Judith Ashmann-Gerst: All right. Good morning, Judge Alarcon.

Arthur Alarcon: Good morning. How are you?

Judith Ashmann-Gerst: And this is Tuesday, April 7, 2007, and I am Judith Ashmann-Gerst; I'm an Associate Justice on the California Court of Appeal, Second District, Division Two. And it's my great privilege and pleasure to interview Judge Arthur Alarcon. Judge Alarcon had been a member of the Second District, California Court of Appeal, Division Four, but is now on the Ninth Circuit Court of Appeal; has taken senior status at this point. And this interview is part of the Legacy Project of the Court of Appeal.

And Judge Alarcon, I've known you since about 1977, when you were a superior court trial judge and I was working for Burt Pines at the Los Angeles City Attorney's Office. I've always looked to you for advice and guidance, and this is a wonderful chance for you to share that wisdom with many others.

What I'd like to do today, if we can, is start with your childhood. Your family fled Mexico because of your grandfather's employment as a law-enforcement officer, and he actually raised you for many years.

Arthur Alarcon: Yes, that's correct. My family came from Mexico during the Mexican Revolution. My grandfather was a law-enforcement officer, and they took the last train out of Chihuahua to El Paso, because Pancho Villa was going to assassinate him and his family, and the president of Mexico told him to flee.

When my father married my mother, they were in Los Angeles, and when I was six months old they separated. And so I was taken back to El Paso, where my grandparents lived, and they raised me until I was almost five. And I spoke only Spanish.

My father remarried and brought me back to Los Angeles, and I learned to speak English in kindergarten.

Judith Ashmann-Gerst: How long did it take you to become comfortable speaking English in the school system here?

Arthur Alarcon: You know, I have no memory of it being a problem; but I was only five years old. I remember that the kids would sit with me and point out "bread" when I'd say "*pan*," and they taught me how to speak English. And I had no problems. I have no memories that it was difficult or that I was teased or anything else.

[Off-camera discussion]

Judith Ashmann-Gerst: Should we just go a little time out or anything like that?

Arthur Alarcon: *[Laughing]*

Judith Ashmann-Gerst: Okay, ready to go?

David Knight: Yes, ma'am.

Judith Ashmann-Gerst: You grew up in this area; as a matter of fact, you grew up right in this area where we are sitting right now.

Arthur Alarcon: Exactly. I was born in a house on Temple Street, perhaps a mile from the Civic Center. And my first job was in the appellate department of Los Angeles Superior Court in the City Hall on Temple Street.

I left there to go to the DA's office on Temple Street, and later I left to go to the Governor's Office. When I returned, I was a judge on Temple Street, and we crossed the street to the new building. And then I left briefly for the California Court of Appeal, and then I returned to Temple Street.

And I was baptized at the La Placita Church, which is a half a block or so from Temple Street. So I tell people I've never gone very far in life.

Judith Ashmann-Gerst: That would be quite an understatement. *[laughing]* You grew up here, you attended local schools here; but you didn't go to college right after graduation from high school. Instead you enlisted in the Army with the understanding that you would be going to school. But that all changed.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: What happened?

Arthur Alarcon: Yes. Well, I was a fan of Jack London's books when I was in high school, and he talked about people going to San Francisco, going to a bar, getting drunk, and waking up on a ship; and that used to be called being shanghaied.

The Army had a program, which they called the Army Specialized Training Program, and they gave an exam throughout the United States in 1943. And the idea of the program was that there was going to be a need to occupy Germany and Japan after the war, and because so many people had left—so many men had left, particularly—and gone into the service, there weren't enough people being trained as engineers, as lawyers, and all the other professions and sciences that would be required.

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So they offered if you passed a test and enlisted, you would go to a program where you would graduate from the university in about two years, be commissioned as a second lieutenant and then be available at the end of the war. That was the plan.

So I did enlist when I turned 18. I went to Fort Benning, Georgia, and I should have realized when I went through the gates—it's called the Infantry School—and that's where the training is of infantry officers and then paratroops. We went through a 12-week training, and I was notified that I was going to go to Pomona College for my undergraduate work, which was wonderful, because my parents couldn't possibly have afforded to send me there.

