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Oral History Interview

with

HONORABLE STANLEY MOSK

Justice of the California Supreme Court, 1964-present

February 18, March 11, April 2, May 27, July 22, 1998
San Francisco, California

By Germaine LaBerge
Regional Oral History Office
University of California, Berkeley

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INTERVIEW HISTORY

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The interviewer/editor prepared the introductory materials.

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Tapes and Interview Records:

The original tape recordings of the interviews are in The Bancroft Library, University of California at Berkeley. Records relating to the interviews are at the Regional Oral History Office. Master tapes are deposited at the California State Archives in Sacramento.

BIOGRAPHICAL SUMMARY

Justice Stanley Mosk was born in San Antonio, Texas, in 1912, and was raised in Illinois. He is a graduate of the University of Chicago, with a Ph.B. (1933), and Southwestern University in Los Angeles, with a J.D. (1935) and entered private practice in Los Angeles in 1935. From 1939 to 1943, he served as executive secretary to Governor Culbert Olson. The governor appointed Stanley Mosk to the Los Angeles Superior Court; except for military service during World War II he remained on that bench until 1959.

As state attorney general from 1959 to 1964, Mr. Mosk created consumer fraud and constitutional rights sections, and argued the California v. Arizona water rights case before the United States Supreme Court. In 1964, Governor Pat (Edmund G., Sr.) Brown appointed him to the California Supreme Court where he has remained for over thirty years, producing many of the most significant opinions and gaining a national reputation as a brilliant civil libertarian.

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[Interview 1, February 18, 1998]

[Begin Tape 1, Side A]

LaBERGE: We like to start with the beginning and get your full background. So why don't you tell me when and where you were born?

MOSK: I was born in San Antonio, Texas, in the year 1912, on September the 4th that year. My father was Paul Mosk, and my mother Minna Mosk. I was precocious and left Texas at about the age three. The family moved to Rockford, Illinois, then a fairly small city about ninety miles north and west of Chicago, right near the Wisconsin line.

LaBERGE: Why did your family move?

MOSK: My father was a small businessman, and he was associated with a manufacturing firm in New York, and they in effect moved him to open up a store in Rockford. And Rockford is where I went all through the public schools, from grade one through high school.

LaBERGE: Did you have brothers and sisters?

MOSK: I had one younger brother, four years younger than I. He passed away two years ago.

LaBERGE: What was his name?

MOSK: His name was Edward Mosk.

LaBERGE: What do you remember of your grandparents or other relatives?

MOSK: I only knew one of my grandparents, my mother's mother. She lived with us at one time. The rest of my grandparents had all expired before I was old enough to know them.

LaBERGE: And do you remember any of their names?

MOSK: No. My mother's maiden name was Perl, last name.

LaBERGE: Any other relatives?

MOSK: I suppose I must paraphrase this by saying, in my advanced years now, my memory isn't quite what it used to be. So there are some names that I may well forget.

LaBERGE: A lot of people, though, don't know some of those names, that far back. Where did your family come from originally?

MOSK: My mother was born in Hartford, Connecticut. Her father was of German origin. I can't tell you exactly where he came from.

My father was brought to this country as a babe in arms by his mother, who came from what was then Hungary.

LaBERGE: So did he have stories about that?

MOSK: Not really, because as I say, he was a babe in arms and didn't realize anything was happening. So his whole life was spent in this country.

LaBERGE: Do you have any favorite childhood memories from Rockford?

MOSK: Oh, yes. I liked Rockford. It was a small town, and yet it had all the advantages of being within reach of Chicago, so that every summer, my father would put my brother and me in the back of our Dort automobile and we'd go to Chicago to see a White Sox baseball game.

LaBERGE: Did you play baseball as a boy, too?

MOSK: Yes, oh, yes, I played. Softball, and I loved the game.

LaBERGE: Because I understand you're a tennis player, or you used to be a tennis player.

MOSK: Yes, I am. Up until recently, when old age began to get my knees. So I haven't played recently.

LaBERGE: What other activities did you like to do?

MOSK: I was active in an organization in Rockford called the Junior Press Club. It was sponsored by the daily newspaper, the Rockford Morning Star, and it was a great organization sponsored by that newspaper. They had two or three or so students in every school in the city, and they would have them write articles about school activities. The Morning Star published every day at least two columns of school

activities, and once a week a full page. Then the students who would write the articles would clip them out and save them, and if they published X number of articles within the year, they (I was fortunate to do so) would get a free trip to Chicago during the spring vacation, at the expense of the newspaper.

That was a great experience. It taught me journalism, it taught me how to use a typewriter to write my articles, and as a result, I was so enthused that I thought I would go into journalism. I kept that idea in mind until I later discovered that my hero, who was a man named Frank Hicks, a sports editor, was earning \$35 a week. [Laughter] And that, I think, destroyed my attraction for journalism.

LaBERGE: But it certainly influenced you, because you certainly kept writing quite a bit.

MOSK: That's true, and I still use a typewriter.

LaBERGE: Well, I'll be darned. But it isn't a manual like Herb Caen's?

MOSK: No, it's an electric typewriter, but nevertheless, instead of using computers like that, I still peck out my opinions and other material on a typewriter.

LaBERGE: Do you know how to use a computer?

MOSK: Vaguely. [Laughter] I still prefer that.

LaBERGE: What other things were you interested in? Did you read a lot?

MOSK: Yes. I read constantly, and I think literature and English and social studies were my preferable subjects.

LaBERGE: What kinds of discussions did you have around your dinner table?

MOSK: We discussed current events. My parents were particularly interested in Wisconsin politics at that time, since we were only twelve miles from Beloit in Wisconsin. They were strong supporters of Robert M. LaFollette in Wisconsin. I used to hear their talk about him and his political activities.

LaBERGE: And how about religious background?

MOSK: Very modest religious background. My parents were Reform Jews. They didn't believe strictly in ceremony, or serious religious observances. Rockford was a very generous community in that regard. There were no religious prejudices that

we were aware of. As a matter of fact, as the only Jewish kid in my senior class of about 400, I was elected president of the class.

An incident occurred that my parents never forgot, laughingly. At graduation ceremonies, we marched into the auditorium, resplendent in our caps and gowns, and I at the head of the line as president of the class, and the orchestra was playing "Onward Christian Soldiers." [Laughter]

LaBERGE: If they weren't singing, did you know that that was the song?

MOSK: Oh, yes. Now, it always occurred to me that nowadays, parents would have filed a lawsuit, and would have tried to restrain the orchestra from playing a religious theme, but my parents were broad-minded, and they just thought it was the funniest thing that they had ever heard.

LaBERGE: So you weren't bar mitzvah?

MOSK: No.

LaBERGE: Any other relatives around, aunts, uncles, cousins, that you have memories of, or that were influential?

MOSK: No, not really. There were no other members of our family in the community of Rockford. So I really never had close contact with cousins, although I had some. As a matter of fact, there's a Mosk family in Houston, Texas, up to this day. But I never see them, unfortunately.

LaBERGE: And what about your mother? What influence do you think she had?

MOSK: Quite a bit. She was a truly remarkable woman.

From Rockford, the family moved to southern California while I was in college. My father passed away, and my mother opened up a bookstore on Eighth Street in Los Angeles, Eighth and Irolo. And as I say, I think she was quite remarkable, because in that bookstore, she read every book that came out so that she'd be able to advise her customers about the theme of the book. She continued operating that store until she was almost ninety years old. She passed away at ninety-two.

LaBERGE: So you have longevity in your history.

MOSK: I hope I have her genes, yes.

LaBERGE: I think you do. Well, before you moved, had she had a job outside the home too?

MOSK: No, she had never worked before in her life, and yet she operated that little shop by herself.

LaBERGE: Well, she must have influenced your liking to read too, if she was . . .

MOSK: It helped, certainly.

LaBERGE: And did your dad continue to work for the same company?

MOSK: Yes, he continued until his death. I don't remember exactly when he passed away, but he was in his late sixties, I think, when he passed away.

LaBERGE: How about summer vacations? Besides going to Chicago for White Sox games, what did you do?

MOSK: One thing I had in Rockford was hay fever. Late August, early September, hay fever would bother me a great deal. So the family would plan vacations in northern Wisconsin, which seemed to be good for that condition of mine.

LaBERGE: On the lakes?

MOSK: On the lakes. There was some little lake called Koshkanong, I believe, up in northern Wisconsin, that we used to visit.

LaBERGE: And what else would you do if you were at home? You played softball.

MOSK: Played softball. There was a vacant lot a couple of doors from our house, and we had a softball field there. I must say, I loved it, until my mother would call me in from the game to start practicing on the piano.

LaBERGE: OK, we haven't heard about that. [Laughter]

MOSK: I had to take piano lessons, and I had to come in and practice. I think because it interrupted baseball games so frequently, I ended up hating the piano. And I can't play a note today.

LaBERGE: You told me a little bit about your favorite subjects, the area. How about teachers? Were there any that were particularly influential?

MOSK: Rockford High School had some excellent teachers, I must say. I can't think of any with whom I was disappointed. They were, I thought, reasonably challenging

and enthusiastic about what they were doing. They were singularly unattractive people, [Laughter] but on the other hand, they were well suited to their work.

LaBERGE: I take it that you liked school.

MOSK: I liked school very much.

LaBERGE: And what other activities there besides. . . . For instance, class president, and the journalism?

MOSK: I was editor of the school paper, the Rockford High School Owl. I was a captain in ROTC [Reserve Officer Training Corps]. And I was on the school debate team. I kept busy.

LaBERGE: Yes. Did you always know you were going to go to college?

MOSK: Oh, yes. A devotion to education was instilled in me constantly, not only in school but at home.

LaBERGE: How did you pick the University of Chicago?

MOSK: I tried to get a scholarship there, and I visited the school. I didn't get a scholarship, but I liked it so much on a visit that. . . . And I think I was influenced a little by the fact that there were two professional baseball teams in Chicago. And I was also attracted by the president of the university, Robert Maynard Hutchins, who was certainly an inspirational person.

LaBERGE: So even without a scholarship . . .

MOSK: I went there anyway. Of course, tuition wasn't as huge as it is today. I think it was, if my recollection serves me, it was about \$150 a quarter. Chicago was on the quarter system, three quarters in the school year and one quarter in the summer.

LaBERGE: Had you had part-time jobs growing up?

MOSK: No. My work with the Junior Press Club took up my time.

LaBERGE: So when you got to Chicago, were you going to major in journalism then, or education?

MOSK: No, I was going to major in the social sciences.

LaBERGE: Was there still the Great Books program, or that special . . .

MOSK: That hadn't started yet. It was started during my sophomore year. That was a great program; I wish I had been part of it.

LaBERGE: How did you decide to go into law?

MOSK: I got to know some our. . . . Well, to backtrack, I joined a fraternity, then called Phi Sigma Delta, and a lot of the alumni would come around the fraternity for dinner sometime. I saw their enthusiasm at being a lawyer, and since that was closely related to the social sciences, it persuaded me that that's the direction I ought to go.

LaBERGE: Did you live at the fraternity?

MOSK: I did. 5625 Woodlawn Avenue, Chicago.

LaBERGE: Is it still there?

MOSK: Still there. The fraternity has faded out, and I think another fraternity took it over or something like that.

LaBERGE: What did you do for social activities in college and law school?

MOSK: Oh, I got to know politics there. Chicago had a somewhat notoriously corrupt city administration, but not. . . . The university area would always elect a liberal, honest city councilman. He never had any great influence at City Hall, but he was always a pleasure to work with, and a lot of us students became active in the city councilman's campaign. I don't remember his name right now, but that was the first time I worked in a campaign. That would be the old-fashioned campaign work, like going from door to door, punching doorbells, passing out literature, and that sort of thing. And on an election day, watching at the polls to make sure there was no obvious corruption.

LaBERGE: So this was before Mayor [Richard] Daly?

MOSK: Yes.

LaBERGE: OK. I don't have my dates all straight.

MOSK: Yes, that was.

LaBERGE: And so that continued; that was just the beginning of your political . . . ?

MOSK: Yes. But it increased my interest in politics.

LaBERGE: And what about on campus? Were there campus politics too?

MOSK: Yes, somewhat. One of my fraternity brothers was ultimately elected president of the senior class, and we helped him out.

LaBERGE: During college, what did you do during the summers?

MOSK: You know, I really don't remember anything significant.

LaBERGE: But you'd go back home?

MOSK: I'd go back to Rockford.

LaBERGE: But no summer jobs?

MOSK: Nothing of consequence.

LaBERGE: What I'm trying to get is, were there any significant things that influenced you later?

MOSK: Nothing comes to mind.

LaBERGE: And did your brother also go on to college?

MOSK: Yes, but he was four years behind me, and by then, my family had moved to southern California, from Rockford to southern California. I stayed on in Chicago, and when my brother went to college, he went to UCLA.

LaBERGE: What impact did the Depression have on you and your family?

MOSK: It had a great effect. First of all, my father's business didn't exactly collapse, but it virtually did so, and that as a result, he moved to Los Angeles. Ultimately, while I got my bachelor's degree at the University of Chicago. . . . Incidentally, their degree was called a bachelor of philosophy, Ph.B. If you say it fast enough, it will confuse people to think that it's a Ph.D. [Laughter]

I got my bachelor's degree. At that time at Chicago, your last year as an undergraduate could be your first year in law school, so that the whole process took six years instead of seven. So I had a year of law school, got my bachelor's degree, and by then, as I indicated, my family had moved to southern California and they couldn't afford to keep me at Chicago any longer. So I came out to Los Angeles and went to Southwestern University for my last two years of law.

LaBERGE: So is that where you got then your law degree?

MOSK: That's where I got my J.D.

LaBERGE: And living at home?

MOSK: Living at home. And those were the Depression days, very difficult days. I did some work under a government program that helped students out, and I can't remember what sort of work I did, but it qualified to get a student loan.

LaBERGE: What were your favorite fields in law school?

MOSK: I was always pointing toward the ultimate bar examination. [Laughter]

LaBERGE: You hadn't thought about, What am I going to do?

MOSK: Not at all. I just hoped I'd be able to ultimately make a living.

LaBERGE: Had you intended to do trial work?

MOSK: I hoped to do some trial work. But the major law firms were not doing any hiring in those days. They were just holding on to what they had. So I had to open up an office by myself. I took an office in a suite with a group of about four other lawyers. That worked out pretty well, because we shared expenses of rent and library and secretarial services and so forth, but each one was totally independent in his work.

But it was quite a struggle. I remember--and this is apocryphal, of course--but I remember coming home and telling my wife, "I had a wonderful day today, I had a twenty-five-dollar case and two small ones." [Laughter]

LaBERGE: Let's step back for a minute and tell me about taking the bar exam. Was that an experience?

MOSK: Yes, an experience I'm glad I never have to have again. It was difficult.

LaBERGE: Did they have bar review classes then?

MOSK: Yes. There was a professor at Southwestern who conducted a review class. He was a miserable fellow, but he was a good teacher, and he covered the subjects well enough so that I did pass, first time.

LaBERGE: Did you have any memorable law professors?

MOSK: Yes, one very significant one: [California Chief Justice] Phil [S.] Gibson.

LaBERGE: Oh! At Southwestern?

MOSK: At Southwestern. I got to know him very well, which turned out to be fortunate, because our paths crossed many times thereafter.

LaBERGE: What classes did he teach?

MOSK: Some aspects of civil law, but I can't really recall specifically. But he was very good. He was a tough teacher, but effective.

LaBERGE: You mentioned coming home to see your wife. Why don't we just cover that part: how did you meet your wife?

MOSK: I was lucky. A close friend of mine invited me to come and play bridge one evening at the home of a lady friend of his. So I went along, and the lady friend proved to be attractive and bright, and later on I asked him if he'd mind if I took her out. [Laughter] Anyway, that started a romance, and we got married shortly thereafter.

LaBERGE: And her name was?

MOSK: She's since passed away. Her name was Edna Mitchell.

LaBERGE: Besides being a bridge player, what was she. . . . Was this in Los Angeles?

MOSK: Yes.

LaBERGE: What was she doing?

MOSK: She was working at something, and I can't remember exactly what it was now. But we had a very happy marriage, many decades.

LaBERGE: And children?

MOSK: Yes, I have one son, Richard Mitchell Mosk.

[End Tape 1, Side A]

[Begin Tape 1, Side B]

MOSK: And my son turned out to be a very remarkable young man. He went to Stanford as an undergraduate, and ultimately to Harvard for law, and he practiced in Los Angeles. Today, he's the only person I know who holds three full-time jobs. First of all, he's a partner in a major law firm. Secondly, he's chairman of the board that rates motion pictures. And thirdly, he's a judge on the Iran-United States Claims Tribunal that sits over in The Hague, Holland. He flies to Holland one week every month to hear cases over there at that tribunal, where he's one of the three American judges. So as I indicate, holding three full-time jobs makes him quite a remarkable fellow.

LaBERGE: I'd say. You must have had some influence on his choice of a career, or it's hereditary.

MOSK: Well, yes, in an amazing way. Realizing that children are frequently contrary, I tried to tout him off on every other profession. "Well, why don't you go into teaching? Why don't you go into something else? Why don't you go into journalism?" Every time I'd make a suggestion, he'd reject it. By rejecting all of those, he ended up in law. So I guess you have to recognize the perversity of children. [Laughter] It helps.

LaBERGE: And so he grew up in San Francisco?

MOSK: No, Los Angeles.

LaBERGE: Back to your beginning law career: when you opened up your own office, how did you know these other fellows? I assume they're fellows.

MOSK: Yes, they were. I don't know how I met them. Maybe they advertised or something, I'm not sure.

LaBERGE: And how did you get clients?

MOSK: It wasn't easy.

LaBERGE: Because there certainly wasn't advertising.

MOSK: No. Well, through a couple of sources. One, my wife's father was a manufacturer of cosmetics, and through him I got a number of cases from his factory.

LaBERGE: What was his name?

