justice Kennard also was a Deukmejian appointee. I was apart from that.

MCCREERY: Since you've mentioned Justice Kennard, you've just pointed out that it was the first time this court had had two women at one time. She, as you say, had been appointed by Governor Deukmejian. So of course it's natural to wonder: How were the two women interacting?

WERDEGAR: I think Justice Kennard had been accustomed to being the only woman on the court, so in that regard maybe it was more of an adjustment for her, I can't really say. Justice Kennard had been widely celebrated when she was appointed, as after Rose Bird was gone there were some years where there wasn't a woman on the court.

MCCREERY: You did mention that she was accustomed to being the only woman, and clearly this was a big change just by that simple fact. What chance did you have to become simply acquainted with her, if any?

WERDEGAR: We were on different floors. Like all the justices on the court, we would experience each other at conference and on the bench.

MCCREERY: Let's move on to some of your other colleagues. You've talked about Justice George, as he was then. I must ask you to perhaps say a little bit more about Chief Justice Lucas.

WERDEGAR: I'd be happy to. I'm not the first to say that he was right out of central casting. [Laughter]

MCCREERY: You are not the first. [Laughter]

WERDEGAR: I am not, but that's because it's so true. He was tall and had a full head of white hair and a resonant voice, and he had both a poker face and a very dry sense of humor. When I came to the court, I believe he either had been or soon would be newly remarried. His wife, gracious Fiorenza, was situated in Los Angeles, so I think at that time Justice Lucas spent, perhaps, more time in Los Angeles than he had before, when he didn't have his new bride down there.

I will say one thing. The court is invited to lunches, bar lunches and dinners, and we go. What happened to me that nobody had prepared me for — and I was certainly unprepared — we would go to, say, a bar luncheon in Los Angeles or up here or in Sacramento, and the chief always, of course, is making some comments. What Justice Lucas did is he would say, "And now Justice Werdegarr would like to say a few words."

What could I do? I was completely inexperienced and unaccustomed to any kind of public speaking, much less extemporaneous. Unprepared. So I'd go up, just trying to get through it and say something.

After about three times, I started to prepare myself to have some few inconsequential remarks. I've never seen that occur with any of the justices that came after me. Some like to say, "Well, yes, it was a tradition." But I would not say that's the case. Of course, you're going to ask me, "Did you ever ask him?" No. I did not ask him. I didn't.

MCCREERY: One does wonder about traditions for giving new justices a little —

WERDEGAR: Maybe that was it. Maybe he thought that it would be good for me. But insofar as it being something that occurs with new justices, I can't say that I ever saw that again. I think it happened a number of times.

Maybe I was a little slow in picking up that I'd better be prepared. It was probably good for me.

MCCREERY: Were there other things that you later learned *were* traditions for new justices, paces they put you through to get you started?

WERDEGAR: There is one. When we go to the Sacramento courthouse, on the ceiling there they have these little recessed impressions, and they all have a little round flower in the middle of them, rosettes, except there's one that doesn't.

The tradition that occurs is every new justice is challenged when we take the bench in Sacramento, to find the one little square that's missing its little flower in the center. So during oral argument there's the new justice with his or her head swiveling to look on the ceiling, but the twist is that where the newest justice sits is the one seat where you can't see it. [Laughter] Everybody else can see it, but not the newest justice.

And so you get off the bench. "Did you find it? Did you find it?" No. Because it's impossible.

MCCREERY: Is that still done today?

WERDEGAR: Yes. But as I say, it's funny because that's the one seat where you can't see that one. It's blocked out by a light or something.

MCCREERY: Let me bring you back to Chief Justice Lucas and the requests for extemporaneous speaking. What else stands out to you about how he brought you into the fold, as it were?

WERDEGAR: There was no formal bringing me into the fold. Every court is different. Every personality is different. At my time, you're here so get on with it.

But Ron George was a big help.

MCCREERY: What did you observe very early on about Chief Justice Lucas as a leader of the panel, in other words his role as the head of the court itself? What style did he display?

WERDEGAR: This was toward the end of his time. I don't recall anything distinctive except that he had a presence. There weren't a lot of occasions to see his leadership in the administrative way. But he looked the part, and he was a very charming man.

MCCREERY: How did he conduct the Wednesday conferences, for example?