And we had a banquet to celebrate, and the soldiers were all scheduled to go to different parts of the country close to their homes. I was going to be at Pomona, only 20 miles from my home; and also, all the young ladies who were in my black book. And all the men were gone off at Europe, so I was looking forward to a wonderful two years.

We got to the train station, we marched there, and the general told us to sit down and relax, there was a problem. Five hours later, he announced that the Army Specialized Training Program had been eliminated and that we were all going into the infantry. I ended up getting on a train to Camp McCain, Mississippi, and I became a private in the 94th Infantry Division.

Judith Ashmann-Gerst: Well, that was quite a shock. *[laughing]* Did he explain why the program had changed? Was it because of what had happened during the war?

Arthur Alarcon: Yes. In North Africa, the American infantry took huge casualties, so they needed immediately to fill it up; so that's why I became an infantryman.

Judith Ashmann-Gerst: What about your World War II experiences do you feel influenced your life, your career? What stands out?

Arthur Alarcon: Well, I went overseas with the 94th Division, and we ended up near Germany near the Maginot Line, and we were part of the Bulge fighting in the Ardennes Forest battle.

And I was given a promotion by my captain from PFC to staff sergeant because of casualties; so at the age of 19, I had a group of 12 men under my care and responsibility.

Within a year I became the acting first sergeant of my company; then I had 200 people, and I had to be concerned about every aspect of their lives. So that forced me into a lot of maturity quickly.

Judith Ashmann-Gerst: Any particular . . . I've always enjoyed talking to you about your World War II experiences. You had some just amazing events that occurred there. Is there anything you'd like to share with us?

Arthur Alarcon: Well, one thing that probably if you've talked to other former infantrymen or Marines, we don't usually talk about what happened on the battlefield. It's painful; I mean, we lost close friends.

I did have an interesting experience. I was a scout for my battalion, which meant I would go out in front whenever we'd go into a battle; and I was also the sniper, which meant that I stayed behind if we had to retreat. So on one occasion the colonel of our battalion ordered me to go out into a valley, and it was covered with snow. And I said to him, "If I were the Germans, I would have a machine gun on the hill on the left and a machine gun on the hill on the right, and I would have crossfire where you're sending me." And he said, "I've given you a direct order; go for it."

So I ran out, and sure enough, two machine guns started firing at me, and as I ran I could see the bullets between my legs, because they had bullets that you could . . . tracer bullets that you could see in the daytime.

So I saw a large hole; it looked to be about a foot deep, looked like an old shell hole. So I raced to that, jumped in it, and was covered with snow. And being a surfer from California, I had no idea about snow and ice.

What happened was, right under the snow was ice, and I cracked through that, and the machine gunners then lowered their guns; so the bullets were going right past my helmet, so I had to get down. And my captain, for whatever reason, choked. He didn't do anything to rescue me; he just sat there all day.

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So when it got dark, I was able to leave that place; but during that exposure, my legs were frozen up to my hips. So the next day I was sent to a hospital in Luxembourg, and the doctor who treated me said, "I'm going to try some experiments with you, because we've had to amputate a lot of people, and I don't want to do that." So he said, "Do you drink?" And I said, "No." And he said, "Well, you're going to drink now," and he gave me an ounce of bourbon every hour for several hours and moved my bed over to the window and opened the window so that I wouldn't change my body temperature in a way that he didn't want. My legs were saved by this wonderful doctor.

So when I came back, I went to the captain and I said, "You know that my legs were frozen under fire. Am I entitled to a Purple Heart? I don't want one if I'm not entitled to it." He said, "No, it has to be shellfire or fragments from a bomb or something." I said, "Okay."

About four years ago, I told this story to one of my granddaughters, who insisted I talk about it. So I told her what

happened, and she said, "That's not fair"—she was about 10 or 11—"and you've got to do something." I said, "What do you want me to do?" She said, "I want you to write to the Secretary of the Army and tell him that you were cheated by that captain, and I want to see the letter."

So I wrote a letter to the Secretary of the Army, and they wrote back to me—now, I was about 77 at the time—and they said, "We're about three years behind in checking this kind of a request." So I wrote back and I said, "You know, I'm 77. I was in World War II, and three years from now I can't guarantee you that I'll be here if I'm entitled to it; but don't award me the medal if I'm not entitled." Well, they wrote back and said, "You were entitled to it." And I also found out that I had not ever been told I was entitled to the Bronze Star.