MOSK: Max Mitchell. They were Canadian by origin, came from Winnipeg. My wife was born in Winnipeg.

LaBERGE: Anything else about your wife and her background? Because your son might like later to . . .

MOSK: Nothing particular. My son did know my wife's father.

LaBERGE: Was she a homemaker?

MOSK: Yes.

LaBERGE: You were in private practice, I have from 1935 to 1939?

MOSK: Right.

LaBERGE: What areas, or were you just taking whatever you could get?

MOSK: Took whatever came in the door. And I had some interesting matters. I remember a minister recommending a man who was charged with molesting a young girl, and he asked me to defend this fellow. I did go to trial and defend him, but he was ultimately convicted. But I got him deported, instead of going to jail, got him deported to Canada. (He was a native of Canada.) I remember, oh, eight or ten years later, I got a letter from this man's wife enclosing a check for \$100 and said, "I realized I still owe you on your fee for defending my husband, and here it is. I'm sorry I couldn't get it to you sooner." Years later, she sent me a check for my fee.

LaBERGE: Did you go to trial on other issues too?

MOSK: Oh, some personal injury cases. Nothing significant.

LaBERGE: Do you remember what your impression was of the judicial system or the judges you were meeting?

MOSK: I believe I thought well of the judiciary generally. I don't recall any serious disappointments. Outside of losing cases now and then. [Laughter]

LaBERGE: How do you think that experience has influenced you as a judge?

MOSK: It was the Depression, I think, that impressed me most. The human difficulty. Those were the days in which [President] Franklin [D.] Roosevelt first got started, and indicated a desire to help those who were in greatest need. I think that's one of the things that moved me toward the Democratic party at the time. So I started working in Democratic politics at the local level. I remember helping a candidate for the assembly in what was then the 59th Assembly District out in the western part of Los Angeles, a fellow named Robert Heinlein.

LaBERGE: The author?

MOSK: The author. [Laughter] I saw that working its way through your mind. He wrote mystery [science fiction, actually] novels. He was a retired naval officer, retired for physical disability, and his first inclination was to go into politics. He ran for the assembly and lost to the Republican, Charles Lyon. Then he turned to writing, with remarkable success.

LaBERGE: I have a son who really loves science fiction. That's how I had heard the name. So you kept up with him?

MOSK: Well, he's passed away. But no, I never did get to keep up with him. He got out of politics completely and devoted himself to literature.

LaBERGE: Your wanting to help people who were depressed or the downtrodden, did that have any roots, say, in your upbringing? Or where did that motivation come from?

MOSK: I suppose it came from the teachings of my parents, who themselves were always struggling to make a living. That certainly had an influence on me, I'm sure, and that's why I've always been an unashamed liberal.

LaBERGE: In the one interview that you did, and I sent you the outline for it, you did cover a little bit of the Democratic politics, and I don't know if you've covered it sufficiently, if we should talk some more about it.

MOSK: I must confess, I haven't had time to review that. It just arrived yesterday.

LaBERGE: OK. It's just the table of contents. Well, why don't we just go on.¹

Tell me more about your entrance into Democratic politics.

MOSK: I think my first interest was in or through Upton Sinclair, who was a little farther to the left than I would desire. He was pretty much of a socialist. But in support of his campaign in 1934, an organization called EPIC was organized, and I thought it was a very useful entree to political activity. And although I didn't give it a great deal of attention, because I was struggling to become a lawyer. I did participate, and concentrated somewhat on a campaign in '34 for Culbert Olson, who was running for state senator.

In those days, the counties had only one senator. There was only one state senator for all of Los Angeles. And Culbert Olson had fairly recently come to California from Utah, where he had also been a state senator. So I participated in

1. See Stanley Mosk, "Attorney General's Office and Political Campaigns, 1958-1966," an oral history conducted 1979 by Amelia R. Fry, in "California Constitutional Officers," Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1980.

that campaign of his to some extent, and got to know him. He was elected, though Sinclair was defeated.

Four years later, Olson ran for governor, so I really pitched in to that campaign.

LaBERGE: And by that, you mean going door to door, and what else?

MOSK: Yes. Well, I did more administrative work in the office at that time. And that probably was fortunate for me, because I really got to know Olson on a personal level.

LaBERGE: And you were doing this in your spare time?

MOSK: Yes.

LaBERGE: Was your wife also interested in politics?

MOSK: Not particularly then. She became so later. [Laughter]

LaBERGE: By osmosis.

MOSK: Yes.

LaBERGE: So this is how you became Culbert Olson's aide.

MOSK: Yes. Olson was elected. He went up to Sacramento, and shortly after he got there, he called me and asked if I'd come up and be his executive secretary. Well, it took me about fifteen minutes to wind up my law practice. [Laughter] And moved the family, my wife and I, to Sacramento.

LaBERGE: What did you think you would be doing?

MOSK: Well, nowadays, governors have dozens and dozens of secretaries. In those days [1939], a governor had only three secretaries. He had an executive secretary, an assistant secretary, and a private secretary, and that was his staff. So we handled everything. One of the secretaries handled patronage matters. I handled the legal problems: executive clemency, extradition, legislative vetoes and matters of that sort. It was a great experience. It expanded my legal knowledge, and also got me to know state government from the inside.

Olson was a remarkable person to be associated with. Indeed, he was the most honest person I think I've ever known. That was his undoing, because if a legislator were with him 90 percent of the time, to Olson he was no good,

because he opposed him 10 percent of the time. We couldn't deter him from having those feelings. But as I say, it was his ultimate undoing, because he never could build a big consensus, an effective consensus.

LaBERGE: Was that a big decision for you, to go up and do that?

MOSK: No.

LaBERGE: You didn't feel like, Gee, I'm not going to be a lawyer any more?

MOSK: No, I thought it was as challenging as ultimately it became.

LaBERGE: Any other anecdotes about him or his dealings with the legislature?

MOSK: No, nothing specific comes to mind.

LaBERGE: What were your impressions of Sacramento?

MOSK: Well, I liked Sacramento. My wife and I bought a little house there. I think we paid about \$9,500. Today the house probably is worth a quarter of a million dollars. Our son was born my first year in Sacramento.

LaBERGE: So happy memories.

MOSK: Happy memories, right.

LaBERGE: When you were there, I guess that's when war broke out?

MOSK: Yes, it did, you're right. The war broke out [1941], and we had lots of problems with the army, and the imprisoning of all the Japanese-American citizens. I don't suppose we became as irate about that development as we should have. Olson would be directed by the army people in connection with orders and seizing Japanese Americans and that sort of thing. It was wartime, and the future of our country was at stake, so I don't think we indicated our opposition to it in any way. It would have been unpatriotic, I suppose.

LaBERGE: And you yourself, were you in the army?

MOSK: Yes. That was a little later, though.

LaBERGE: Did you volunteer?

MOSK: Yes. Well, Olson was defeated for reelection by Earl Warren. In his final days, he offered me a position as a superior court judge in Los Angeles, so I accepted that, and went back to Los Angeles as a judge. While I was on the bench, I left

the superior court and volunteered for the army, so I did ultimately serve in the army.

LaBERGE: Where were you serving?

MOSK: I did my basic training with the engineers at Fort Leonard Wood, Missouri, and then somehow, and I don't remember how exactly, I transferred to the transportation corps. I was assigned to the port of embarkation at New Orleans, from which ships went out into the Pacific. If you have to fight a war, New Orleans is not a bad place.

LaBERGE: Were you there the entire time?

MOSK: Yes.

LaBERGE: You weren't sent overseas.

MOSK: As a matter of fact, my outfit was sent overseas just as the war ended, and by then, I wanted to get out and get back on the bench. So I remember Phil Gibson was then the chief justice, and I frantically called Phil from New Orleans--the war was now over--and I said, "Get me out of here!" I was discharged shortly thereafter and went back as a superior court judge.

LaBERGE: Was your family able to go with you to New Orleans?

MOSK: No. My wife had some kind of a job. I wish I could remember exactly what it was, but she was working. I was a private making fifty dollars a month, and I was occasionally writing home asking her for money so I could go to some of those New Orleans restaurants. [Laughter]

LaBERGE: How did the experience of the war and the whole thirties and forties influence you later?

MOSK: I don't know that the war had any significant influence on me. I felt guilty at not being in the service when so many of those my age were in. And that's why I left the comfort of the superior court judgeship to volunteer as a private.

LaBERGE: Because you didn't . . .

MOSK: I was exempt under the law, yes. But there was that guilt at seeing those my age serving, and I was enjoying comfort, and it bothered me.

I must give credit to Earl Warren as governor then. He never filled my position while I was in the service, so that it was there when I came back. He could have made an appointment, because I had resigned.

LaBERGE: Did you know him personally?

MOSK: I did not at that time. Well, let me correct that. I represented the governor on some boards and commissions where Earl Warren, as then attorney general, was also a member, so I did get to know him somewhat that way.

LaBERGE: How many other judges do you think left the bench during that time?

MOSK: I know of one in Merced County, a judge left the bench. But he had the misfortune of having his term expire while he was away. He got his name on the ballot for reelection, and somebody, a lawyer in Merced, put his name on the ballot to run against him, and defeated him while he was away, which I always thought was really unfair. But it turned out to his advantage ultimately, because he became a lobbyist later on in Sacramento for liquor interests, and I'm sure that enhanced his fortune much more than being a judge would have.

LaBERGE: I think we'll go back to when you became a judge in the superior court [1942]. How did the appointment process happen, and confirmation?

MOSK: This is the greatest example of pure luck that I have ever experienced. In the closing days of the Olson administration, there were three vacancies on the superior court in Los Angeles and two on the municipal court. The governor called me in a couple of weeks before the end of his term and said, "Stanley, I want you to make out commissions for Harold Landreth for the superior court, Harold Jeffries for the superior court, and Dwight Stephenson for the superior court, Gene Fay for the municipal court, and you take the other municipal court vacancy."

Well, I thanked him profusely. At age thirty, a municipal court appointment was all that occurred to me as a possibility. I went out and made up the commissions, brought them in, the governor signed them. But by then, it was after five o'clock, and the secretary of state's office was closed. So I locked them in my desk, intending to file them the following morning.

In the middle of the night, the governor called me at home and said, "Stanley, have you filed those commissions yet?" I said, "No, Governor, I apologize, I didn't get to the secretary of state's office until after five o'clock." He said, "Well, good. I can't leave Bob Clifton off. So put Bob Clifton in your place on the municipal court." Well, my heart sank. But he said, "And you take Dwight Stephenson's place on the superior court."

LaBERGE: Oh, my gosh!

MOSK: So just by about as clear an example of luck as I can imagine. By not getting to the secretary of state's office by five o'clock, I was elevated from the municipal to the superior court.

LaBERGE: And you probably thought you had done something wrong. [Laughter]

MOSK: Certainly fate was with me. I've never forgotten that example of just pure good fortune. And it changed my whole life, because as a superior court judge, later on I ran for attorney general, and so on.

LaBERGE: In filing that with the secretary of state, you didn't need any confirmation or anything like that?

MOSK: No, not for trial judges.

LaBERGE: And did you have to run for . . . ?

MOSK: I had to run for reelection shortly thereafter, and I was opposed by two municipal court judges. One was Leroy Dawson, a man who was a disabled veteran of World War I, a very well-known municipal court judge, and the other was a woman, Ida Mae Adams, who had run for judge several times. She was a formidable opponent. I remember she used to start her political speeches at clubs by saying that her opponent, she'd refer to "this young man who's occupying the office." Let's see, how did she put that?

In any event, I had to have a runoff with her. I didn't get a majority the first time, and had a runoff. It was a difficult campaign. That was the first time my wife really got involved in political life, and the problem of raising a few dollars for the campaign.

LaBERGE: How did you do that?

MOSK: Well, I hadn't the foggiest notion of how to do it at first, but I remember calling on. . . . The first person I went to see was a man who was somewhat active in politics, a man named Lawrence Harvey who was a manufacturer. I remember he gave me a \$1,000 campaign contribution and I was just overwhelmed.

LaBERGE: So it was just really grassroots, asking for help?

MOSK: Grassroots, asking for help. Nothing I could do for him as a judge, but he was a good friend, and willing to help, and had the means to do so.

LaBERGE: Were you pretty well established in Los Angeles by then? Did you know a lot of people?

MOSK: Yes, moderately so.

LaBERGE: Mainly through politics?

MOSK: Yes, through political activity primarily. Going out and making speeches. As a judge, I had to stay out of partisan politics, but I'd go to Rotary Club meetings and various organizations and have a few anecdotes about cases to get them laughing and applauding.

LaBERGE: This was your debate and your speech experience.

MOSK: Yes, it helped.

LaBERGE: Do you still do that?

MOSK: Yes.

[End Tape 1, Side B]

[Begin Tape 2, Side A]

LaBERGE: When we turned the tape over, you said that you gave a speech on humor in the courtroom.

MOSK: Yes.

LaBERGE: Can you give me a couple of anecdotes?

MOSK: I developed a little talk on humor, just to keep things a little light. I found that there is humor in which the judges have a little fun with lawyers appearing before them, and the lawyers, of course, must laugh at the jokes from the bench.

[Laughter] And then there's a second kind where the lawyers somehow manage

to get the last word without antagonizing the judges. And then there's another category I developed where the judges try to help a struggling lawyer who's trying to explain his position, and the lawyer just can't understand it and doesn't accept the help from the court. I found examples of all of them.

LaBERGE: When you went on the job for the first day as a superior court judge, what kind of training or orientation did you have?

MOSK: At first, very little. The presiding judge of the superior court was a man named Emmet Wilson. When I reported for assignment, he wasn't about to give me any assignment, because he wasn't very happy at having this thirty-year-old youngster on the superior court. So I probably would have cooled my heels if it hadn't been for a man that I had gotten to know, Alfred Paonessa, who was a superior court judge and sitting in Long Beach.

So Al Paonessa went to Presiding Judge Wilson and said, "If you have no other assignment, I'd be very glad to have Judge Mosk with me in Long Beach." So my first assignment then was to Long Beach.

And Al Paonessa was a tremendous help to me there, in the form of judging. He was a charming man. We had a lot of fun. The superior court in Long Beach was then in the Jurgen's Trust Building, which overlooked the beach. At noontime, I'd come to in to visit with Paonessa and have lunch perhaps with him, and there he'd be with his binoculars, looking down on the beach at all the pretty girls. [Laughter]

LaBERGE: Another humor in the courtroom.

MOSK: Right. So I can't say enough about what kind help he gave me in getting started on. . . . He never told me how to decide a case, but the form and that sort of thing.

And I must say with a certain amount of pride, after six months, I was reassigned back to downtown Los Angeles, and the Long Beach Bar Association passed a resolution praising my work there. So that gave me a good start.

LaBERGE: Do you remember the first cases that you had?

- MOSK: One of the first cases was a personal injury case in which Joe Ball, a very prominent lawyer, appeared. He was one of the peers of the bar, a great lawyer. It was a personal injury case, and he lost it. But then he got me reversed on appeal. [Laughter]
- LaBERGE: For instance, for that first case, how would you prepare for it beforehand?
- MOSK: I don't really remember anything specific, but I must have.
- LaBERGE: In general with your cases, how would you prepare?
- MOSK: Yes, well, I would review the file, the record, and have a pretty good idea of what I would do once I ascended the bench.
- LaBERGE: Did you have to kind of bone up on rules of evidence, and how did . . . ?
- MOSK: Yes, that was . . .
- LaBERGE: Because you'd been kind of out of that for about four years, I guess.
- MOSK: Yes, for some time. But I would do whatever was necessary in the way of preparation beforehand.
- LaBERGE: And how did you happen to then get reassigned back to Los Angeles?
- MOSK: I think it was just a matter of custom. The assignments were for six months; my six months were up, and they moved me back to L.A. And for most of my period there, I was in Department 14, which was on the top floor of the old Hall of Records building.
- LaBERGE: From then on, was it Emmet Wilson who originally didn't want you there?
- MOSK: That's right, but by then, he was no longer presiding judge.
- LaBERGE: I see. How did you get your assignments?
- MOSK: They came from the presiding judge.
- LaBERGE: And was the presiding judge rotating?
- MOSK: Yes. It was an annual appointment.
- LaBERGE: Even in that early time, can you see how you started developing your philosophy?
- MOSK: Not exactly. I'd just take each case as they came. And many of them proved to be boring. It would be just two other automobiles colliding in another intersection, and trying to ascertain fault.
- LaBERGE: Could you foresee yourself doing that for many years?

MOSK: At first it didn't trouble me, but it's many years later that it began to get somewhat boring. That's why I ultimately took a chance to run for attorney general.

LaBERGE: How did that come about?

MOSK: Pat Brown, who had been the attorney general, was then running for governor, so there was no incumbent attorney general. I figured my chances were as good as anyone else's.

LaBERGE: And did you know him well?

MOSK: I knew Pat Brown pretty well, yes.

LaBERGE: How did you stay involved in the Democratic party while you were on the bench?

MOSK: I really didn't stay in touch with the party as such. But I did my share of speaking to generally nonpartisan groups, service clubs, luncheon clubs. Oh, I belonged to the Rotary Club and that sort of thing, and gave my share of talks about legal or quasi-legal incidents that might interest lay persons.

LaBERGE: How did your wife feel about you running for attorney general?

MOSK: She accepted it gracefully. [Laughter] As a matter of fact, she became active then in women's Democratic groups. She was very helpful.

LaBERGE: When you decided to run, did you then step down from the bench?

MOSK: Yes. I didn't have to resign, so I always kept that possibility of returning. But I took a leave of absence and I sent my salary check back every month.

LaBERGE: How did you go about campaigning for that, then?

MOSK: There was a Democratic political group.

LaBERGE: Is it the CDC [California Democratic Council]?

MOSK: CDC. And I got help from two persons who pitched in to my campaign. One was a fellow named [Glen] Wilson, recently passed away. And the other was a woman named Nancy Strawbridge. They were a tremendous help in getting endorsements from CDC chapters, and that proved to be really my source of ultimate victory.