WERDEGAR: There's not much to conduct. I happen to have been acting chief justice yesterday and a few other times. We rotate it. It's not because I'm most senior. In fact, I was acting chief justice within the first two weeks of my appointment to the Supreme Court. They rotate it. Now we would rotate it so that the newest judge would not be at that place in the roster.

What it meant then is signing scores and scores of orders every day. The chief justice, all of them so far, have chosen not to have a signature machine, so if Malcolm Lucas is in Los Angeles you'll get this stack of very routine orders that you don't discretionarily review for their merit and make a substantive decision. They just require the chief's signature, so you would sign as acting chief.

But otherwise, presiding at the Wednesday morning petition conferences, what a chief does — I just did it Wednesday — you have this binder, and you vote on petitions, and you pass the signature page of the orders around, and then you put that in the binder, and you flip through to the next one.

MCCREERY: You were, of course, quite familiar with the process of how the cases moved through the system from working here as a research attorney to Justice Panelli. What can you tell me about how Chief Justice Lucas managed that aspect of it?

WERDEGAR: I don't know that the chief justice has much influence on how cases move. But some time before, perhaps earlier in Chief Justice Lucas' tenure or more likely in Rose Bird's, the court had been sued for not abiding by the ninety-day rule, the rule that you can't get paid if the causes that had been submitted to you had not been disposed of within ninety days.

Evidently the way they handled it — this is hearsay on my part — was that after argument they wouldn't say "cause submitted," because then the clock would start running. They had a system — this is hearsay, again, but well known — where a case that you had to sign off on or vote on or write a separate opinion on would be in a box, and the box would go from one judge's chambers to another in order of, I think, seniority. It didn't move quickly.



Somebody sued the California Supreme Court for violating the ninety-day rule, and as a consequence, in the aftermath of that, a commission was appointed to come up with some resolution to this violation of the rule. This was new. When I was working with Justice Panelli we didn't have this elaborate preliminary response system. But what came out of the commission, I gather, so that cases would be resolved and filed within ninety days of oral argument, was what we now have, the preliminary response system.

I think Justice Panelli in something I read recently has been quoted as saying, "If you go on the bench and you haven't had an up-front analysis and interchange about the case that's going to be argued, it's almost impossible to get a final opinion and all the separate opinions done in ninety days. Because you're not just working on that case, you're working on dozens."

The commission came up with the idea of what is now called front-loading. We are known and sometimes criticized for it, although I support the system. We don't set a case for oral argument until the assigned chambers has circulated a calendar memorandum that lays out the contentions, the issues, and the analysis that the assigned judge intends to adopt if he gets a majority.

Every other justice has to submit, in writing, a preliminary response. That preliminary response can be a straight "concur," it can be "concur with reservations," and you state what the reservations are. It can be a "doubtful." You explain what the doubts are. It can be a "disagree, I will write a dissent."

When you have at least three justices that agree with the author you can set the case, but the better practice is to have everybody — some people are slow in getting their preliminary responses in, but it's better to have everybody's preliminary response in. That became, therefore, a more formalized procedure at the same time that we returned here and had our cluster/pod arrangement for justices and their attorneys.

You were asking, "How did Justice Lucas deal with processing of the cases?" That commission introduced that procedure, and there's a deadline supposedly for getting your preliminary responses in. I don't think he — it's been said that a chief is a chief, but every single judge is an independent operator, and the chief really has no influence on any other judge, which is an interesting fact. None. The power of persuasion, maybe. Maybe a little

ostracization. But really the chief has no authority to modify a justice's behavior in any way.

MCCREERY: How does that align with your view of how things should be?

WERDEGAR: I didn't really have a contrary view as to how things should be. Each justice is a constitutional officer appointed for the term that's provided by law. I would hope that we would all cooperate to the same end insofar as administrative matters, and as far as my experience has been we largely do. We share a concern for keeping things moving, for improving our processing of cases, improving the promptness of our responses. But I don't see how it could be otherwise. We are each separately appointed constitutional officers.

MCCREERY: Returning, if we might, to your colleagues, let me ask you to speak for a moment about Justice Mosk, whom you had encountered, or not encountered, a little bit very early in your career. [Laughter]

WERDEGAR: Oh, yes. I'm very happy I had the opportunity to serve with Justice Stanley Mosk. He's a legend in California political history of a certain era, and he certainly brought that to the court. We are not political, supposedly, but it's good to have a little knowledge of history and what went before and a real-world political sense. He was a force on the court, very independent minded, and he had a sense of humor. But a great repository of court history and California political history and had a great deal of charm. I will say, after I was sworn in he came to my chambers to congratulate me.