So three years ago, thanks to my granddaughter, I was awarded the Purple Heart—and it's right here—and the Bronze Star.

Judith Ashmann-Gerst: I see that. Was there any ceremony?

Arthur Alarcon: Oh, yes. Senator Feinstein is a very close friend of mine, and she found out about this and she insisted that she wanted to award both to me. So she gave a party for me in San Francisco.

Judith Ashmann-Gerst: Ah, that must have been a really lovely experience.

Arthur Alarcon: Yeah.

Judith Ashmann-Gerst: So then when you returned from the service, then you enrolled at UCLA.

Arthur Alarcon: Yes. And I had an interesting maturing experience there as well. I signed up in 1946, two months after I got out of the service. And I got the list of classes. I bought the textbooks, and I bought several swim shorts and several beach towels and I went to the foot of Chautauqua to Will Rogers State Beach, because I used to love two-man volleyball and I hadn't played all the time I was in Europe.

So I became one of the best two-man volleyball players in that area, attended very few classes, and then took my exam for each of the classes in the first semester. Having been a straight-A student in high school, I thought, "It'll be a snap. All I have to do is cram at the end."

Well, I got straight C's, and the counselor called me in and said, "I thought you wanted to go to law school." I said, "Yeah, I want to go to law school." She said, "You're never going to make it unless you change your habits. What are you doing?" So I confessed, and she said, "No more two-man volleyball."

And the thing that I didn't realize was that every other student who was a freshman was a straight-A student at UCLA. *[laughing]* They studied; I had not. So I ended up with about a 2.6 average by the time I left UCLA. So I got almost straight A's thereafter.

Judith Ashmann-Gerst: 3.6, probably.

Arthur Alarcon: 2.6—no, it was—yes.

Judith Ashmann-Gerst: Probably 3.6.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: But you didn't stay at UCLA for law school.

Arthur Alarcon: No. An interesting thing happened. USC announced that they were going to have a special program, and they were going to select a few law students who had three years, who had completed three years and passed a test, the LSAT—passed that at a very high level, and had almost straight A's. They said, "This is what we're looking for."

So I contacted USC and I said, "I'd like to apply to that." And the woman said to me, who was the counselor, she said, "Change from UCLA to USC for your remaining classes"—well, I had to make up a few units—"because we're going to start with USC graduates, or third-year people at USC."

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So I transferred to USC. And then at the end when I finished my work and one semester in summer school, I started USC Law School. And at the end of the first year of law school, I was awarded a bachelor's degree in pre-law, because I made it through the first year. So I have kind of a phony bachelor's degree.

Judith Ashmann-Gerst: *[Laughing]* And some other degrees, as well.

Arthur Alarcon: Yes. Yes.

Judith Ashmann-Gerst: What other degrees do you hold now?

Arthur Alarcon: Well, at the end of my three years at USC, at that time law students were awarded a bachelor of laws, an L.L.B. Many years later, people who were in the military who were lawyers found out that they were not getting . . . they didn't start at the highest level that they could have, had they gotten a doctorate degree. And so the lawyers in the military got the law changed so that you now get a J.D., as I'm sure you have a J.D.

And what they did is the law school sent a letter out to all of us saying, "If you send $25, we will give you a J.D." Well, I

decided to be unique; so I didn't send the $25, so I am still an L.L.B., one of the few left in the United States.

Judith Ashmann-Gerst: I think my husband is still an L.L.B., right. I don't think he did it, either, and he graduated from USC as well. *[laughing]*

So are you a Bruin fan or a Trojan fan?

Arthur Alarcon: I am a Bruin fan. I was on the rally committee, and I worked the games. I sat with John McKay, who coached at USC, at some USC function, and he asked me about my background. I told him that I'm with UCLA, and he said, "Are you one of those people that doesn't give a damn who beats USC?" So I tried to not answer that. *[laughing]*

Judith Ashmann-Gerst: So after law school, your first job, as you indicated, was clerking for a judge for the superior court.