I was opposed in the primary by a state senator from San Francisco, Bob McCarthy, and I must say that turned out to be the cleanest campaign I have ever

known. Neither one of us ever said an unkind word about the other. As a matter of fact, I hadn't known him before, but ultimately Bob McCarthy became a very good friend of mine.

And I was fortunate in the primary; I defeated him, but by a very narrow margin comparatively. I think it was 135,000 votes statewide. I trailed for forty hours after the polls closed, because in San Francisco, they had voting machines, and in Los Angeles, everything was done by hand. His strength was here and mine was down there. So for forty hours, Bob McCarthy was winning, and his friends were claiming victory, though he never did. I always felt sorry for him: he thought he won, and yet it was snatched away from him in late returns. And as I say, he endorsed me in the finals, and we became good friends.

The finals I won by over a million votes.

LaBERGE: And who did you run against?

MOSK: The Republican nominee was Richard Nixon's successor in his congressional district, Pat Hillings. It probably did him good to lose, because he ultimately became the lobbyist for Ford Motor Company in Washington.

LaBERGE: Well, that must have been something, to really have a statewide campaign.

MOSK: It was.

LaBERGE: I would assume people in the state had heard the name Bob McCarthy, but maybe not yours.

MOSK: Exactly. But it was fun to campaign around the state in those days. I really enjoyed it. I met people, the kind of people I normally wouldn't have known. I remember climbing under a locomotive in Roseville to shake hands with a grimy engineer. That sort of thing was fun. And it didn't take the kind of money that it takes today to run a campaign. I don't think we spent over \$85,000 in the primary, statewide.

LaBERGE: Was your mother still alive then?

MOSK: Yes.

LaBERGE: I just wondered what was her reaction to how her son was . . .

MOSK: Yes, she was. She was very happy for me.

LaBERGE: I think that you pretty much covered that whole period in this other interview, so
I think, shall we stop?

MOSK: Yes, a good time.

LaBERGE: And then next time, we'll start with the [California] Supreme Court.

MOSK: Very good.

[End Tape 2, Side A]

[End of Session 1]

[Interview 2, March 11, 1998]

[Begin Tape 3, Side A]

LaBERGE: When you were attorney general in 1964, how did Pat Brown then appoint you to the supreme court, and how did you make that decision?

MOSK: Well, I served as attorney general for the four-year term, and then I was reelected for another four-year term. But by then, political campaigning in California had become a matter of raising tremendous funds and organizing a political campaign. Frankly, raising funds did not appeal to me at all. I remember going in to a reception, or a public dinner, and looking at everyone with a dollar sign over his head. I began to hate myself for that.

So when there was a vacancy on the supreme court and Pat Brown offered it to me, I decided to just get out of politics completely and devote my time to the law, which I have always enjoyed.

LaBERGE: How was that, to make that decision? Because you really liked politics, or you were interested in politics.

MOSK: Yes. Frankly, I liked politics. I liked going to meetings of varied groups. I liked getting to meet and know people of various occupations and personal characteristics. It broadens one's perspective. So I enjoyed that part of politics, but it was the fundraising and the need to expend money for printing of literature, mailing it out, and running ads in newspapers, and nowadays on television, all of which requires tremendous resources. That aspect of politics never agreed with me.

LaBERGE: You must find today's brouhaha over campaign spending interesting if nothing else.

MOSK: Yes, it is, and it's distressing, I think, that candidates feel it's necessary to raise tremendous sums and to solicit persons and organizations for funds. That's too bad.

LaBERGE: When Pat Brown appointed you, how did the confirmation procedure go?

MOSK: There was no problem at all. It was very routine. Apparently, I had not antagonized enough people to come in and oppose me.

LaBERGE: And Justice Burke was appointed at the same time?

MOSK: Yes. That showed, I think, Pat Brown's character to a certain extent. After all, I was a Democrat; Louis Burke was a Republican. And he appointed us at about the same time. And Lou Burke was a first-rate appointee, I must say. We worked together very well.

LaBERGE: You've seen a lot of people be appointed and lived through a lot of governors. What is your opinion of the appointment process and how someone is chosen?

MOSK: You never know what impelled a governor, any governor, to make an appointment of him or her over others who were perhaps seeking the office. I assume every governor has in the back of his mind certain qualities and characteristics that he wants on the court, and he makes the appointments accordingly.

I think Pat Brown genuinely attempted to appoint persons with qualifications. He appointed people like Mathew [O.] Tobriner and Ray [Raymond L.] Sullivan. They were just outstanding persons. And of course, Lou Burke turned out to be first-rate as well.

LaBERGE: What qualifications do you think a supreme court justice needs?

MOSK: He needs a professional background, an education, and an experience. I don't think he must necessarily have been a judge before, although that in many instances is helpful. After all, some of the greatest jurists on our United States Supreme Court had no judicial background. I had in mind people like Earl Warren and Louis Brandeis, and many others that I could catalogue, who had no

judicial background and yet turned out to be quality members of the highest court in the land. As a matter of fact, you don't even have to be a lawyer to be on the United States Supreme Court.

LaBERGE: Oh, really? I didn't realize that. Have there been any nonlawyers?

MOSK: No, there haven't been. But theoretically, there could be, and as a matter of fact, in reading a biography of Franklin Roosevelt, he did seriously consider some nonlawyer members of the high court. But I think he was dissuaded from doing that.

LaBERGE: So education and some background. In education, do you mean the law degree?

MOSK: Yes.

LaBERGE: And having passed the bar. I was thinking about, there was controversy a little bit over William Clark, is that right?

MOSK: Yes, there was, to some extent.

LaBERGE: What about judges being appointed either for merit or for political reasons? Could you talk about that?

MOSK: Inevitably, a governor has a political philosophy regarding criminal law, and perhaps aspects of civil law, and it's understandable that he would appoint persons of similar point of view in making his selection. At the present time on the California Supreme Court, there are six Republicans, and I am the only Democrat. I don't resent that one bit, because they were appointed by Republican governors, [George] Deukmejian and [Pete] Wilson. I think it's inevitable that they would appoint persons of their particular philosophy, and I think they have a right to do so. If a Democrat is elected governor, I assume he will appoint persons of a different political philosophy.

LaBERGE: When you were appointed, did you have any kind of orientation, or did someone walk you through the steps of what you were going to be doing?

MOSK: No, not really. As I recall, I was on the bench a week after being appointed, and hearing a series of cases.

LaBERGE: Do you remember your first day?

- MOSK: No, I suppose I was more worried about whether my robe would fit, [Laughter] and not the details of the impending cases.
- LaBERGE: That's so funny, I would expect a woman to worry about that! Did you have to order it ahead of time, or be measured, or. . . ?
- MOSK: Well, I believe I still had a robe left over from my days as a superior court judge, and I was able to use that until I could order a fresh one.
- LaBERGE: What about meeting your staff? Would they have helped to orient you a little bit?
- MOSK: I was sorry to have left the staff I had at the attorney general's office. I had some wonderful people as my appointees. A woman named Nancy Strawbridge had been with me all of my time as attorney general.
- LaBERGE: What was her position?
- MOSK: She ran the office. And deputies like Howard Jewel, who later married Nancy Strawbridge. And Charlie [Charles] O'Brien was one of my top deputies, and Richard Rogan. They were a wonderful group of people that I enjoyed associating with, and I was sorry to have to leave them when I left the attorney general's office.
- I walked into the supreme court office and had to pick some law clerks, and I think my first law clerk was a Harvard Law graduate named John Hansen, who today is a top lawyer in San Francisco.
- I've enjoyed the opportunity to have law clerks and to follow their careers after they leave the office. One of them is now a municipal court judge in Santa Monica, Larry Rubin. Four or five of them are law professors at various schools, one of them at a university up in Canada. I take some pride in their accomplishments.
- LaBERGE: Oh, I'm sure you do.
- Coming to the Supreme Court meant also a move from Sacramento, is that right?
- MOSK: Yes. I really live in a United Airlines plane. [Laughter]
- LaBERGE: And you always have?

- MOSK: I always have. As attorney general, we had offices in San Francisco, Sacramento, and Los Angeles. I established a new office in San Diego, which was a growing community. So I deliberately tried to spend some time in each one of the offices.
- LaBERGE: So then you didn't need to move to San Francisco?
- MOSK: Not really. Although knowing that I would be in San Francisco most of the time as member of the court, I finally did buy a cooperative apartment. So there's a certain permanence about that.
- LaBERGE: But otherwise, where was your main. . . ?
- MOSK: I kept my principal residence in Los Angeles.
- LaBERGE: Even when you were attorney general?
- MOSK: Even when I was attorney general. I would stay in hotels in Sacramento and San Francisco.
- LaBERGE: So do you feel like. . . . Is it an Angelino, is that the term?
- MOSK: Yes, that's the term. I did then, but now I register to vote here in San Francisco, so this is my real residence now.
- LaBERGE: Your first days at the court were at the Civic Center?
- MOSK: Yes. The court was housed in the Civic Center, where we stayed until the earthquake, when was it, of '89.
- LaBERGE: So there were permanent staff there when you got there?
- MOSK: Yes.
- LaBERGE: Research attorneys and so forth?
- MOSK: Yes, there were some available.
- LaBERGE: So did you inherit some, or. . . ?
- MOSK: Yes, I did. But I was able to bring in my own selections. As I mentioned, John Hansen was the first one.
- LaBERGE: And what about Peter Belton?
- MOSK: Yes. He came to me. As I went on the court, Justice [B.] Rey Schauer retired, and he called my attention to Peter Belton, who had worked for him for a few years, and told me that I'd be doing myself a great service if I took Peter Belton on. I interviewed him, was impressed, and so I did take Peter with me. He's

been with me all thirty-three-plus years that I've been on the court. He has a great legal mind. He could have made a fortune in private practice except for the fact he has a serious physical disability. He's a paraplegic, and it's a little difficult for him to get out into the cold, cruel world.

LaBERGE: Do you remember the first case that you heard?

MOSK: No, I don't.

LaBERGE: How about the first opinion you wrote?

MOSK: I should remember it, but I don't.

LaBERGE: The first dissent? [Laughter] Or maybe there weren't so many those years.

MOSK: No, there weren't as many in those years, because I found it difficult to disagree with legal giants like Mathew Tobriner and Raymond Sullivan, and the chief justice at that time . . .

LaBERGE: Roger Traynor?

MOSK: Roger Traynor.

LaBERGE: Did he come in just when you came in? The same year, I didn't know, but . . .

MOSK: Yes, he succeeded Chief Justice Phil Gibson at that time. So he rose from associate justice to chief justice. I was appointed to succeed him as associate justice.

LaBERGE: When you first come in, is there some kind of feeling like, Gee, I don't know what I'm doing, and I'd better wait to find out what the . . .

MOSK: Well, no, not really, because as attorney general, I had been responsible for producing over 2,000 opinions during my six years in that office. The procedure was not totally dissimilar to the procedure on the court, in that you'd have an issue, you'd discuss it with a deputy, the deputy would draft a proposed attorney general's opinion, you'd make corrections or additions or deletions from that, and it would ultimately be published.

The procedure on the court is not totally dissimilar in that you worked with your law clerks much the same way.

LaBERGE: And you wouldn't be reluctant to speak your mind with the other justices, being a newcomer?

- MOSK: No. I think because I'd had a certain relationship with them when I was attorney general. I'd appeared and argued before them. So there was no fear of expressing a view that was in agreement or contrary to theirs.
- LaBERGE: Tell me about Chief Justice Traynor, your assessment of his time on the court.
- MOSK: Traynor was a brilliant jurist and produced excellent opinions. My only criticism of him would be as an administrator of the court, he showed somewhat a lack of interest. He did his job, and that was it. As compared with, let's say, our current chief justice, Ron [Ronald] George, who's a splendid administrator.
- LaBERGE: How were the assignments made back then? I'm sure it's changed. Or maybe it hasn't.
- MOSK: No, it's pretty much the same. There were preliminary memoranda written and circulated, and that indicates generally the point of view of each member of the court. From those points of view, the chief justice can ascertain who has the greatest interest and represents the majority view of the court, and therefore, he's able to make the assignment in that manner.
- LaBERGE: Do you ever ask for the assignment if you're really interested, or. . .
- MOSK: I never have. Now, I really can't be sure that some of my colleagues may have done so, but I'm not aware of it.
- LaBERGE: Or do you refuse?
- MOSK: No, you don't refuse unless you feel you're disqualified for some reason. Let's say it's a lawsuit against a bank and you own stock in that bank, you're going to disqualify yourself.
- LaBERGE: Did you have to read, I'm sure, or bone up on the canon of judicial ethics before you became a supreme court justice, so that you would know, Gee, if I get that kind of a case, I should disqualify myself?
- MOSK: No, you really know that. And as a matter of fact, for a while after my appointment to the court, I did have to disqualify myself in many criminal cases where as attorney general I had taken the appeal in the first place.
- LaBERGE: And in that case, the chief justice appoints someone else?

- MOSK: The chief justice will assign someone else, usually a member of the intermediate appellate court, to sit in my place on that particular case.
- LaBERGE: Could you go on and describe a little bit more about the process when you're assigned an opinion? Or I guess before that, the oral argument.
- MOSK: Yes. At oral argument, there usually is considerable give-and-take between the lawyers arguing the case and members of the court. Almost every member of the court will ask some questions during the session. The questions are usually provocative. They attempt to draw out of the contending attorneys more details about their views, and sometimes the questions indicate the view of the judge who asks the question. Not always. I prefer to, if I have an opinion brewing within me, I tend to ask questions contrary to that point of view, just to stimulate the attorney's contention that would be helpful to me.
- LaBERGE: Sort of play devil's advocate?
- MOSK: Exactly.
- LaBERGE: And before that, you've had a chance to read the lower court opinion?
- MOSK: Yes, I've read the lower court opinion, I've read the briefs of the appellant and the respondent, and occasionally I am prepared with some questions I intend to ask before the session begins.
- LaBERGE: And so after oral argument, then what happens?
- MOSK: After oral argument, the very same day, the seven of us have a conference. We discuss the cases and reach a tentative conclusion. That is, if there are four who take a particular position, the chief justice will assign one of those four to write the opinion, the majority opinion. That proposed majority opinion will circulate among the other six members of the court. Some of them will offer suggestions helpful to that position; others may prepare a dissent, or a separate concurring opinion.
- Then we must complete that process within ninety days. We have to sign an affidavit before we get our paycheck every month that we do not have any cases under submission for longer than ninety days.
- LaBERGE: So at one time, how many opinions would you be working on?

MOSK: I'm studying every opinion, of course, but I write roughly forty opinions a year. Now, that includes some dissenting opinions and some separate concurring opinions. But it's almost an opinion a week.

LaBERGE: After you've taken this preliminary vote and then the opinion is written, how often does someone change their mind, or. . .

MOSK: I don't think they ever completely change their mind, but they may change the approach they're taking, or they may add or subtract issues from the prepared draft of an opinion.

LaBERGE: Let's just talk about the Traynor court and what that collegiality was like. Do you remember some of the discussions on opinions? I've got a couple of cases written down, but you might remember something else. One was Mulkey v. Reitman in 1966, when the court invalidated the anti-fair housing initiative. Or some of the tort cases, because there were lots of tort cases those first years.

MOSK: Yes, there were. Traynor was particularly interested in the tort field. He did write some excellent opinions in that area. He was very scholarly, and he did win, and deserved to win, a national reputation in the tort field. I think prior to his day, the tendency of the judges was to lean toward the defense in tort cases, toward protecting insurance carriers that were insuring defendants being sued. But under Traynor, he was more concerned, I think, with making the plaintiff whole. And as a result, he earned a national reputation for his work in that area.

And usually, Justices Tobriner and Sullivan, and [Raymond E.] Peters when he was on the court, would go along with Traynor's point of view.

LaBERGE: And you also?

MOSK: And I also, for the most part.

[End Tape 3, Side A]

[Begin Tape 3, Side B]

LaBERGE: If Justice Traynor was interested in the tort cases, would that influence which cases you agreed to hear, the court as a whole, do you think, or was it just the circumstances of those years?

MOSK: No doubt he retained for himself those cases in which he felt he was going to make a significant contribution to the law of torts. And I don't think anyone resented that, because we felt that he was truly an expert in that area.

LaBERGE: I read a law review article that Justice Tobriner wrote assessing the ten years on the court between '62 and '72, and he talked about doing a lot of tort cases and strict liability coming in, and then I think he called it status law, is making a decision depending on the defendant's status in society.¹ Did you ever think of it that way?

MOSK: No, I never did.

LaBERGE: OK. I thought that was very interesting.

Well, I'll just give you some of the names of cases I have written down if you want to comment. One was Elmore v. American Motors [Corporation],² and it was unanimous, 1969. And the liability wasn't based on contract, but it was based on the manufacturer's. . .

MOSK: Warranty?

LaBERGE: Yes. And his representing that he was performing this certain function.

MOSK: I will have trouble recalling the details of cases.

LaBERGE: OK. And you see, I have this all this written down. What about bartenders' liability? Do you remember any of those cases? Their liability for serving intoxicated customers.

MOSK: No, but I'm sure they haven't. [Laughter]

LaBERGE: This is one that you wrote, Pike v. Frank G. Hough Company,³ talking about design defects?

MOSK: Yes. The design defect case.

1. Mathew O. Tobriner, "Retrospect: Ten Years on the California Supreme Court," 20 UCLA Law Review 5 (1972).

2. 70 Cal. 2d 578 (1969).

3. 2 Cal. 3d 465 (1970).

LaBERGE: One thing you and I didn't talk about is before you even get to the oral argument, how does the supreme court decide which cases they're going to hear?

MOSK: That's our most difficult task. We get about 6,500 petitions for hearing every year, and we produce about 100 opinions. So in deciding which cases to take, we have a difficult task. We try to take those cases in which perhaps there is a disagreement among the intermediate appellate courts; one, say the court in San Diego, is deciding this issue one way, and the court in Sacramento is deciding the same issue a different way. We feel we have an obligation to determine what the law is so they won't have that disagreement in the future.