I said, "Were you there?"

He said, "No, but I want to congratulate you." So that was nice.

MCCREERY: Again focusing on the very early times after your arrival, what opportunity might you take, if any, to seek out a Justice Mosk or someone on any particular matter?

WERDEGAR: Ron George and I talked a couple times. I went to him one time when he was circulating a case.

MCCREERY: Justice George, you mean?

WERDEGAR: Yes. Something was coming along, and I just felt I had to tell him personally that I couldn't agree. So we would interact, but not much really. You're pretty much on your own, at least in my experience. I know

there have been justices during my time here who confer closely with each other, but I've never been in that situation.

MCCREERY: May I ask who you're thinking of?

WERDEGAR: It doesn't really matter.

MCCREERY: All right. Moving on to finish out that original panel as you encountered it, Justice Arabian, who had been appointed of course by Governor Deukmejian also?

WERDEGAR: Yes. Justice Arabian was a large figure. I don't mean in physical size, but he had a big personality and a big presence, and he didn't mind a bit being out there. He was very friendly to me and very nice. He wasn't here all that long when I was here because he and Justice Lucas retired about the same time. He had a flamboyant, large personality and could be very prominent at oral argument.

Some people are more reticent, and others are more front and center. Some talk a lot, and some talk seldom. You do get to know your colleagues' styles on the bench, and everybody definitely has a style. I enjoyed him.

MCCREERY: Since you've mentioned it, what was your style on the bench in those early years?

WERDEGAR: Or what is it? I'd have to have somebody else tell me. It's been reported by observers — but I can only tell you I don't know how I'm perceived — but that I ask direct questions that seek to elicit information, that I seem to be seeking to solve the case, seeking to get information that I need to make up my mind. Really, you'll have to read what people say about what my style is. It certainly isn't front and center and dominating the argument, but it's not total silence either.

MCCREERY: Let me ask you to speak about Justice Baxter, whom you had met in the connection of being an —

WERDEGAR: Yes. He was very welcoming and very cordial.

MCCREERY: How well did you get to know these colleagues in the early years?

WERDEGAR: Again, there are some justices who are close friends, socialize, talk to each other all the time, maybe because they had a preexisting relationship. And maybe there are people, others, who are extremely

outgoing. In my case, I just came to know them through doing my work. You do get to know each other through conference, or maybe you will speak to a judge about a case or work on a committee with a judge. You get to know each other that way.

MCCREERY: And as you've pointed out, there may be quite different styles in oral argument, which are of course very public displays and reported afterwards in the media.

WERDEGAR: Oh, yes. Yes.

MCCREERY: So certainly people develop reputations. Justice Kennard, for example, has been mentioned many times as quite talkative in oral argument. What's the effect of that on others?

WERDEGAR: I can't speak about others.

MCCREERY: Let me just say, "the effect on you, as one of the others." Thank you.

WERDEGAR: Justice Kennard did become known for starting the oral argument questions and, at length, expressing what she knew or believed the case was about. That was the style that she had. It was unique to her.

MCCREERY: In terms of overall time, what effect did that have on the participation of others, if I may ask?

WERDEGAR: It had to take a lot of the time from the attorneys. It helped her reach whatever resolution she was going to be reaching. If others wanted to speak they might have become a little impatient — I don't think judges are shy about intervening, but — it was a characteristic.

MCCREERY: Is there anything else that you could bring forth about oral argument as you experienced it here in the early times on the Supreme Court? Again, I'm thinking now more of the longer lengths of arguments, as you pointed out, and the kind of advocacy you saw from counsel.

WERDEGAR: Oh, yes. The longer argument, of course, is notable. I don't know if it's a carryover from the marines or what, but — you're on the bench for three hours, and nobody's going to be the weak one that says, "Can we take a break?" It's physically demanding.

MCCREERY: Is that cruel and unusual? [Laughter]

WERDEGAR: The quality of the advocacy is by and large very high, I would say. Again, when I was starting out in the law I wanted to — I talked or thought about joining somebody who was already an appellate attorney. I don't remember his name, but he was a true pioneer. He was the only one that specialized in appellate argument.

And of course now it's not a complete specialty, but the attorneys that are before us are the appellate branch of their firm or they have a completely appellate practice. We benefit from that. We can tell. We'll sometimes get off the bench and say, "Oh! It must have been the trial attorney." [Laughter]

MCCREERY: And it reflects a reality that it's a very different kind of advocacy at the appellate level.