Arthur Alarcon: Yes, for the appellate court under the superior court.

Judith Ashmann-Gerst: Right. And then after that, you became a deputy district attorney.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: What made you choose your various career paths at that point in your life?

Arthur Alarcon: Well, at that time it was very difficult for people who belonged to minorities to get into the big law firms. There weren't any Hispanics, there weren't any blacks in the big firms or the middle firms. And so I decided that if I went to the DA's office and stayed there about three years, I could then bring into the field a lot of experience and perhaps overcome the reluctance to hire Hispanics and blacks. So that's why I chose the DA's office.

When I went to the DA's office, after, the DA called me in and said, "You're number one on the list; I'd like to appoint you, but I want to find out something. Are you going to have us spend a fortune training you to be a good trial lawyer and then leave us to go make money?" And I said, "I have to be honest with you, Mr. Roll," who was the DA. "I intend to stay three years and then make up my mind whether I want to make it a career or whether I do want to leave." And he said, "Thank you for an honest answer," and he hired me.

At the end of three years, I was so happy doing what I was doing that I decided to stay in public law, and I'm still in public law.

Judith Ashmann-Gerst: You stayed at the DA's office—

Arthur Alarcon: Until . . . I had been there about nine-and-a-half years.

Judith Ashmann-Gerst: Now of course when anyone talks about you and your career at the DA's office, they talk about L. Ewing Scott.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: And of course that's one of the most well-known cases in the annals of California criminal jurisprudence.

But there are other cases or other aspects of your career as a prosecutor that I'm sure are just as important to you.

Arthur Alarcon: Well, there are two cases that do stand out that I like to think about, and one of them is the *L. Ewing Scott* case, because in that case I worked . . . I second-chaired to, I thought, the best lawyer in the United States, the best trial lawyer, J. Miller Leavy. He divided the work right in half, even though I was much junior to him, and we were able to get a first-degree murder conviction, although the body had never been found, still has not been found, which in a sense made our case a lot easier because we didn't have to worry about an autopsy surgeon or any postmortem kind of examination of the body. We never found the body.

The other case that I like to remember is a case involving a furrier in Beverly Hills, whose name was Teitelbaum. And my boss called me in and said, "The grand jury has indicted Mr. Teitelbaum for faking a robbery of his fur salon. The case is a loser, but there's going to be a lot of media attention on it. And I want you to go out there and pick somebody to work with you, and I want you to try the case, although you're going to lose it."

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And I said to Mr. Roll, I said, "You want me to be like a swan in Swan Lake; you want me to die beautifully." And he said, "What are you talking about?" I said, "Excuse me." He didn't apparently attend ballet. *[laughing]*

So I went out to Santa Monica and tried the case, and we won—which reminds me. Trial lawyers and former trial lawyers never talk about the cases they lost.

Judith Ashmann-Gerst: *[Laughing]* You then left the DA's office to go to the Governor's.

Arthur Alarcon: Well, the Governor contacted my boss, who was then Bill McKesson, and said, "I need to borrow Arthur Alarcon to study the narcotics problem in California." And I was away on vacation with my father at the time, and McKesson said, "Well, I don't think that would be in his best interest."

So when I got back, I got a call from a wonderful lawyer named Grant Cooper, who was close to the Governor, and he said,

"The Governor wants you to study the narcotics problem. There's a lot of pressure against him in the media, and he has selected you to make recommendations, and he will push them through the Legislature with your permission; but you've got to talk to your boss to give you a leave."

So I went to see Mr. McKesson and I told him, "I really would like this opportunity, and I would like you to grant a leave for me." He said, "Well, you know, this is kind of a dead end," and I said, "Well, it will bring me to the attention of the Governor, and I kind of like that."

So he did grant me a leave. So I took the job. We got a pretty large budget, and we were given a year to complete our work. We completed our work in nine months, and I turned back $25,000, maybe one of the few people that went under budget and returned the money back to the taxpayers. *[laughing]*

Judith Ashmann-Gerst: Right. *[laughing]*

Arthur Alarcon: I went back to the DA's office, and about three months later the Governor called me, and he said, "I would like you to be part of my staff and be my legal advisor, clemency and pardons secretary." And I said, "Governor, number one, I'm a Republican; and number two, I don't agree with a lot of your political positions, and while you're vehemently opposed to capital punishment, I am not opposed to capital punishment."