Secondly, we'll take a case that we think has been decided wrong by the courts below, and it's a matter not just between two contending litigants but affects society as a whole. There are many times that we look at an opinion of the courts below and it just involves a dispute between A and B, it doesn't affect anybody else, doesn't affect society as a whole. We may really think that if we were deciding it, we'd reach a different conclusion, but the issue is unimportant, it's factual, and it doesn't affect anybody else, so reluctantly, we'll leave it alone.

So it's only cases that we think affect a large segment of the populace that we will take it over.

LaBERGE: Do you have the same kind of conferences as you do after oral arguments?

MOSK: Yes, we do. We meet every Wednesday fifty-two weeks out of the year. If Wednesday is a holiday, we'll meet on Tuesday or Thursday. We had a long session this morning, all morning, in which we decided what cases that are pending that we want to take over.

LaBERGE: In the same kind of procedure: you read the opinion and the briefs?

MOSK: We read the opinion, we read the petition for hearing, and any briefs to the contrary. Each of us, I think, has a pretty good idea of how he's going to vote on those pending petitions for hearing.

LaBERGE: What are the discussions like among you? I'm sure this changes as the court changes.

MOSK: Somewhat, but we speak in order of seniority. As the senior member of the court, I must be well prepared, because I have to speak first, and talk about the case, and give my views on whether we ought to take the case over or not. And then it goes down in order of descending seniority, until some of the newer members of the court don't have much to say except "I agree with him," or "I agree with her."

LaBERGE: So do you speak before the chief justice?

MOSK: Yes, he speaks last, as a matter of fact.

LaBERGE: And that's always, even if he were the senior. . . ?

MOSK: That's always.

LaBERGE: So after you agree, yes, you're going to hear this case, then . . .

MOSK: Then it takes four votes out of seven to grant the petition for hearing. Unlike the United States Supreme Court, where it only takes four out of nine. Here it takes a majority, four out of seven. The chief justice will assign one of those four to write what we call a conference memorandum, which is prepared prior to oral argument.

LaBERGE: So there's the conference memorandum, and there's the calendar memorandum after it?

MOSK: They're the same.

LaBERGE: Do you have any anecdotes about those first years on the court under Roger Traynor, or were there any cases that you remember particularly?

MOSK: Oh, I can remember a couple of cute incidents. I remember, there was Justice Paul Peek on the court at that time, and he had a delightful sense of humor. I remember one case in which an attorney was arguing before the court, and one of the members of the court asked him a serious question. He stopped and paused and said, "Your Honors, it's strange that you should ask me that question, because I was rehearsing my speech at home last night and my wife asked me the very same question, and she suggested this answer." Well, then he went on.

A few minutes later, another difficult question from the bench, and I remember Justice Peek said, "Counsel, what did your wife say about that one?" [Laughter]

There were a few light moments on the bench. Usually the matters are too serious to joke about. But on the other hand, if the joke is not aimed at someone's weakness or personality, it lightens things up. When Justice [Malcolm] Lucas was chief justice, he had a delightful sense of humor. There was a case involving the city of Azusa, which had passed an ordinance prohibiting fortune-telling.¹ Didn't license it, it didn't regulate it, it just was a total prohibition.

Well, obviously, there are some First Amendment problems. After all, every sporting page forecasts how sporting events are going to come out, and some ministers tell us what the hereafter is going to be like. So anyway, a fortune-teller named Fatima Stephens brought a suit to enjoin enforcement of that ordinance. She lost in the courts below, and we granted a hearing. Now, as her lawyer got up to argue, Chief Justice Lucas said, "Counsel, you have us at a disadvantage." The lawyer said, "Why, Your Honor?" Justice Lucas said, "Well, hasn't your client told you how this case is going to turn out?"

LaBERGE: [Laughter] Oh, that's good. And I'm sure it just diffuses any nervousness.

MOSK: It does. This lawyer was pretty good. I could not have thought of an answer to that, but he said, "No, Your Honor. You must remember, I did not consult my client; she consulted me."

LaBERGE: How did that case turn out?

MOSK: It turned out that she won, seven to nothing. I wrote that opinion. If she committed fraud, or deceived people, she could face some charges of that sort, but she couldn't be prohibited from purportedly forecasting the future.

LaBERGE: When Justice Traynor decided to step down, I can't remember, did he just decide to retire?

1. Spiritual Psychic Science Church v. City of Azusa, 39 Cal. 3d 501 (1985).

MOSK: He just retired at age seventy, I believe. Donald Wright was appointed his successor. I must say, I was very fond of Don Wright. He was a great human being. I wouldn't have guessed it from his background. He was born in Orange County, lived in Pasadena. He was a typical country-club type, and yet it turned out he was a man with a heart.

LaBERGE: You were acting chief justice when. . .

MOSK: Just for the short period.

LaBERGE: So you voted for his confirmation?

MOSK: I voted for his confirmation. He was well qualified, obviously; he had served on the trial court before. But we were very apprehensive. . .

LaBERGE: When you say "we," what do you mean?

MOSK: Well, all of us on the court were somewhat apprehensive, because of his rather limited social background. And I remember, I swore him in as chief justice. We were holding a session in Monterey, in the first courtroom after California became a state. It was recognition of a historical event.

Don Wright took his seat as chief justice, and as I say, we had been somewhat apprehensive until that first case. I'll never forget, it involved an interpretation of a statute. The counsel argued back and forth, and I remember the new chief justice made the statement in the courtroom, he said, "If the legislature didn't mean what it said, why didn't it say so?" [Laughter] We decided we liked Don right from that point on.

LaBERGE: Something that I read suggested that Justice Louis Burke was possibly going to be appointed, or that was rumored that he might have been appointed chief justice.

MOSK: I don't know. Let's see, it was Governor [Ronald] Reagan, I believe, who made the appointment.

LaBERGE: Yes, 1970.

MOSK: I would have been happy with Lou Burke as chief justice, but it turned out Don Wright was first-rate.

LaBERGE: When at the same time, I think it was the California Journal that I was reading, there was just one blurb, and it didn't mention it again, that you were maybe considering running for [United States] Senate again.

MOSK: Well, there are always political rumors before each election. I suppose I gave fleeting thought to running for something else, but then I decided that would get me back into politics, and that's what I left, so why do it? So I have always decided to stay where I am.

LaBERGE: Well, you must have liked it, because you did keep the same. . . . Under Chief Justice Wright, did the tenor of the court change at all?

MOSK: Not very much, if at all. As I indicated, Don Wright was a very courageous fellow. Though a conservative Republican appointed by a conservative Republican governor, he had the courage to write an opinion, People v. Anderson,¹ which declared the death penalty to be unconstitutional. It was the most courageous opinion I can recall. And to have Don Wright, a conservative Republican, write that opinion, was quite remarkable.

LaBERGE: Do you remember any of the discussions around that?

MOSK: No, but a majority of the court backed him up. But of course, the people through initiative took care of that opinion at the first opportunity, and declared specifically that the death penalty is not cruel or unusual punishment.

He relied on the distinction between the United States Constitution Eighth Amendment, which prohibits cruel and unusual punishment, with the California Constitution, which prohibits cruel or unusual punishment. And he placed great significance to that distinction between the "and" and the "or."

LaBERGE: And then later, you wrote an opinion based on the state, cruel or unusual, on the penalty. On whether the penalty was cruel or unusual, because it was I think one year or life.

MOSK: Yes. [Pause]

1. 6 Cal. 3d 628 (1972).

LaBERGE: Now I've probably made you lose your train of thought, and I've lost mine. Well, then there was the initiative [1978] so that the death penalty is now constitutional.

MOSK: Yes.

LaBERGE: When you have a problem with what you in your conscience believe and what the law is, how do you solve that?

MOSK: That's a difficult problem for anyone with a conscience. You feel that if you were making the law, you would do it in this manner. But on the other hand, I realize that I stood up and I took an oath to support the constitution and the laws as they are, and not as I might prefer them to be. As a result, I have to adhere to the laws as they are.

For example, if I were writing on a clean slate, I would find that the death penalty does violate the "cruel or unusual" clause of the constitution. But on the other hand, the law is the other way, and so I have written probably more opinions upholding death penalty judgments than any other member of this court or of any court in the country.

LaBERGE: During that time, I don't know if you call it the Mosk doctrine, but someone referred to it as the Mosk doctrine, and that is interpreting or basing decisions on the state constitution rather than the federal.

MOSK: Yes.

LaBERGE: Could you talk a little bit about that, and how you developed that?

MOSK: Yes. I do believe that our state constitution should take first precedence. I think I originally got that from some of the meetings we used to have at national organizations. There was a justice on the Oregon Supreme Court named Hans Linde, and he used to contend that in deciding a set of facts, a judge should first look to the statute involved. Second, he should look to the constitution of the state. And only as a last resort, [he should] look to the Constitution of the United States. That always appealed to me, so I adhere to the philosophy of state's rights, and that our state constitution should be the governing body.

And we were able to prevail on a number of issues using our state law primarily. For example, the United States Supreme Court in a case called Swain

v. Alabama¹ declared that there could be no limitations whatever on the right of attorneys to peremptorily challenge prospective jurors. As a trial judge, I had seen many cases involving a black defendant, and there would be a white victim, and a white prosecutor, and a white judge. A black man would be put in the jury box, and the prosecutor would immediately challenge him, solely on the basis of his race. I always thought that was terribly wrong, but I couldn't do anything about it, in view of the Swain v. Alabama opinion.

When I was on the supreme court, we had a case called People v. Wheeler,² and I was able to write an opinion saying, "Sorry, we disagree with Swain v. Alabama, and under state law, we hold that you cannot limit peremptory challenges unless they are being used for a racially discriminatory purpose." And we described the procedure the court was to undertake under those circumstances. So the challenging of jurors because of their race, or sex, or ethnicity, was no longer permitted.

Seven years later, the United States Supreme Court came around to our point of view in a case called Batson v. Kentucky,³ and they agreed that race could not be the reason for challenging a prospective juror. Taking the lead in an issue of that sort is gratifying.

LaBERGE: How did you have the courage to do that? I mean, not knowing that seven years down the road . . .

MOSK: Well, we relied on state law, the state constitution, that prohibited discrimination. We felt that should take precedence. And a majority of the court agreed with my view on that. We used to say, "With four votes, we can do anything."
[Laughter]

LaBERGE: Before you were a member of the state supreme court, had you thought about the states' rights very much, or was it something that kind of developed?

1. 380 U.S. 202 (1965).

2. 22 Cal. 3d 258 (1978).

3. 476 U.S. 79 (1986).

MOSK: I guess it developed, because until I was on the court, I didn't have an opportunity to make state law prevail over conflicting views of federal courts or other states' laws.

LaBERGE: How do you keep up on what the federal laws are, what other states' laws are?

MOSK: We get at least a synopsis of federal opinions regularly.

LaBERGE: When you were talking about meeting with other groups throughout the nation, what kinds of groups?

MOSK: When I was attorney general, there was a very active national association of attorneys general. The fifty of us would meet periodically, usually in very nice resorts in the country. And similarly, on the supreme court, there are constant seminars arranged by various judicial and professional groups. So it's fairly easy to keep up with trends and opinions of other jurisdictions.

LaBERGE: And is there some group that's just other supreme court justices?

MOSK: Yes, there is a national association of supreme court justices. They meet at various places around the country. Then there's still a group of former supreme court justices who have organized. Let's see, they're going to have a meeting this summer up in Mackinac Island, Michigan. That's an association of former attorneys general.

LaBERGE: OK. So you qualify for that one.

MOSK: That's right. Frank Kelly is the attorney general in Michigan, and he's retiring this year, and he's hosting that conference.

LaBERGE: I see, so that's why it's there. There's actually a beautiful governor's mansion. . . . I mean, I don't think it still is the governor's mansion, but it was.

What about the ABA [American Bar Association]? Were you active in the ABA?

MOSK: Not particularly. I belong, but that's it.

LaBERGE: How about the case Serrano v. Priest?¹ The educational opportunities being unequal because of the different taxes paid by different cities.

1. 5 Cal. 3d 584 (1971).

MOSK: I'd have to brush up on that.

LaBERGE: OK. You did not write that opinion. I know we started to talk about this a little bit off tape, the Bakke¹ opinion.

MOSK: Yes. That opinion has always interested me. As you know, Bakke applied for admission to the medical school at Davis. As I recall, they took in 100 new students each year, but reserved sixteen of the 100 for minorities only. Bakke had better objective qualifications than any of those sixteen who were admitted, but he was rejected because of the fact they were taking in sixteen minorities.

He came to court, and we held three things. One, that Bakke had to be admitted; secondly, the racial quotas were bad; and thirdly, that race should not be deemed a factor at all in college admissions.

That case went up to the United States Supreme Court, and they--a majority--agreed with us on two of the three propositions. They agreed that Bakke had to be admitted, they agreed that quotas were unconscionable, but they did say race could be considered among other factors. Justice [Lewis] Powell wrote that opinion.² I was satisfied certainly with that result. But I must say--

[End Tape 3, Side B]

[Begin Tape 4, Side A]

LaBERGE: OK, for four years . . .

MOSK: For four years, I was scared to death that Bakke would flunk out of medical school and make our opinion look bad. But he graduated with honors. He won an internship at the Mayo Clinic in Rochester, Minnesota, and as far as I know, he's practicing medicine in Minnesota today. But it gives one a certain satisfaction at helping to create a medical doctor.

But of course, the Bakke opinion is not without controversy. There are those who believe that there should be racial quotas. There are those who think that

1. Bakke v. Regents of the University of California, 18 Cal. 3d 34 (1976).

2. 438 U.S. 265 (1978).

race should be a factor in determining college admissions. I respect those who have that point of view, but I don't share it.

LaBERGE: From the beginning, how did the vote go among the seven of you, deciding how you were going to decide, and then how did you get assigned that opinion?

MOSK: There wasn't any question but that it was an important enough matter for the court to take over, and I think everyone agreed on that. When it came to deciding the case, Justice Tobriner took a contrary point of view. He favored the racial factor in college admissions. I remember in our discussions, Chief Justice Donald Wright expressed himself. He said that his heart was with Tobriner but his head was with me. So it was, as I recall, a six-to-one opinion.

LaBERGE: And how did you come to that decision? Because I'm sure people would have expected you to vote the other way. Have you been told that?

MOSK: Yes, perhaps so, but I firmly believe that people should be judged solely on merit, objective merit, rather than their race or their color. So it seemed to me that it was improper to reject Bakke in favor of persons who had less objective qualifications merely because of their racial complexion.

LaBERGE: In deciding that, did you realize you were breaking new ground?

MOSK: Yes, we did recognize it was a significant matter of considerable controversy, of course. We wrote the opinion using many federal authorities with the firm expectation that the case would go up to the United States Supreme Court, and if they said we were wrong, so be it. But we thought it was important enough that there be a national consensus on this, rather than just a California point of view.

LaBERGE: When it went to the U.S. Supreme Court, did you go sit in?

MOSK: No. But we followed it very closely, of course.

LaBERGE: I don't know if you can comment on this, but since then, in the developments in affirmative action and the passage of Prop. 209,¹ have your views stayed the same, or how have you reacted to that? I don't know if that's all right for you to comment on that.

1. Proposition 209 (November 1996).

MOSK: Yes. In general, I believe my views are pretty much the same. But I do have a gnawing sympathy for those who were disadvantaged because of race or color or economics, so that they cannot compete on a basis of equality with others. I've always seen the long-range solution to be roughly this: that those who have a disadvantage of any kind, whether it's race or economics or physical, ought to be given some special treatment during their early days of education in the public schools, so that when the competition begins later on for college admission, for professional school admission, or for employment, that they will be able to compete on a basis of equality. But I concede that it's going to take some special training for many of those people in the early days of public schools, and I don't think we're doing that today.

LaBERGE: How are we doing time-wise, and are you tired?

MOSK: No. Want to go about ten minutes more?

LaBERGE: Sure.

[Discussion deleted]

LaBERGE: Anything more on Bakke? Are there any anecdotes?

MOSK: No. Of course, I never met [Allan] Bakke; I don't meet litigants. But at a dinner on my twenty-fifth year anniversary as a member of the court, he did send a telegram from Minnesota commending me.

LaBERGE: He probably follows you just the way you follow him. [Laughter] Some other issues that came up during Chief Justice Wright's time as chief justice. One was lawyer advertising. Now it seems like, Oh, that's such an old issue, but at the time, it was so new.

MOSK: Yes, that was a difficult issue.

LaBERGE: One of your decisions, was it Jacoby v. State Bar?¹ I think that was just like the beginning, the tip of the iceberg.

MOSK: Yes. I'm not sure that we were right, but I think the general view of the court has been that advertising is a First Amendment right, free speech right, and that it

1. 19 Cal. 3d 359 (1977).

can't be denied to lawyers any more than it can be denied to any other citizens. Having said that, however, I think it has demeaned the profession a good deal. I saw an ad the other day in the San Francisco Chronicle of a lawyer calling himself a shark, and he had a picture of a shark in his ad. Well, that, I think, cheapens lawyering as a profession. And yet, it's one's First Amendment right to speak ill of himself if he chooses to do so.

LaBERGE: Then the same thing with other professions too.

MOSK: Yes.

LaBERGE: Because I remember when all of that was taboo. Doctors and dentists.

Now, I have written down that you were at one time, 1973, chairman of the National Center for State Courts, when there was a review of the state appellate court system. Do you remember doing any of that kind of administrative . . . ?

MOSK: I guess I did my share of it, but I really don't like it.

LaBERGE: Everyone sort of has to do their share, is that the idea?

MOSK: That's the idea. But I'm not big on administrative matters.

LaBERGE: What about Chief Justice Wright? How was he as an administrator?