WERDEGAR: Oh, yes. I remember one attorney who I happened to be acquainted with. He was a remote friend, a nice fellow. He was arguing to us. It was clear that he thought he was arguing to the jury, you know? [Laughter] That's what a trial attorney does, so the specialty of appellate practice has benefited us a great deal.

MCCREERY: Thank you. I can't help noticing that you took your seat in the month of June of 1994, and in November you had to stand for a confirmation election. Talk about that for a moment.

WERDEGAR: It's sort of strange. That's what happens. Let's see, you mean Justice Panelli — I was in a new term?

MCCREERY: It was fulfilling eight years of his previous term, but you still had to stand for confirmation that very same year.

WERDEGAR: All right. It was my first confirmation, and there I was on the ballot. Of course, it's a little ludicrous because nobody's ever heard of you. But I was confirmed by a substantial number. I can't remember. I blessed the public who votes in faith because all they have to do is "yes," "no," or nothing, and you have to hope that, just out of faith or good citizenship, they'll make the effort to say yes. It's kind of precarious. This is before they know anything about you, and there was nobody talking about you.

I believe my next one is the one where there had been some resistance to confirming me, and we will get to that later. But when they don't know anything about you, you just hope for the best and the best occurred.

There was one where I got the highest number of votes in the United States. But how did that happen? It wasn't a presidential election year. I'm in the largest state, and I'm unopposed, so there's no other comparable situation. The governor would have been opposed, and the votes would be divided. No other state having any unopposed election has as many people, so maybe — I didn't go back to look, but maybe that was the election where I got the most votes of any candidate in the United States. I think it was 2002.

MCCREERY: That is an honor of some sort, for certain. [Laughter] As we said, Governor Wilson was reelected for his second term at that same time, in 1994, and you've pointed out that there was quite an emphasis in the public's mind on being tough on crime at that time.

WERDEGAR: Oh, yes.

MCCREERY: He rode the wave of that, certainly, into office that second time. It was also the election at which Propositions 184 and 187 were passed, one on the Three Strikes law, which we can get into next time when we have more time, but also one on denying public services to "illegal aliens." I wonder to what extent the major public issues of that time stand out to you now as you recall standing for your first confirmation?

WERDEGAR: You mean at the time that I did? Oh, not really. The only time that the high-profile charged political issues of the day impacted me is when I was assigned the case related to the Three Strikes law, and then I had to deal with something that the outside world had strong views about.

MCCREERY: Maybe given our length today we will take that up next time. But may I ask whether you were able to help Governor Wilson again this time around or anything like that, given that you were on the bench as his appointee?

WERDEGAR: Oh, no. Help him in what way?

MCCREERY: I just mean in terms of his —

WERDEGAR: Not at all. No. In fact we would, if ever we saw each other, and it wasn't that often but *never* would we get into politics. It wouldn't be appropriate.

MCCREERY: His opponent this time, of course, was Kathleen Brown, the sister of the current and former governor, so it was a very interesting time.

WERDEGAR: Yes, yes, it really was.

MCCREERY: Have you anything to add about being confirmed or any of the more procedural things of your early appointment times?

WERDEGAR: No. I'll just say that, although I had served — I was really in a way *very* qualified because I had worked here for six years, knew all the internal workings, knew how to write the opinions and do all that, but of course come to the conclusion that Justice Panelli was wanting. And then I had been a judge for three years on the Court of Appeal.

I knew a lot when I came here, but what I didn't know were some of the internal procedures among the justices. I remember a conference, and it must have been a very early conference. I don't know if it was a post-oral argument conference or a petition conference, but I was speaking up. I spoke up twice.

Finally Justice Kennard said, "Chief, are we adhering to procedures?"

I thought, "What procedures?"

That's how I learned — nobody had told me — that you speak in order of seniority. The junior justice speaks last, except the chief has the final word. That's one thing Ron George had neglected to tell me, and I was just chiming in. [Laughter] Now we tell people these things.

MCCREERY: Let's stop there for today, and perhaps next time we can take up your assignment for the Three Strikes case.

WERDEGAR: Yes, 1996 was that case, and that was a year of some — certainly Three Strikes, but there were some other high-profile cases that year.

MCCREERY: I look forward to it. Thank you so much.

WERDEGAR: Thank you.