And he said, "I'm not selecting you for your political views; I'm selecting you because I think you would give me honest legal advice, and I have studied your background and I know your work." And I said, "Well, I really like what I'm doing." He said, "You know, it's not polite to turn the Governor down on the telephone. I want you to come to Sacramento." And I said, "I don't have the money to fly to Sacramento."

So he sent me the tickets and I went to Sacramento, and he charmed me into accepting the position.

Judith Ashmann-Gerst: You had a very long, close relationship with Pat Brown . . .

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: . . . even though he was a pretty liberal Democrat and you're a fairly conservative Republican. He's indicated that he wanted your unbiased views.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: How did that all work out over those years? What other positions did you hold with him?

Arthur Alarcon: Well, when I first went to work with him, he said, "Whatever you do, if it's in the best interests of the people of the State of California, it will make me look good; so don't worry about politics. You just do the best you can."

About a year later, he phoned me. I happened to be at Lake Tahoe giving a speech. And he said, "Come back. My chief of staff has resigned, and I'd like you to take over my staff." And I said, "Governor, remember? I am a Republican. I don't want to be involved in Democratic politics." He said, "I'm not asking you to be involved in Democratic politics; I'm running for office and I'm going to be away from Sacramento, and I need someone I trust to make decisions or contact me and give me recommendations. And again, do it for the good of the people; don't worry about me, because you'll make me look good if you make wise decisions." So that was our arrangement, which was unusual.

Judith Ashmann-Gerst: And then all of your appointments to the courts have been by Democrats, isn't that correct?

Arthur Alarcon: Yes. I was elevated by Jerry Brown, Pat Brown's son; Jerry is a Democrat. And then I was appointed to the United States Court of Appeals by Jimmy Carter, a Democrat.

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Judith Ashmann-Gerst: Right. I think that's pretty unique as well.

Arthur Alarcon: There is a funny story about my elevation to the United States Court of Appeals. Jimmy Carter is not a lawyer. He has a Ph.D. from the Naval Academy in physics, which a lot of people don't know.

So he decided, unlike his predecessors and successors, to turn the recommendation for federal judgeships over to commissions. So he appointed commissions in every circuit, and the commissions had lawyers and laypersons, and he tried to balance them with Democrats and Republicans.

They advertised in the legal newspapers, "Would you like to be a federal judge? If you have 10 years' experience, clip out this coupon and send it in." I didn't do that.

After several months I got a letter from Sam Williams, who was a wonderful lawyer and later a deputy attorney general and a great private practitioner after; he was co-chair of the commission of the Ninth Circuit. And the letter said, "We have asked 15 persons, including you, to apply. The commission has indicated that you are qualified, and we need people like you."

So I talked to my best friend and legal advisor at the time, Warren Ettinger, who is now a superior court judge, and I said, "What do you think? I've never wanted to be a federal judge. What do you think I should do?" And he said, "Well, what do

you want?" And I said, "I'd like to be on the California Supreme Court, since you asked." So I was then on the Court of Appeal. So he said, "Well, look, they're not giving you the appointment; they're only asking you to apply. There are a lot of other people, so go ahead and apply." So I applied.

Several months went by, and I think it was even a Sunday night. I was at the Court of Appeal at 10:00 at night, and the phone rang. And I picked it up, and the voice said, "This is a White House operator. Are you Judge Alarcon?" And I said, "Yes." And then Sam Williams got on the phone and he said, "We're on a speakerphone, and the White House staff are around me, and they claim that you are a Republican. Say it isn't so."

And I said, "Sam, I have been a Republican since I was at UCLA when I was eligible to vote, because I was very upset that every major committee in the Congress was chaired by a Southern Democrat, and what they were doing to civil rights was something that was totally offensive to me. That's why I became a Republican. I wanted to go back to the party of Lincoln, and I wanted to try to change the Republican Party to take care of civil rights and so forth."