MOSK: He was very good. He got along with everyone. If I'd call his office and say, "I'd like to see the chief for a few minutes." Within a few minutes, he'd be down in my office saying, "What's on your mind?" He was just a delight to work with.

LaBERGE: How does that work in between your regular conferences when you all meet? What's the collegiality like? Do you call each other and wander on down?

MOSK: It depends on the chief justice. That was true of Wright, and it's currently true of Chief Justice Ron George. I must say when Rose Bird was the chief justice, though she was a very intelligent woman, but as administrator, I have to say she was somewhat of a disaster. I'd have to have an appointment to see her to discuss a case or a problem. Her door was always locked.

LaBERGE: Not just closed, but locked?

MOSK: Closed and locked. And I don't think she liked the administrative aspects of being chief justice. I wouldn't have liked it, frankly. I want to do my work, and I really don't want to be prescribing rules for the court and that sort of thing.

LaBERGE: And what about [Chief Justice] Malcolm Lucas?

MOSK: He's a very charming man, and was a good chief justice, let's say as distinguished from a great chief justice.

LaBERGE: OK. Another case, and it was after the ALRB [Agricultural Labor Relations Board] was established, that you wrote the opinion upholding access for union organizers on the growers' property.¹

MOSK: Yes, I vaguely remember the case, without remembering details, but it involved the ability of organized labor to organize, and to have access to potential members of the organization. In effect, we said yes, they could have such access.

LaBERGE: Because there was another case that was decided otherwise, except you dissented. I don't have it at my fingertips, but it was a private shopping center, and whether initiative backers could obtain signatures.

MOSK: Yes. No, I wrote the majority opinion there. It was a question of whether persons could go on a privately-owned shopping center to obtain signatures on petitions. Our court held yes, they could. But interestingly enough, the United States Supreme Court in a case coming out of Oregon held that the property owners had a right to exclude those who were there for purposes other than to shop. In other words, they approved the owners' philosophy, which was "shut up and shop." [Laughter]

We held in another case later on, after the Oregon case went the other way, we held nevertheless that the petition seekers had a right to go on private property shopping center, so long as they weren't interfering with the shopping, and I must say that the United States Supreme Court took over that case from us, and we were apprehensive that that was the end of our point of view. Amazingly, they held, with Chief Justice [William] Rehnquist writing the opinion, in a nine-to-nothing opinion, that OK, if states want to have different provisions than we've ordered in the Oregon case, so be it, that's their right. They upheld our opinion.

LaBERGE: Do you remember the name of that case, by any chance?

1. ALRB v. Superior Court, 16 Cal. 3d 392 (1976).

MOSK: Justice Frank Newman wrote the second opinion, I know.

LaBERGE: Oh, is it Pruneyard?¹

MOSK: Yes, it's Pruneyard. Pruneyard was the case. That was the second one.

LaBERGE: OK. I didn't realize he'd written it. OK, this is another important case of yours: Friends of Mammoth?² And the first interpretation of the [California] Environmental Quality Act. Do you remember that?

MOSK: I remember that we upheld the act. Apparently, it's been received with some enthusiasm.

LaBERGE: Yes, by environmentalists.

MOSK: By environmentalists. As a matter of fact, they recently held a conference in Yosemite and invited me to come down and receive their applause, but I wasn't able to make it.

LaBERGE: On all of these, the cases just run the gamut of subjects. Is that difficult for you to . . . ?

MOSK: Well, I guess as a member of the court, we're expected to be experts on absolutely everything.

LaBERGE: Is that a good place to stop? Next time we can start with the Rose Bird court.

MOSK: OK.

LaBERGE: Unless we have forgotten something that you think of.

MOSK: Oh, I'm sure we have. If we've forgotten it, I can't think of it.

[End of Session]

1. Pruneyard Shopping Center v. Robins, 23 Cal. 3d 899 (1979); affirmed 447 U.S. 74 (1980).

2. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247 (1972).

[Session 3, April 2, 1998]

[Begin Tape 5, Side A]

LaBERGE: We ended with when Chief Justice Donald Wright stepped down. We had talked a little bit about the independent state grounds theory. Since that time, I've talked to a couple of law professors, simply because this is going to be used for research, so I wanted to see what questions they had. One was, did you have relationships with other justices throughout the country where you would discuss theories like this that would help you develop that kind of a theory?

MOSK: Yes, there were a number of justices, and a few college professors, who were advocates of a states' rights theory, that is, the right of state courts to interpret their own constitutions. We did meet irregularly at national conferences and discuss the issue. I have in mind one particular justice who was a leader in that thought movement, and that was Justice Hans Linde of the Supreme Court of Oregon.

LaBERGE: Had he ruled on this before you did, or concurrently?

MOSK: Yes, he was way ahead of the pack. I think he had a good influence on many other justices.

LaBERGE: Other justices on the California Supreme Court, or. . . ?

MOSK: Well, on supreme courts generally. There were several supreme courts that seemed to take the lead in this movement. New Jersey, for example. Massachusetts. Oregon, and to some extent Washington, and California.

LaBERGE: So how carefully do you watch what other courts are doing?

MOSK: I watch that irregularly, but I like to be aware of what the trends were in other parts of the country, and to see how they could be adapted to what we were doing in particular cases in California.

LaBERGE: What about [United States Supreme Court] Justice William Brennan?

MOSK: Yes, Brennan, of course, was strongly in favor of states interpreting their own constitutions, even when they might be in conflict with a decision of the United States Supreme Court. There was one case that went up to the U.S. Supreme Court. It involved distribution of handbills and circulation of petitions on a privately-owned shopping center. In a case called Diamond v. Bland,¹ we held that in the conflict between the free speech and free circulation rights of citizens, and the right of a property owner to exclude persons who were not on his premises for shopping purposes, we held in that conflict the rights of those seeking signatures on petitions would prevail, provided, of course, they were not disturbing the shopping that was going on in the shopping center.

After we held for the petition circulators in that case, there was a petition or certiorari to the United States Supreme Court, and they denied it. So we felt that our interpretation of that constitutional conflict was correct. But lo and behold, at the next session of the U.S. Supreme Court, a case came out of Oregon entitled Lyod v. Tanner, but there they held to the contrary, that the property owner had a right to exclude persons who were not there for business purposes. In other words, the owners' slogan was, "Shut up and shop."

LaBERGE: So they granted certiorari, and they actually ruled on it?

MOSK: No, they did not grant cert in the California case.

LaBERGE: Not the California case, but in the Oregon case?

MOSK: In the Oregon case. A few years passed, and we had another case involving precisely the same issue. We held in that case that once again, the rights of the circulators of petitions and their free speech rights prevailed over the business rights of the shopping center owner.

That case went up to the Supreme Court, and lo and behold, in a nine-to-nothing opinion written by Chief Justice Rehnquist, he held, well, if a state wants

1. 11 Cal. 3d 331 (1974).

to act this way, it has a perfect right to do so under its own constitution. So we felt that was a complete vindication of the exercise of states' rights.

LaBERGE: Do you think you had anything to do with changing the minds of others on your court in that direction?

MOSK: No, I don't think so. They acted independently. As I recall, there were a couple of dissenters on that issue. Justice [Frank] Richardson frequently dissented on the issue, and I think Justice Bill Clark did as well. But the others all generally agreed with that proposition.

LaBERGE: When it comes down to an issue that is in both the state constitution and the federal Constitution, how do you decide?

MOSK: Justice Hans Linde always had a theory that you decided a case by looking first at the state law, second at the state constitution, and only third and lastly, if necessary, the U.S. Constitution. But if he could decide it on the first two issues, he would do so.

I have in mind the use of peremptory challenges to prospective jurors.

LaBERGE: And I have that written down: People v. Wheeler?¹

MOSK: Yes. The United States Supreme Court had decided some years back in a case called Swain v. Alabama that there could be no restrictions whatever on the right of an attorney to exercise peremptory challenges to prospective jurors. I had been a trial court [lawyer] for many years and tried many criminal cases, and on occasions there would be a case with a black defendant and a white prosecutor, and white witnesses, and white victims, and then whenever a black person would be put in the jury box, the prosecutor would immediately challenge that black juror on just a peremptory challenge. And it always occurred to me that this black defendant would not feel that he was getting a fair trial when persons of his race were excluded from the fact-finding process, but I couldn't do anything about it because of the Swain v. Alabama case.

1. 22 C. 3d 258 (1978).

When I got on the supreme court, we had a case called Wheeler, and there we had an opportunity to hold that there could not be restrictions on peremptory challenges provided they were not being used for a racially discriminatory purpose. And we outlined the procedure to be followed by a trial court in determining whether the challenge was for a racially discriminatory purpose. And in the Wheeler case, we very specifically said that we were not going to follow Swain v. Alabama. We were rather brutally frank about that.

Passage of time, I think it was five or seven years thereafter, the United States Supreme Court came around to our point of view in a case called Batson v. Kentucky, and they distinctly held that you couldn't exercise challenges, peremptory or any other kind, for a racially discriminatory purpose.

So that's an example of how state law can take a lead in protecting individual rights.

LaBERGE: Any recent cases like that?

MOSK: No, and there are not likely to be very many, in view of the fact that the people in their wisdom passed an amendment to the state constitution which declares that the state constitution is to be interpreted in accord with the federal constitution.

LaBERGE: Are you saying that tongue in cheek? [Laughter]

MOSK: I'm saying that I think that was an unfortunate amendment.

LaBERGE: Because we're on that topic, this must have been passed through initiative?

MOSK: Yes.

LaBERGE: I'd like to hear your views on the initiative process.

MOSK: Well, now, I said that too fast. It may have been passed by the legislature and placed on the ballot by the legislature. But it was voted on by the people.

LaBERGE: And I'm embarrassed to say that I forgot that I voted on that. I know that you have various views on the initiative process.

MOSK: Yes. The initiative was a great theory when [Governor] Hiram Johnson put it forth many years ago. The idea of letting the people legislate is excellent in theory. But I'm not sure that it is working well in a state the size of California. After all, we're the most populous state in the nation, and therefore, it takes

tremendous resources to qualify an initiative measure and then to persuade the people to vote for it after it has qualified. And so today, most initiatives, at least of controversial nature, are proposed by persons and/or organizations and/or economic interests by those who have tremendous resources.

And too, I find that it's not uncommon for an initiative measure to have a simple error in it that was not discovered. After all, in the legislative process, a matter goes before a legislative committee in the assembly, and if it's passed it goes on the floor of the assembly where it's debated, and if passed it goes to a committee in the senate where it's debated, and then it goes on the floor of the senate where it's debated, and then it goes to the governor who has a veto power. Now, in that lengthy process, any bugs or flaws or inconsistencies or unconstitutional aspects are discovered.

Whereas, you and I can sit down at a typewriter this afternoon and peck out an initiative measure, and give it a seductive title like "For lower taxes and better government," and we'll get all the signatures we need, and we can get it on the ballot. It may have some serious flaws in it.

There was a case a few years ago, and I can't possibly remember the name, where we had to interpret "and" to really mean "or" in order to make an initiative measure valid.

LaBERGE: Was it the Victims' Bill of Rights?¹ I remember reading about that.

MOSK: I have no recollection of . . .

We had to interpret "and" to mean "or." Now, that kind of an error would have been discovered in the legislative process in all those committee hearings and floor debates. But whoever drafted that measure did it without necessarily consulting anyone else.

So in short, I think legislative proposals are more likely to be practical and workable, and valid constitutionally, than are initiative measures.

1. Proposition 8 (June 1982). See also Justice Mosk's concurring opinion in People v. Skinner interpreting Proposition 8.

- LaBERGE: How much time would you say you have spent having to decide on the constitutionality of an initiative?
- MOSK: After every election, when a dozen or more initiatives are passed, there are bound to be some challenges to them. I can't describe them in terms of percentages.
- LaBERGE: I know Proposition 13 was one in 1978.
- MOSK: Yes.
- LaBERGE: Shall we turn to the Rose Bird court? What was your reaction when she was appointed both to the court and chief justice?
- MOSK: Rose Bird is a very bright, intelligent, competent woman, but that does not necessarily equip her to be administrative and legal head of the entire judiciary of California. So there were problems. I remember, I don't know whether I ought to tell this or not, but one of the first days that . . .
- LaBERGE: You could look at it later.
- MOSK: OK. One of the first days that she was on the court, I was in talking with her, and I remember vividly what I said. I said, "I certainly cannot blame you for being here, but I blame [Governor Edmund G., Jr.] Jerry Brown for putting you here." She never let me forget that statement. [Laughter]
- I'm afraid it was inevitable that there would be administrative problems, and as a result of those, public controversies during her administration. She would have made a fine judge or justice on any court, and it was a pity that the governor didn't evaluate her capabilities more carefully.
- LaBERGE: Did you talk to the governor about this, or did he ever consult you?
- MOSK: No, he never did. I heard indirectly, I think from a good state senator who was a friend of mine, that the governor said that. . . . Oh, the state senator spoke to the governor and suggested that I might be an appropriate chief justice, and he was quoted as saying, "I could never appoint Justice Mosk because of the Bakke case."
- LaBERGE: Oh. I was reading Justice [Allen] Broussard's oral history this week, and he was commenting on his confirmation procedure, and George Deukmejian before he was governor asking questions like, "Are you going to be a judicial activist?"

And just that idea that you and I talked about before, of how do you appoint a justice? Do you appoint on philosophy, or how do you confirm someone, or how do the electors vote? That's very interesting.

Well, when Justice Bird took her position, what were the visible changes on the court, or the way it was administered?

MOSK: She was somewhat aloof from her colleagues. We generally had to have an appointment to see her to discuss a pending case or matter. Whereas in previous and subsequent administrations, members of the court can just wander in and out of each other's offices. I never close my door to my office, and I don't have to have an appointment to see my colleagues to talk about a matter. So she had this administrative problem that made it difficult for smooth operation of the court.

LaBERGE: And what about your staffs? Are the staffs segregated in the sense that you have your staff or does everybody kind of work together?

MOSK: No, each of us has a staff of his or her own lawyers. We each have five who belong to me and work with me. But there again, they do mix around with others and talk about mutual problems, and sometimes try to persuade the staff of another justice of a position that they're assuming. I think I am fortunate in having what I think is the best staff of the court. My senior staff member has been with me all thirty-three years I've been on the court.

LaBERGE: This is Peter?

MOSK: Peter Belton. Unfortunately, he's a paraplegic, or else he'd be out making a fortune in private practice.

LaBERGE: When Rose Bird became chief justice, was there a change in the way the staffs interacted, do you think?

MOSK: Probably so, but I don't know that I can describe it.

LaBERGE: I know that the administrator for the courts left, Ralph Kleps. And that that was unusual.

MOSK: Yes, he had been with the court for many years, and I think was generally considered the best court administrator in the country.

LaBERGE: How much dealings do you have with the court administrator? Or is it mainly the chief justice?

MOSK: Yes, it's mainly the chief justice, but on the other hand, if I needed a new chair or a new desk, some blinds to keep the sun out of the office, I would call the court administrator and he would take care of it.

LaBERGE: But for the most part, it doesn't really impact you who the person is?

MOSK: That's right.

LaBERGE: At the same time that Rose Bird was appointed, Wiley Manuel also, and Frank Newman? Or just a little bit later?

MOSK: I don't recall the order in which they were appointed, but they were two splendid members of the court. Wiley Manuel was outstanding, I think. Frank Newman was a very bright man, but his interests were primarily international, and I think he never did fully adapt to a state court. He liked running over to Geneva or to The Hague for some international conference, and he no longer could do that.

LaBERGE: You once said that you didn't really like administration. But do you think you would have liked being the chief justice?

MOSK: I don't think I would have liked it, because of the requirement that you be effective as an administrator. I had to do a certain amount of that when I was attorney general, and frankly, I don't think I'm really equipped to decide who can work with whom, and if they don't get along, how to adjust that. So I was really happy that I no longer had to do that when I left the attorney general's office and became an associate justice.

LaBERGE: Well, during that time, there were a lot of death penalty cases, and then the 1978 election and the Los Angeles Times article¹ after that, and then the hearings.² I've

1. "Supreme Court Decision to Reverse Gun Law Reported," Los Angeles Times, 7 November 1978.

2. In the Matter of Commission Proceedings Concerning the Seven Justices of the Supreme Court of California, C.J.P. No. 3012 (1979).

read a little bit, but I would like to hear what your take on all of that is. I guess first of all with the Tanner¹ decision.

MOSK: Rose Bird was pilloried because she generally voted to find some defect in death penalty convictions and to reverse them. I probably don't like the death penalty any more than she does. As a matter of fact, I think the death penalty is wrong, that a person has no right to kill, and the state has no right to kill. But the difference is that I took an oath to support the law as it is and not as I might prefer it to be, and therefore, I've written my share of opinions upholding capital judgments.

But that became an issue in . . .

LaBERGE: Was one of the reasons it was an issue because of the death penalty initiative, and it being fuzzy, or the fact that it hadn't been tested?

MOSK: Well, it's inevitable that death penalty judgments would be an issue. Tremendous resources go into the trial of a capital case, and then a . . .

[End Tape 5, Side A]

[Begin Tape 5, Side B]

LaBERGE: You were saying that tremendous resources and time and effort go into a capital case.

MOSK: So that if the case is reversed, inevitably there will be great disappointment among prosecutors and the public. So that it was inevitable that would become an issue in the retention campaigns of Rose Bird and others.

LaBERGE: Can we talk a little bit about the Commission on Judicial Performance investigation after the 1978 elections? I know that Rose Bird asked for it and didn't ask the rest of you whether you also agreed with that. How did you feel about that?

MOSK: Yes, that's true, but I really don't recall what the issues were or how . . .

1. People v. Tanner, 24 Cal. 3d 514 (1979).

LaBERGE: Well, it was after the Los Angeles Times article came out on election day, accusing the court of holding back one of the decisions until the election was over, because Rose Bird was up for confirmation.

MOSK: Yes.

LaBERGE: And so the question was, was there any impropriety? She asked for an investigation of the court so that the court's name could be cleared. And you were all asked to testify in public.

MOSK: A couple of my colleagues testified in public, and I insisted that the proceedings had to be private. I indicated I would not testify unless I did so in private. That case went all the way up to the supreme court.¹ And my son represented me. Every supreme court justice, of course, disqualified himself, so that it was a supreme court consisting of seven court of appeal justices who heard the case, and they unanimously agreed with me. So the proceedings did become private. Once they were private, they seemed to come to a quick end.

LaBERGE: And it was found there was no impropriety in the court's actions?

MOSK: That's correct.

LaBERGE: In one of those cases, and particularly the Tanner case, it came up for a rehearing and you changed your vote. Do you recall that, or why you changed your vote?

MOSK: I recall the vote, but I frankly don't recall the rationale at the moment.

LaBERGE: It had to do with the trial judge's discretion whether to grant probation or not.

MOSK: I really can't discuss that without reviewing it.

LaBERGE: Do you remember another case that you're famous for, Hawkins v. Superior Court,² requiring the use of preliminary hearings after a grand jury indictment?

MOSK: I remember the case, and I ruled, but I don't remember any details.

LaBERGE: Well, tell me about your son representing you. How did you decide to ask your son to represent you?

1. Mosk v. Superior Court, 25 C. 3d 474 (1979).

2. 22 C. 3d 584 (1978).

MOSK: Well, he volunteered to do it. He's a good lawyer and a member of a substantial law firm in Los Angeles, and he was willing to undertake the cause. He since has gone on to a substantial career. He's a judge in the Iran-United States Claims Tribunal which sits over in Holland. He's also chairman of the board that rates motion pictures. And he's a member of a substantial law firm at the same time. So in short, I had good representation.

LaBERGE: Have you read any of the books that were written about the court, like Preble Stoltz'?¹

MOSK: Yes, I know Preble Stoltz very well from my days as attorney general. I thought he did a commendable job.

LaBERGE: Because one of the things he says in there is that after this investigation of the court that. . . . Or that it was a sad day for the court, that the court lost some of its, not respectability, but . . .

MOSK: Luster.

LaBERGE: I guess so. And I just wondered how you felt about that, if you thought the same.

MOSK: Yes, to some extent I think that's accurate. For the court to be embroiled in a controversy publicly was unfortunate. We do have our conflicts of course, and disagreements, but they're all among ourselves and they don't see the light of day, fortunately.

LaBERGE: Another person who wrote is Joseph Grodin, wrote an autobiography after he was off the court. Did you read that one?²

MOSK: Yes, I read his book. I thought it was a good book.

LaBERGE: That comes to the other election, and that's the 1986 election, when Rose Bird, Joseph Grodin, and Cruz Reynoso were not elected to another term, but you were. What's your opinion of those retention elections? Are they too political?

1. Preble Stolz, Judging Judges (New York: The Free Press, 1981).

2. Joseph R. Grodin, In Pursuit of Justice. Reflections of a State Supreme Court Justice (Berkeley: University of California Press, 1989).

MOSK: They may be political on occasion, and to a large extent they were that year, in '86. But I think our system is a pretty good one. It's sort of a compromise between the system of choosing and retaining and electing judges in states like Illinois, where they run with party labels, named opponents, and for reasonably short terms. I think that's an unfortunate method. And the other, to the contrary, is the federal system, where judges are appointed for life, never have to answer to the public.

Well, I think our system, where we have reasonably long terms, twelve-year terms, and where we don't have a political designation opposite the name, you don't know whether the judge is a Republican or a Democrat, and where we don't have a named opponent, it's just a yes or no vote. That gives the public a chance to reject a judge who may have become senile, or an alcoholic, or have some other serious disability, and yet, he doesn't have to appeal to political partisanship. So I think our compromise between the two possible methods is a pretty good one.

LaBERGE: You didn't get involved in a campaign at all that year, and you weren't targeted. Why not, do you think? Because you had voted somewhat like the rest of them, if that was the reason they weren't kept.

MOSK: Yes, an analysis of my record would not be greatly disparate from those other three. But to be somewhat immodest, I might suggest that I used a little political acumen in that first of all, I didn't announce that I would seek retention until the very last possible day, and by then, the campaigns against the other three had already been pretty well organized, so that I was not then included.

In addition, I made a public announcement that I would not seek nor accept any campaign contributions, that my only expenditure would be twenty-six cents to purchase a stamp to mail my petition to Sacramento. That got me more attention in the press than if I had hired a P.R. man to work for me. Those two rather simple events, I think, distinguished me somewhat from the others who were busy raising campaign funds and out campaigning.

- LaBERGE: Either of those happenings, the fact that they were not retained, or the commission's investigation of the court, what kind of a reaction and effect do you think it had on the way you worked together?
- MOSK: I don't think it had any effect on the way we worked together. Certainly Joe Grodin and Cruz Reynoso and other members of the court, including myself, were always compatible. We worked together, produced our work in cooperation.
- LaBERGE: And the same thing in '79, after the Commission on Judicial Performance took testimony from all of you, and I know there were disagreements in the testimony. Or people's feelings could have been hurt by what was said. I just wondered how you were able then to, even during that time, meet and . . .
- MOSK: You mean before the new appointees were . . . ?
- LaBERGE: Yes.
- MOSK: I don't recall any serious problems.
- LaBERGE: You were able to leave things at the door when you come in.
- MOSK: Yes. I think we were all very fond of Joe Grodin and Cruz Reynoso, and Cruz is a delightful person on a personal basis. I don't think he bears animosity toward any human being.
- LaBERGE: I'm hoping that we'll get to interview him too.
- Well, I read a little piece where Bernard Witkin called the Jerry Brown court, " the highest point of judicial activism." Would you agree with that?
- MOSK: No, I don't really understand the use of the term "activism." I know it's employed today in connection with federal appointments by President [William J.] Clinton. I think a judge is either competent or incompetent professionally, and I don't think it's possible to determine when a judge is an activist and when he isn't.
- LaBERGE: You just decide the cases on the individual basis.
- MOSK: That's right.
- LaBERGE: Were you surprised that the three were not confirmed?
- MOSK: Yes, I was. I didn't think the rejection campaign would prevail.

LaBERGE: A couple of cases that occurred during that time. One was Sindell v. Abbott Labs.¹ It had to do with DES and market share liability. Do you recall that one?

MOSK: Yes, indeed, I do. That was the first case in the country, I believe, that established a market share liability. It was an interesting factual situation. These women plaintiffs were ill because of something their mothers had taken in the way of a pharmaceutical product. Now, they couldn't establish precisely which company manufactured the product that was taken, the DES. But if they could establish that all the companies involved manufactured the identical product the very same way, then we said each one could be responsible for its market share. If they produced 5 percent of the DES that was sold in California at that time, then they should be liable for 5 percent of the damages.

Now, interestingly enough, I got the idea for the market share theory from a law review article written in the Fordham Law Review by a law student.

LaBERGE: And how did it even come to your attention?

MOSK: Good research. [Laughter]

LaBERGE: Good answer. So do you recall more about the law review?

MOSK: No, but the law review article had suggested the market share theory of liability, and I thought it made sense. I was able to persuade a majority of the court, although I didn't get everybody, and Sindell was an opinion that I am rather pleased with.

LaBERGE: Later, I guess eight years later, there was another DES case, Brown v. Superior Court.² Do you remember that one?

MOSK: I don't. I think within the last few years, a couple of other states have adopted that market share liability theory. I forgot whether it was New Jersey or New York in particular.

LaBERGE: Now, when an opinion like that comes out, and it's something new, do you get reactions from other people across the nation?

1. Sindell v. Abbott Laboratories, 26 C. 3d 588 (1980).

2. 44 C. 3d 1049 (1988).

MOSK: Not particularly. I don't personally. The court gets editorial comment, and some praise and some criticism.

LaBERGE: But say, for instance, you mentioned Hans Linde. He wouldn't call you up and say, "Hey, how did you come to that?" or you'd have a conversation about it?

MOSK: No.

LaBERGE: In other cases, are there law review articles or just conversations with other people that affect you and how you're going to decide?

MOSK: No, not isolated conversations, but something in print may have an influence on one.

LaBERGE: Can you think of any examples?

MOSK: Not offhand.

LaBERGE: And what about lawyers' oral arguments? Are some more persuasive that they could make you look at an issue in a different way?

MOSK: In a small percentage of the cases, yes. Generally, members of the court have their minds fairly well made up prior to oral argument. They may be persuaded to make some minor changes, to add or eliminate a particular point of view or aspect of the case, but it would be a small percentage of the cases where the members of the court have their minds completely changed by the oral argument. Now, that doesn't mean we should not have oral argument. I think it's very important, particularly for the clients to know that their attorney is having an opportunity to present their point of view in public and to a tribunal. But its effectiveness is definitely limited.

LaBERGE: And you don't think you're alone in thinking that?

MOSK: No.

LaBERGE: I mentioned Proposition 13. There was a case brought after that, Amador Valley,¹ on whether that initiative was constitutional. We didn't talk about that, whether an initiative has more than one subject.

1. Amador Valley Joint Union High School District et al. v. State Board of Equalization et al., 22 C. 3d 208 (1978).

MOSK: That's a concept that's generally ignored, sad to say. The theory of the initiative was that a single subject would be prepared and presented to the voters. Unfortunately, those who draft initiatives have a tendency to put in several aspects, as many as they think they can get away with. That makes it difficult for a voter who wants to intelligently analyze the proposition. He may be for three-fourths of it but find one-fourth of it objectionable. Under those circumstances, does he vote yes or no? It's difficult for him to decide.

So I think the one-subject rule is very important to maintain.

LaBERGE: When we were talking about the death penalty and reviewing those cases, which you're always doing, what are the errors that can come up during review?

MOSK: That's a difficult matter to analyze. It's inevitable that in a long trial, and death penalty cases do take a long time to try, that there will be mistakes made, by the prosecutor, or by incompetence of defense counsel, or by the judge. The question we have to answer on appeal is, Did that mistake or those mistakes affect the result? Generally, we will find that an error made was harmless, in that it really didn't affect the result. In other words, the defendant would have been convicted anyway if the mistake had not been made.

So the tendency of the court is to affirm death penalty judgments, indeed all criminal judgments, despite some errors that were made in the trial, if they were not crucial, and if we can find that the errors were harmless overall.

LaBERGE: Was there a change when Malcolm Lucas became chief justice and the composition of the court changed?

MOSK: Yes. Yes, there was a significant change, and statistics bear that out, from the Rose Bird days, when many death penalty judgments were reversed, and the Lucas court, in which death penalty judgments were affirmed. I don't have statistics at hand, but I believe about 90 percent or more have been affirmed. And that's been true ever since.

LaBERGE: What is your opinion of depublication of the court of appeal cases?

MOSK: I believe it's necessary to have that right. A matter may be heard by the court of appeal and a decision prepared. When it comes up to us on a petition for

hearing, we may find that there is some illogical point made in the opinion, that it may mislead others in the future, but the bottom-line result is correct.

Theoretically, we could take the case over, and that means having oral argument, writing an opinion, circulating it, so forth, to reach the same bottom-line result that the court of appeal reached, but without the errors in its rationale. So it seems to be useful from a practical point of view to leave the result of the court of appeal opinion, but just write the opinion off the books, so that the mistakes or the errors in it can't be cited in the future. But I think it's a necessary right. But I can understand a court of appeal justice who put his heart and soul into writing an opinion, and then has it just wiped off the books. He's not happy about it, and I can understand that.

LaBERGE: Do other states do it the same way?

MOSK: I don't think so. I think we're rather unique in that.

[End Tape 5, Side B]

[End of Session]

[Session 4, May 27, 1998]

[Begin Tape 6, Side A]

MOSK: Well, it's good to see you again. Thanks for coming over and coming up to my chambers.

LaBERGE: My pleasure. I thought we would start with one of the cases that Olga Murray mentioned. On the video at the Alumnae Resources luncheon,¹ there were three cases that she mentioned, and we've talked about two of them. One was Bakke, and one was Sindell v. Abbott Laboratories. But the one we haven't covered is City of Berkeley v. Superior Court.²

MOSK: That involved a matter of conservation of water and access to water by citizens. I don't recall the details of it at the moment, but it did set a pattern for other cases involving communities on the ocean or other bodies of water.

LaBERGE: And I think the public access maybe . . .

MOSK: Yes, it insisted upon public access to bodies of water.

LaBERGE: I have lists of court cases, but then there are just subject matters, so I thought we'd just go with subject matters. And one is hypnosis. I know that you wrote at least one opinion about the effects of hypnosis, or whether testimony was allowed that had been taken under hypnosis.

1. Olga Murray, retired from Justice Mosk's staff of attorneys at the California Supreme Court, won the Women of Achievement, Vision, and Excellence Award at the Alumnae Resources luncheon on May 21, 1998.

2. 26 Cal. 3d 515 (1980).

MOSK: Yes, I'm not enthused about testimony that is obtained through hypnosis. It's artificial, and though there may be scientific bases for indicating the validity of such testimony, I remain doubtful.

LaBERGE: And so you would rule that way?

MOSK: I would rule it out, I think, as a whole.

LaBERGE: What is your opinion about electronic media in the courts, whether it's cameras. . . once you voted, I think, in the minority against having a camera in the courtroom. Or videos.

MOSK: Yes, that's a difficult problem, in that one feels like encouraging scientific developments of various kinds, whether it's in the field of photography or in taking down conversations as we are doing right now. But on the other hand, what I fear most is that having cameras in a courtroom will make actors out of witnesses, and out of lawyers who are appearing. I think it's inevitable that when a witness knows that he or she is being photographed, he or she will become extraordinarily careful in presentation, and perhaps even do a little bit of acting for the future.

So I would much prefer the proceedings to be conducted in a normal manner without cameras and other scientific devices.

LaBERGE: Are there cameras now when you hear oral argument?

MOSK: Sometimes yes and sometimes no. It depends upon a vote of the seven members of the court. I rather consistently vote no, but I've been outvoted by my colleagues from time to time.

LaBERGE: Does it have an effect on you and whether you ask questions or not?

MOSK: No, not really. I avoid becoming an actor for the camera. [Laughter]

LaBERGE: When we stopped the last time, we had sort of finished talking about the Rose Bird court, and so I thought we'd move on to the Malcolm Lucas court. One subject of several cases was the insurance industry, and one was, I don't know if you'll remember the name, Moradi Shalal v. Fireman's Fund [Insurance Co.]¹ that overruled one of your previous rulings, that injured third parties could no longer

1. 46 Cal. 3d 287 (1988).

sue the tortfeasor's insurance company for bad faith dealings, and it overruled Royal Globe Insurance [v. Superior Court].¹

MOSK: Yes. Well, whether that's progress or retrogression I suppose depends upon one's point of view. I think it was unfortunate that Royal Globe was not continued as the law of California, but I recognize that is a point of view and I respect my colleagues who may have disagreed with me.

LaBERGE: In other insurance cases, were you usually in the minority?

MOSK: I remember Chief Justice Roger Traynor used to say, "The purpose of insurance is to insure." And I always took that seriously.

LaBERGE: In general, not just during that time but for many years, fifteen years, you have been the only. . . . You've been a lonely dissenter, maybe after Justice Broussard left the court. How do you feel about that?

MOSK: Of course, I'm in favor of diversity on any tribunal, and particularly on a supreme court that helps make the law for the state of California. And so I think it's significant that one have an opportunity to express his point of view on what the law is or ought to be. Unfortunately, that matter of diversity seems to at this moment depend upon me. The other six members of the court all were appointed by Governors Deukmejian and Wilson, and quite naturally, and I don't criticize this at all, but quite understandably, they represent a point of view that is consistent with that of the governors who appointed them. I am, as the seventh member of the court, the only one who does not generally represent that point of view.

LaBERGE: One article I read, maybe a couple of years ago in California Lawyer, suggested that you and Justice [Joyce] Kennard were voting more closely together.²

MOSK: That is accurate in some respects, but not entirely so.

LaBERGE: How has the presence of more women on the court changed the atmosphere, if at all?

1. 23 Cal. 3d 880 (1979).

2. Philip Hager, "The Odd Couple," California Lawyer, September 1993.

MOSK: Not at all. I think it's encouraging that there are three members of the court who are women [Justices Janice Rogers Brown, Kathryn Mickle Werdegar, and Joyce Kennard]. As a matter of fact, recently, one male member of the court was disqualified from hearing a particular case, and the chief justice appointed another woman, so we had a majority on the court for that one case. Incidentally, there was one state, Minnesota, that had a majority of women on its supreme court for some time. Unfortunately perhaps, one of the female members passed away or retired and was succeeded by a man, so that no longer is true.

LaBERGE: How about the subject of separation of church and state?

MOSK: I feel very strongly about that issue, that the state should not do anything to harm or discourage religious activity, but it also should not do anything to encourage it. I think our founding fathers made it very clear that ours was to be a society in which religion did not control activities. By the same token, of course, the state should not discourage or put hurdles in the way of free religious activity. But the two must be entirely separate and distinct, one not controlling or even encouraging the other.

LaBERGE: I remember you telling me the story how you in your high school graduation, you were either the valedictorian or you led in the procession to "Onward Christian Soldiers."

MOSK: Yes. Yes, I remember that very vividly. And nowadays, parents would have filed a lawsuit, but my parents thought it was humorous and took it as a joke.

LaBERGE: Since then, you ruled that public high school graduations could not have religious invocations.¹

MOSK: That's correct.

LaBERGE: And the same thing, what about textbook loans to private schools?

MOSK: Oh, I don't think public textbooks should be available to private institutions, whether religious or secular.

1. Sands v. Morongo Unified School District, 53 Cal. 3d 863 (1992).

LaBERGE: Then there are others having to do with religion, cases where, if there's a Christian Scientist or a Jehovah's Witness that doesn't want their child [medically] treated, how do you approach that?

MOSK: That is one of the most difficult issues that we can possibly face. That is, where a child may be suffering from a very serious malady, and the parents, who do not believe in medical science or treatment, prevent the child from getting any help that might make its life more pleasant. I think courts under those circumstances, very limited circumstances, could decide what was in the best interest of the child, not the parents but the child, assuming the child is not of an age where it may make a decision for itself. If a child is, say, a teenager or old enough to make decisions on its own, and the child believes in the religious values of its parents and therefore declines medical help, I don't think society can force medical assistance on the child. But on the other hand, if the child is not old enough to make that kind of a decision itself, then I think society can decide for it.¹

LaBERGE: And how does that then translate to the parental consent for abortion?

MOSK: I don't think it's inconsistent with it, in that with parental consent required for abortions, we're allowing the parents to decide what is in their best interest and the best interest of an unborn child that obviously cannot make decisions on its own. [static on the tape here]

LaBERGE: I know you've ruled that way, and then I think two justices left the court and two new ones came in, so then it was overturned, is that right?

MOSK: Yes, that's accurate. The original decision was four-to-three in favor of the statutory parental consent law. But before the decision became final, Justices [Armand] Arabian and Chief Justice Lucas retired; two new justices were appointed, and both voted to grant a rehearing. On a rehearing, the vote was four-to-three the other way; that is, holding that the statute was unconstitutional.²

1. See Walker v. Superior Court 1988.

2. American Academy of Pediatrics v. Lungren, 1997 Cal. LEXIS (Cal. Aug. 5, 1997).

I found that difficult to decide. Were I a legislator, I might not have voted for that parental consent law. But the legislature in its legislative power voted for it, and I could not find anything unconstitutional in the passage of that bill.

LaBERGE: In a case like that where two justices leave, how does it even come up that there is going to be a rehearing? And then does that mean you have oral argument all over again?

MOSK: No, there is a statutory period before a decision of this court becomes final, and during that period, the losing party may seek a rehearing, and frequently does, I may add. But the court generally gives rather short shrift to petitions for rehearing because we feel we've given the matter adequate consideration before arriving at our determination. But this was a very unusual set of circumstances. As a matter of fact, I can't recall any previous case in which two justices in the majority retire before the opinion becomes final, and two new justices come in and vote for a rehearing.

LaBERGE: So was there then a new oral argument?

MOSK: No. They would just read the briefs and vote accordingly.

LaBERGE: On that issue of interpreting a statute or making legislation, what should the court be doing? Should the court be making the law, or should it be interpreting the law?

MOSK: We have to remember that we have three independent branches of government. The judicial branch is independent, but the legislative branch is also independent. It has a right to adopt whatever measures it deems to be in the public interest. The only thing that a judiciary can do is to ascertain whether that legislative act offends the constitution of either the state or the United States. We have no right to give our preference as to whether we like the legislation or don't like it. Our only purpose is to determine the constitutionality of a legislative enactment.

LaBERGE: Do you have any other examples just off the top of your head that were significant?

MOSK: I would say 99 times out of 100, the judiciary does not find a constitutional conflict with legislation. It's very rare that we do. We may interpret the legislative enactment to find out whether it applies to certain situations and not to

others, but to declare an enactment invalid because of a constitutional conflict is very rare indeed.

LaBERGE: On the other hand, propositions, where you, it seems more often than not, do. The latest one was term limits, and I think you were one of, or maybe the only dissenter, to uphold that proposition.¹

MOSK: Yes. Initiative measures are a little more suspect than legislative enactments. You and I can sit down at a typewriter this afternoon and peck out an initiative measure, and give it a seductive title like "For Better Government and Lower Taxes," and we'll get a lot of signatures and probably have the measure passed. Yet there can be flaws in initiative measures. After all, when a bill is proposed in the legislature, it goes to a committee in one house, and then the floor of the house, to a committee in the other house, floor of that house, and finally to the governor for signature or veto. And in that long process, flaws and bugs and various problems in the measure are generally discovered.

But as I suggested, you and I might write up a measure this afternoon, and there could be all kinds of technical and other serious problems with it. As a matter of fact, I recall some years back we had to interpret an initiative measure, and in order to make sense out of it, we had to hold that "and" really meant "or." Now, that would have been discovered in legislative proceedings, but not in the initiative process.

LaBERGE: During Chief Justice Malcolm Lucas's time, several justices left, had just a short time here on the court. Do you have any reaction to that, about spending only a little bit of time? Some writer called it "the turnstile court" and suggested that that wasn't good for the stability of the court or . . .

MOSK: Yes, I am inclined toward that point of view. I consider being on the highest court in the state the highest distinction that one in the legal profession can attain. It does trouble me a bit to see how many lawyers become judges, whether at a trial level or on the supreme court, and leave after just a few years to go back

1. California v. March Fong Eu, 54 Cal. 3d 492 (1991) upheld Proposition 130 (November 1990) in a 6-1 decision.

into the legal profession and generally make a lot of money. I hate to see being on the supreme court reduced to an item in their biography. I think it's more significant than that.

LaBERGE: And also, several judges have gone on to do alternative dispute resolution. What is your feeling on that?

MOSK: Yes, that's really what I meant by going back into the legal profession, and the reports are that they do very well financially. But I don't think making money should be the ideal of a judge.

LaBERGE: Could you give an assessment of the court during Malcolm Lucas's time, I guess '86 to '96?

MOSK: Malcolm Lucas was a fine chief justice. He has amazing dignity, and I think he created a good impression of the judiciary by his appearance at public events. On the other hand, I don't think he was a great administrator, as our current chief justice, Ron George, appears to be. But on the other hand, he was a credit to the court, and I found him a very fine and cooperative colleague. He also had a kind and gentle sense of humor that lightened critical events in the courtroom itself.

LaBERGE: And what about Chief Justice Ron George? You said he's a good administrator.

MOSK: Yes. He is very long on court administration, and I think has done a remarkable job in a short time of working on projects that affect the judiciary, from lower courts all the way up to ours.

LaBERGE: I know he was influential in getting the law passed for more money for the courts.¹

MOSK: Yes, he's been very effective in that. He's worked well with the legislature and with Governor Wilson. And as a show of his interest in how the judiciary is functioning, within a year and a half of his taking office, he visited the courts in all fifty-eight counties, which is quite a remarkable achievement.

LaBERGE: When the chief justice is gone and something needs to be signed or done, who does it?

1. Lockyer-Eisenberg Trial Court Funding and Improvement Act of 1997.

MOSK: This is done through appointing one of the other six members of the court to be an acting chief justice. And generally, it proceeds by seniority. I will take the first three months, and then the next senior justice three months thereafter, so there's always someone available to be an acting chief justice if the chief is away, as he is right now, by the way. He's over in Europe on a holiday.

LaBERGE: So are you acting chief?

MOSK: No, my turn has passed. Justice [Kathryn Mickle] Werdegar is the current acting chief.

LaBERGE: On the issue of administration, I know that you've had a plan to separate the court into civil and criminal . . .

MOSK: Yes. Back in 1983, I first made a proposal through an article in the Los Angeles Times that we ought to seriously consider having a bifurcated supreme court; that is, a supreme court civil and a supreme court criminal, each with five justices, a chief justice would be overall, and he'd have the power to assign cases to one court or the other, and to sit in one or the other in the event a judge is ill or otherwise unable to act. At that time, I pointed out that our criminal work was overwhelming in that we had 126 death penalty cases pending. That didn't stimulate a great deal of interest. Today we have nearly 500 death penalty cases pending. And so it occurred to me and to Senator [Quentin] Kopp that perhaps it was time to consider seriously the bifurcation of the supreme court. I'm not hopeful that it will succeed in the legislature at the present time. But . . .

[End Tape 6, Side A]

[Begin Tape 6, Side B]

LaBERGE: Senator Kopp is sponsoring right now, in this . . .

MOSK: Yes, he has a constitutional amendment proposed, currently under consideration by the legislature.

LaBERGE: And how do your colleagues feel about that?

MOSK: My colleagues are opposed to it.

LaBERGE: It's not your opinion, but why would they be opposed, when there's such a backlog?

MOSK: I think their feeling is that there should be just one supreme court that handles absolutely everything. My suggestion is not wholly new in that the states of Texas and Oklahoma have bifurcated supreme courts, and have had for years.

LaBERGE: If it doesn't pass, and you think that probably it won't pass, are there other ways to relieve the amount of work you have to do?

MOSK: The only way, I suppose, is for the court just to deny hearings in more and more cases. I think that's unfortunate.

LaBERGE: What do you foresee for the future, for the state of the judiciary in California? Is that one of the things you foresee, that more cases will be denied? Or more staff?

MOSK: Statistically, I think a higher percentage of the cases will be denied, inevitably. As the number of petitions for hearing grows, necessarily more and more will have to be denied. I don't think creating a larger staff will be helpful. I think our staffs are adequate at present. Each of us has five lawyers, and I don't think we need any more at the present time.

LaBERGE: One of your most recent decisions, and actually, I'm not sure if you wrote it or not, is a Kaiser Permanente one about arbitration and health maintenance organizations, just in 1997. [Engalla et al. v. Kaiser Permanente Medical Group et al.]¹

MOSK: Yes, I did write that opinion. The facts reveal that Kaiser required arbitration of contentions made about the care it provided, but it did not encourage or even permit rapid arbitration. They took months and sometimes more than a year before their representative would cooperate in having an early arbitration hearing. In our opinion, we criticized that conduct very severely, and I understand that Kaiser has been making serious efforts to correct its arbitration policies.

1. 15 Cal. 4th 951 (1997).

MOSK: Most everything we do is in writing. We very seldom have two-party discussions over opinions. But what I do is what my colleagues do, is to draft a proposed opinion, and that is circulated among my colleagues. They respond with either agreement or disagreement, or as more often, suggestions of how the opinion may be improved and, as improved, acquire their signature.

It's a good scholarly approach, I think, to solving problems. And ultimately, at least the majority will have a consensus, and others may write dissenting opinions.

LaBERGE: And will you see those, too, ahead of time?

MOSK: Oh, yes. Everything is circulated among all seven justices.

LaBERGE: In the same way, what is the chief justice's role in promoting collegiality?

MOSK: Actually, he is only one-seventh of the court, and he can't issue orders. But he does demonstrate by his own conduct how the rest of us ought to conduct ourselves with regard to our colleagues. Chief Justice George is quite good at that.

LaBERGE: What about socialization on the court? Do you have social events or do you socialize outside of work?

MOSK: Only at law-related events, bar association meetings and luncheons and dinners, and the law school events. But other than that, I'm not aware of any close social relationships among any two members of the court.

LaBERGE: Or even here in your offices, do you celebrate birthdays or things like that, or have lunches?

MOSK: Generally only with your own staff.

LaBERGE: So your staff is more of a social group in some sense?

MOSK: That's right, it is more of a unit.

LaBERGE: I know you've spoken highly of Peter Belton before, and Olga Murray. How do you work with your staff and how do you pick out such fine people to work with you?

MOSK: Just lucky, I guess. [Laughter] No, I am very fortunate. Peter Belton has been with me all thirty-three-plus years that I've been on the court. Olga Murray was with me for I think ten or eleven years. I have another member of my staff who

MOSK: Just lucky, I guess. [Laughter] No, I am very fortunate. Peter Belton has been with me all thirty-three-plus years that I've been on the court. Olga Murray was with me for I think ten or eleven years. I have another member of my staff who is probably the most productive member of the whole court, Dennis Maio. He's a graduate of Yale and just a remarkable legal mind.

LaBERGE: What do you look for, if you needed another attorney, what do you look for?

MOSK: In the old days, law clerks came and stayed only one year, and then went out into the cold cruel world to make their mark. Now, the staff members stay permanently. So I don't have to interview applicants and consider their qualifications. In a way, it's kind of sad, because I've always enjoyed getting to know young lawyers and then to watch their progress in the profession years later. I have a number of my former law clerks who are law professors at various schools. I have one who's a judge of the municipal court in Santa Monica [Larry Rubin]. I kind of like the idea of watching their progress. I don't have that opportunity now that they stay permanently.

But in a law clerk, I look for legal acumen, plus industry. I expect them to work hard, to put in long days of research and writing, and fortunately, all five of my law clerks do that.

LaBERGE: You're noted for the work that you put out, more than anybody else, I think.

MOSK: Yes, statistics do verify that. [Laughter]

[Interruption]

LaBERGE: How are we doing time-wise?

MOSK: We can take another ten minutes or so.

LaBERGE: We were talking about research and writing and the amount of work that you and your staff put out. How do you think what's happened in the world, how that impacts the law? I'm thinking, for instance, of the Vietnam War, or changing ideas towards abortion, or new discoveries in medicine.

MOSK: I suppose that every development in any related field does have an impact on the judicial process. But I think the impact at first is in the legislative field, both through the legislature and through the initiative process, and we get the issue only secondhand after it's been distilled by other branches of government. How it

affects us is hard to determine. We I guess have yielded to mechanical developments, while here I have a typewriter, but I also have a gadget back here that's mechanical [demonstrating a computer] that I find difficulty in using. But I guess we cannot be unaware of scientific progress.

But on the other hand, courts are tradition-bound and guided entirely by a document that was designed in the 1700s.

LaBERGE: For instance, the computer has helped, I'm sure, your attorneys in their research. I'm not sure exactly how to use Lexis, but I know that it's easier than shepardizing.

MOSK: Yes, my staff does take advantage of all the scientific improvements. So to that extent, I guess it does shorten the work time, or hasten the conclusion of matters pending before us. And that has become important, because we're guided by a ninety-day rule. We must produce our opinions within ninety days of oral argument. As a matter of fact, I have to sign an affidavit every month that I do not have any cases pending before me for more than ninety days before I can get my salary check.

LaBERGE: Even the Microsoft case that's now being investigated. You would have to know something about computers, I think, to even understand the issue.

MOSK: Yes. But on the other hand, we do get quite often cases involving scientific issues, and we have to, as I suggest, become experts on absolutely everything.

LaBERGE: Does new thinking in society affect you at all?

MOSK: No, I don't think so. It has an effect on the political process, of course. But I would hope it does not impact seriously on the judicial process.

LaBERGE: And do you consider the judicial process political? Because some people do.

MOSK: No, I don't. It's true, you're right in that some people try to make a political issue out of a judicial opinion. But they shouldn't, and it should not be a political issue.

LaBERGE: I have more questions that would maybe last another interview.

MOSK: Fine.

LaBERGE: OK. More on not specific cases, but your interests, your philosophy, would that be OK?

MOSK: Another interview.

[End Tape 6, Side B]

[End of Session]

[Interview 5, July 22, 1998]

[Begin Tape 7, Side A]

LaBERGE: I thought today we'd talk about general things, other than your judicial career. What are some of your outside interests and hobbies? And maybe even not just now, because I know you used to play tennis. Things that you used to do or that you've always enjoyed.

MOSK: Well, I did enjoy tennis, and I played regularly at least once a week up until about a year ago, when my knees started to bother me. I decided I didn't want surgery, so I gave up tennis.

But one of my hobbies is collection of historical documents. I have at least one letter or document or photograph signed by every president of the United States, from George Washington right down to Bill Clinton; every vice president, from John Adams right down to Vice President [Albert] Gore; and every justice of the United States Supreme Court. It's a delightful hobby, but it's sort of gotten out of hand with me, because the prices of acquiring these are now astronomical. For example, a number of years ago, I paid about seventy-five dollars for a pardon signed by Abraham Lincoln. Today, you couldn't get that document through a dealer for under \$7,500.

So I have this collection which I keep at home in what are described as fireproof boxes. I hope they are. And each instrument I have in an acetate folder, so that anyone looking at it wouldn't leave fingerprints. So that's been a hobby of mine for many years.

LaBERGE: How did you get started on it?

- MOSK: Way back in the Dark Ages, when I was the secretary to Governor Olson, I used to see letters from distinguished persons coming across his desk, and that intrigued me and induced me to try to acquire these. I found that there were quite a number of dealers around the country who handle historical documents. Most of them are more interested in theatrical celebrities than they are in history, but they handle historical documents as well.
- LaBERGE: This is going to be a part of somebody's historical document someday.
[Laughter]
- MOSK: Well, my son has covetous eyes on that.
- LaBERGE: I bet he does.
- MOSK: On this collection. [Laughter]
- LaBERGE: What other kinds of outside interests?
- MOSK: I love the theatre, and enjoy. . .
- LaBERGE: For instance, do you have season tickets, or do you just. . .?
- MOSK: I have had season tickets for the symphony, and I see every major play that comes to town. I love the theatre.
- LaBERGE: I noticed in the book that you gave me, Democracy Day By Day,¹ one of the ones you quoted was from A Man For All Seasons, which is one of my favorites too. Do you read the plays also?
- MOSK: Not generally. Unfortunately, there is so much compulsory reading in this court work that I don't have a chance to read outside books as much as I would like.
- LaBERGE: That leads into my next question: if you could pick your five favorite authors, who would they be?
- MOSK: John Grisham would have to be on the list of modern authors. And John Galbraith, Charles Beard, Alex Haley, Bertrand Russell, to mention a few.
- LaBERGE: I read someplace that Camus was one of your favorites at one time.
- MOSK: Yes, Camus.
- LaBERGE: Do you have a book going right now, that you're reading on the side? [Laughter]

1. Stanley Mosk, Democracy in America--Day by Day (New York: Vantage Press, 1995).

- MOSK: No, I don't, although I do have an idea for a book I'm going to get to someday. That's discussing the myths and realities in the law. For example, what people actually think about, oh, such matters as the death penalty. What are some of the myths. Do they realize. . . . Well, they don't realize that it costs more to execute a criminal, a murderer, than it does to keep him in prison for the rest of his life. That's one of the myths that I'd like to explode, among many others.
- LaBERGE: Do you want to mention some of the others?
- MOSK: No, I'd rather save it.
- LaBERGE: What about the impact of a lawyer's and/or a judge's work on family life, on social life? What kind of outside life does it give you or allow you?
- MOSK: I don't think it inhibits private or social life particularly. As a matter of fact, most lawyers like to get out socially, because it may attract additional clients, if nothing else. The only thing it may do to a judge is require him at some future date to recuse himself if friends that he's gotten to know get involved in litigation. But that's the only factor, I think, that inhibits one.
- LaBERGE: Have you had to recuse yourself very often?
- MOSK: Oh, yes. Not often, but occasionally some friend gets into a problem and you'll have to step aside because you can't be impartial.
- LaBERGE: And what about family life?
- MOSK: I don't think it has a serious effect on family life.
- LaBERGE: And would your wife say the same? [Laughter]
- MOSK: No, I think she rather enjoys coming with me to a bar luncheon where there's a good speaker, and getting to travel to conferences in faraway places. For example, a little over a year ago we were invited to and attended a conference in Hong Kong, just thirty days prior to the Chinese takeover of the colony. It was a conference on constitutional law and what might happen to it after the Chinese takeover. Incidentally, over there they called it a "handover" instead of a "takeover." But it was a conference sponsored by the University of Hong Kong, and I was fortunate to be invited to attend.

I got in touch with Chief Justice Rehnquist and told him I was going to the conference and asked if he had any message he'd like to send, and lo and behold, he sent me a beautiful message that I was able to read to the conference.

LaBERGE: Were you the only justice from California?

MOSK: Yes. In fact, there were very few Americans. There were judges from all over the Western world.

LaBERGE: Have you been involved in a lot of judges' associations?

MOSK: Yes, I've belonged to most of them, I think, at one time or another. But since being in the judiciary, I really haven't been completely active in the associations. I pay my dues and get their literature and attend some of the conferences, but generally as a spectator.

LaBERGE: I was reading Justice Broussard's oral history, and he commented that California has one of the best continuing education programs for judges. Have you been a part of that?

MOSK: Yes, and that was a good comment. It is true, California does have a splendid program, sponsored by the bar association. And then there is an agency over in Reno that holds sessions to which judges can refresh their legal background and training.

LaBERGE: Have you been asked to be a mentor for anyone when they come on the court, or for somebody on the court of appeals?

MOSK: No. Everyone deems himself or herself to be equal to everyone else.

LaBERGE: What about teaching?

MOSK: I have taught. I taught a course at Santa Clara University Law School. It was a lecture series, three hours an afternoon twice a week.

LaBERGE: That's a lot.

MOSK: I found that it became a bit onerous. It took me an hour to drive to Santa Clara, three hours there, and an hour back. And I had to do that twice a week. And after a semester, I decided that it really wasn't for me. It was a little too difficult physically. I enjoyed the rapport with students, but it was physically difficult.

Then for two summers, I believe 1984 and 1986, I taught for two weeks at Trinity College in Dublin, Ireland. These were principally American students who were over there, primarily for a holiday but while they were there, they thought they'd pick up a few credits. [Laughter] But I found Trinity College delightful, and of course, Ireland is a pleasure to visit for two weeks.

LaBERGE: What subjects did you teach?

MOSK: I taught state constitutional law, emphasizing the important of individual states' rights. My theme always was, and is still, that the United States Constitution sets the floor for individual rights, but that states have the power and the authority to grant their citizens more individual rights than are required by the federal constitution.

LaBERGE: We talked a little bit about that in some of your rulings.

MOSK: Yes.

LaBERGE: Did you teach the same class at Santa Clara?

MOSK: Yes.

LaBERGE: Do you think your judicial philosophy has changed over the years?

MOSK: Generally not. However, my emphasis on states' constitutional rights I think expanded as the civil rights movement became more and more active.

LaBERGE: Kind of in that same vein, how do you think both you and just the court in general can influence social policy, or vice versa, does social policy influence the decisions?

MOSK: Well, theoretically, we should be governed solely by the law and not by individual concepts of rights and duties. But inevitably, individual rights do enter into opinions that may be written. Whether that's good or bad, effective or ineffective, is always debatable.

LaBERGE: Could you describe how you come to make a decision? I read something about [United States Supreme Court] Justice [Benjamin] Cardozo, and he was talking about how all these different things come into it, both his own personality, the law, what's happening in the world.

MOSK: I don't know if I can describe it.

LaBERGE: If a problem is presented to you, is your first reaction, What is the law?

MOSK: That's right. My first reaction is, Is this a legal question or is it a factual matter? If it's a factual matter, of course, it has to be decided by the trier of fact: a judge or a jury. If it's a legal question, then we have to look at the law. There was a judge on the supreme court of Oregon, Hans Linde--I mentioned this previously--I had a lot of confidence in him and his views--and he said you always first look at the statute involved. Second, you look at the state constitution. And finally, as a last resort, you look to the United States Constitution. And I suppose I've always tried to do that.

LaBERGE: But you can't describe how the rest of your own philosophy or . . .

MOSK: No. I don't know how one gets the inspiration to do what he does. I suppose to some extent, I have a certain sympathy for individuals in our society. Our society has grown so large and impersonal that I think we sometimes have the tendency to overlook an individual's rights and obligations.

LaBERGE: I'm not sure if you can comment on this, because it might be before you, but what about the concept of stare decisis?

MOSK: Well, yes, we're bound by stare decisis, although this court does have the power to overrule its own prior decisions if it deems it necessary. But generally, we follow precedent. And it's important to do that, because lawyers and judges are bound by our prior decisions and use them as authority, and the litigants appearing in courts below feel bound by our prior decisions, and so we should not overrule them readily. And I don't think we do.

LaBERGE: What about the California court and the U.S. Supreme Court's decisions? How bound are you to . . .

MOSK: We're bound by higher court opinions generally, but there again, I return to my basic view that the Supreme Court--the other one, in Washington--rules on federal law, and we are bound primarily by state law. And here again, I believe that we have a right to give our citizens greater individual rights than are required under federal law.

LaBERGE: Now, here's a state issue, and that's the state bar. Would you like to comment on what's happening in the state bar right now [July 1998]?

MOSK: Yes. I think it's unfortunate. The state bar serves a very useful purpose, and what's more significant, it finances itself through bar dues. The state doesn't contribute any financial help to the state bar. Now, I suppose it is true that the bar on occasion has taken public positions on issues that are not strictly affecting lawyers, and they probably shouldn't do that. But I don't believe that justifies the abolition of the state bar, which seems to be going on these days. I hope that the bar can be saved and continue its useful work.

LaBERGE: And what about the issue of lawyer discipline?

MOSK: Yes, that's one of the functions the bar serves very usefully. They make recommendations for discipline of lawyers. Of course, they may appeal to us ultimately, the lawyers who are disciplined. So we do get the final word there, but nevertheless, the value of a lawyer's license is very significant. It enables him to practice his vocation, and the bar performs a very useful service in the disciplinary process.

LaBERGE: You've seen a lot of changes, both in the law and in the way the court works. What do you think are some of the most significant?

MOSK: I don't know that there have been any major changes in the function or operation of the court. The process is still pretty much the same. A petition for hearing by a party that has lost in the courts below; we prepare memoranda and hold a private session in which we discuss whether to grant or deny the petition for hearing; the matter, if granted, is given to one member of the court to prepare a draft of a potential opinion prior to oral argument; and after oral argument, we hold a session, usually the very same day of oral argument, in which we decide by a vote how the case is going to come out; and one of the justices in the majority is assigned by the chief justice to write the court's opinion.

I think that process has existed pretty much the same for all of my more than three decades on the court.

LaBERGE: Has there been a change, do you think, in the way the public looks at the law or the judicial system?

MOSK: Unfortunately, yes. I think a certain amount of the respect accorded to the judicial process has been eroded in recent years. I attribute that to a large extent to politicians who rather blithely talk about judges soft on crime, or liberal judges, or reactionary judges, depending on points of view. I think that has eroded a certain amount of public respect for judges and the judicial process.

LaBERGE: How did you feel about the institution of the part of the bar exam on ethics, and just the fact that ethics is more talked about today? Was that a necessary addition?

MOSK: Well, certainly educating lawyers--and judges--in ethics is valuable. Every once in a while, you read about a judge, or we hear through disciplinary proceedings about a judge who contacts one side or the other in litigation and discusses the case with one lawyer, when everything he does, the judge does, should be out in open court.

LaBERGE: What do you think is the effectiveness of the Commission on Judicial Performance?

MOSK: I think it does a good job, generally. Every once in a while, the public rebels at something it does. But it's a useful agency, and I think is helpful to the judicial process.

LaBERGE: Have you had a part in it, in appointing people to it, or do you decide together?

MOSK: Yes. The chief justice really makes the appointment, but he always discusses it with members of the court. He will say at a conference, "Here are three or four names I'm considering appointing. Do you see any reason I shouldn't appoint any of them?" So to that extent, he does discuss it with the court, but he has the authority.

LaBERGE: How effective do you think the jury system is today? Even though you're not intimately involved, you must have thoughts on it.

MOSK: Well, I do remember as a trial judge sending a jury out to deliberate on a case, and I would think, Here's the way I think it's going to come out, and perhaps 90 percent of the time I would be accurate.

[End Tape 7, Side A]

[Begin Tape 7, Side B]

LaBERGE: OK, more on the jury system.

MOSK: So I have confidence in the jury system, with a couple of exceptions. One I think we took care of in the Wheeler case. To repeat: I found when I was a trial judge that there would be a black defendant and a white prosecutor and white witnesses, and that white prosecutor would challenge peremptorily every black who was placed in the jury box. I felt intuitively that that defendant would not feel that he was getting a fair trial when everyone of his race was excluded from participation, but I couldn't do anything about it because of a case called Swain v. Alabama in which the United States Supreme Court held that there could be no limitations whatever on peremptory challenges.

When I got to this court, I was able to, with the help of my colleagues, of course, write the Wheeler case in which we held there could be no limitations on peremptory challenges unless they were being used for a racially discriminatory purpose. And happily, seven years later, the United States Supreme Court came around to our way of thinking in Batson v. Kentucky. So that, I think, was a major aid to effective use of the jury system.

LaBERGE: We've talked about a lot of your cases, but just in case we didn't hit any main one, what one do you think was the most challenging of your decisions?

MOSK: Well, probably the Bakke case.

LaBERGE: Which just had its anniversary, I noticed.

MOSK: Yes. Also to repeat: Bakke wanted to be admitted to medical school to Davis, but they had a policy of taking in 100 new students each year, but sixteen had to be minorities. Bakke's credentials were objectively better than any of the sixteen they were taking in, but he was rejected, so he brought a suit. We held three

things. One, that Bakke had to be admitted; secondly, racial quotas were bad; and thirdly, that race should not be a factor at all in considering higher educational admittees.

The case went up to the United States Supreme Court and they agreed with us on two of the three. They agreed that Bakke had to be admitted, and they agreed that racial quotas were bad, but Justice [Lewis] Powell for the majority said, "Well, race may be considered among other factors." So that's where the Bakke case stands.

Incidentally, I of course never saw or knew anything about Bakke as a person, except that he handled himself very well. He declined interviews. The only thing he said was, "I don't want to be a martyr; I'm not fighting for a cause. I just want to be a medical doctor." I must say, for four solid years, we were scared to death that he'd flunk out of medical school and make us look bad. But he graduated with honors and won an internship to the Mayo Clinic in Rochester, Minnesota, and he is practicing in Rochester, Minnesota, today.

LaBERGE: Do you think that's the case you're most known for?

MOSK: Probably.

LaBERGE: One other: what was the most interesting case? And maybe it's the same one.

MOSK: Probably is. It stirred up some elements in the public. By an amazing coincidence, I had been scheduled to give the commencement address at the University of California at Davis shortly after that opinion came out. The picketers were numerous, and as a matter of fact, they threatened to disrupt the commencement event while I was speaking. The dean handled it very well, I think; he called in all the protesters beforehand, said, "You have a right to protest. As a matter of fact, you can walk out before the justice speaks, as long as you do it quietly and don't disrupt the proceedings. And then you can return after he speaks." But he warned them that if they created a disturbance, anyone who did would not graduate. They followed the instructions very faithfully. I think about thirty-five students walked out on me. They missed my magnificent, eloquent speech. [Laughter]

LaBERGE: Was this at the law school?

MOSK: Yes.

LaBERGE: Who was the dean?

MOSK: I've forgotten.

LaBERGE: You might remember when you see the transcript. Have you often given commencement addresses?

MOSK: I wouldn't say often, but I've given a number of them.

LaBERGE: Do you have any heroes, legal or otherwise?

MOSK: My hero was Justice William Brennan of the [United States] Supreme Court. I admired all of his opinions, and I had an opportunity to be with him for two solid weeks one time at the invitation of New York University. They formed a seven-person committee--this was while I was attorney general--to make a study of British procedure, and Brennan was among the seven, and I was as well. When you're with a person morning, noon, and night for two solid weeks, you get to know him pretty well. I got to know Brennan, and it enhanced my admiration for him.

LaBERGE: Any other heroes?

MOSK: Yes, Justice Arthur Goldberg of the U.S. Supreme Court. I don't remember how I got to know him so well, but I did, and he came out here frequently for medical attention. Every time, we'd get together socially. I always enjoyed his company.

LaBERGE: And for instance, you mentioned calling Justice Rehnquist. Have you had an opportunity to get to know him?

MOSK: Casually.

LaBERGE: How does that come about? At judicial meetings?

MOSK: Exactly, yes. Yes, at judicial functions or university events.

LaBERGE: What would you say is the significance of pro bono work?

MOSK: It's very important. In years past, only litigants with resources could have an attorney and pursue their rights through the judiciary. But after all, there are poor people who have rights as well, and they may have trouble meeting their needs for housing and food and support of children, and they frequently don't have the

resources to pursue their legal rights. So the existence of pro bono lawyers who are willing to help people who lack means to hire lawyers is very useful. I certainly commend those who perform pro bono services.

Many of the major law firms today encourage their younger lawyers to volunteer their services, and that does two things. First of all, it helps the clients that the pro bono lawyers are serving, but it also gives them additional experience, the lawyers get that additional experience.

LaBERGE: I've read that there is a shortage of appellate lawyers for many defendants.

MOSK: That's particularly true of death penalty defendants. The state does pay the lawyers, but it's difficult to find lawyers who will undertake that responsibility. First of all, it's an onerous responsibility. Sometimes the trial transcripts in those cases will run 60,000 pages. I can see a lawyer serving a death penalty defendant, and he gets to know the defendant. He hates to see him be executed. And yet, his chances of prevailing are very slim. Our court affirms more than 90 percent of the death penalty convictions. So if I were the lawyer, I wouldn't be happy with getting to know my client and then realizing that I only have a 10 percent chance of prevailing.

LaBERGE: Do you have any suggestions for the future and how to improve or streamline the judicial process? I know you've made the suggestion of having two courts.
[Laughter]

MOSK: I was just going to say that. Yes, I have suggested a bifurcation of the supreme court. My idea, which I expressed in a 1983 article in the Los Angeles Times, that we ought to have a supreme court civil with five justices, a supreme court criminal with five justices, and then a chief justice overall. At the time I made that suggestion, we had about 190 pending death penalty cases. The numbers might not be totally accurate, but that's close. Today, we have 500 death penalty cases pending, and as I suggested, some of them have transcripts of 50,000, 60,000 pages. So they take up a great deal of time. I think the public would be better served if those cases went to a court specializing in criminal cases.

Now, I've heard criticism saying, "Well, who would want to sit and handle nothing but criminal cases?" The answer is, there are a lot of good lawyers in the attorney general's office, in district attorneys' offices, in public defenders' offices, who would be delighted to serve on a supreme court criminal. But I have to concede that my idea has not found a great deal of support. Senator [Quentin] Kopp did introduce a proposed constitutional amendment, but it's been amended several times and several ways that I'm not enthused about, and I don't think it's going anywhere during this legislative session.

LaBERGE: You're probably just before your time.

MOSK: Texas and Oklahoma do have two supreme courts, in effect. But they're not deemed to be the best examples.

LaBERGE: If you could put into words the rewards and the frustrations of being a justice of the supreme court, what would they be?

MOSK: The reward is performing a necessary public service, and doing it in a manner consistent with your beliefs and your faith in democratic virtues. The frustration, of course, is in being in a minority in a great many of the cases, and not being able to prevail. But on the other hand, I also recognize that under our system, the majority does prevail, and if I am not in the majority, I accept that result.

LaBERGE: What do you think your major contribution has been? And you don't have to be modest. [Laughter] To legal history, to California history . . .

MOSK: I do have the personal satisfaction of setting California records. I have now written more than 500 dissents, which exceeds the number written by Justice Jesse Carter some years ago. And yet, all that means, I suppose, is that in 500 times, I've been deemed wrong by my colleagues. [Laughter]

Then, from the point of view of years of service, the record in California was set by Justice John W. Shenk at thirty-five years. I will have served thirty-four years on September 1, 1998, and if I seek to go on the ballot in November and the public voters retain me, I'll have an opportunity to exceed that record. I don't know really what satisfaction there is in going into the history books on that kind of a record. I'd much rather get into the Guinness Book of World Records.

LaBERGE: Well, what mark do you think you've left on the court, or on California law?

MOSK: One, as I suggested, was emphasis on state constitutionalism, and I hope lent some help to protection of individual rights, as against a monstrous society that grows constantly. And I hope I've contributed something toward respect for our constitutional basis. I can't think of anything more important, for example, than the First Amendment, the freedom of speech, even speech that we may despise.

LaBERGE: Anything else? Is there anything that you'd like to say that we haven't covered?

MOSK: I can't think of it. You've been so thorough, and your preparation has been admirable, I must say.

LaBERGE: Thank you. If when you get the transcript, there are things that you want to add, if you think, You know, I really wish I had discussed that case or I had discussed that philosophy, or another favorite author or any of those things . . .

MOSK: All right. Fine.

LaBERGE: I want to thank you very much for your time.

[End Tape 7, Side B]