And there was a long pause, and then Sam Williams said—and I'll change one of the words—but basically he said, "Oh, shoot." And notwithstanding that, I got the appointment. So I am President Carter's oh, shoot. *[laughing]*

Judith Ashmann-Gerst: So let's go back to when you got appointed to the superior court.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: What year was that? What were your assignments?

Arthur Alarcon: I was appointed in 1964 in July. I drove down from Sacramento overnight, and I went in to see Judge Joe Wapner and said to him, "Here I am, but I haven't had any sleep." He said, "Oh, well, I have a jury waiting for you." So I tried a jury trial without sleep the first day.

Judith Ashmann-Gerst: And you were appointed directly to the superior court . . .

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: . . . which at that time was also somewhat unusual.

Arthur Alarcon: Yeah. Pat Brown had a philosophy that his judges should serve on the municipal court. He felt that they should get the experience of dealing with people who made a mistake, just ordinary citizens who went too fast or maybe had too many drinks or what-have-you and to get some compassion for

people. He also wanted them and insisted they go out to visit state prisons and mental hospitals before they were appointed.

But he decided in a handful of cases, of Shirley Hufstedler, Otto Kaus, and me, to appoint us directly to the superior court. And in fact, when he appointed me to the superior court, I had just completed serving 90 days as chairman of the California Adult Authority, and he appointed me to that.

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Again, he asked me to go under the Adult Authority and see what the problem was, because there was a high recidivism rate. Over 70 percent of the people within three years were coming back to prison, and he was getting lambasted in the media. So he said, "I want you to see if there are changes that have to be made."

So I went to the Adult Authority, and on the way out, he said, "Okay, you've never asked me; but I know you want to be a superior court judge." And I didn't say anything and he said, "I'll tell you what. The first opening that comes up is yours." So I walked out without really responding, but highly hopeful.

In the next 90 days, I gathered together the brightest parole agents and staffers in the parole division and in the Adult Authority, and we created manuals. They had no written manuals for parole supervision or for policy for the members of the parole board. So we drafted those.

And after 90 days, the Governor called me and he said, "Well, I have an opening," and he appointed me to the superior court, true to his word.

Judith Ashmann-Gerst: Your first assignment on the superior court was where, after the jury trial you had waiting? *[laughing]*

Arthur Alarcon: Well, my first assignment was in criminal, and I spent about six months in the criminal courts. And then I got called in by the presiding judge and he said, "You know, you need civil experience. You've never been a civil practitioner. And I think you have a great future in the court system; but I want you to go to Pomona to try civil cases." Well, that was quite a job for me. I lived near Pasadena at the time, but I had to accept the appointment.

Well, I went out to Pomona, and the presiding judge in Pomona said, "Oh, wonderful. We have a backlog of criminal cases." So for the first 10 months, I tried back-to-back criminal trials. And finally I went to him and I said, "Please, I was sent here to get civil experience. Let me have your law and motion, let me have adoptions, let me have default divorces, let me get experience." So they did that for me.

After I finished my year, the presiding judge appointed me to be presiding judge of the criminal courts, which was kind of unusual.

Judith Ashmann-Gerst: Back downtown.

Arthur Alarcon: Back downtown, yeah.

Judith Ashmann-Gerst: That was unusual after just one year.

Arthur Alarcon: I served in the criminal courts; I served as presiding judge for a couple of years, and then I asked the presiding judge, "I still haven't got that civil experience." They said, "Well, we need you in the criminal side because of your experience." I said, "Let's make a deal. Send me over to civil for three years, and then I'll take three years back in criminal, and let's just alternate through my career." And they agreed, and every presiding judge thereafter honored that. So I went back and forth during the 14 years I was a superior court judge.

Judith Ashmann-Gerst: How would you compare the civil trials and the criminal trials?

Arthur Alarcon: It's really how I would compare the lawyers; and maybe this is because I was a prosecutor for nine years. I found the lawyers, at that time at least, in the criminal cases, civil, worked well together even though they were on opposite sides.

When I was transferred to civil, I was startled at how antagonistic the bar was and some of the things that they did to each other, which would have never occurred on the criminal side. In fact, when I was a prosecutor on the criminal side, we would battle all morning in a case and sometimes I'd go to lunch with my opponent, or we'd pick a restaurant where his client didn't see us, because it might have worried his client; but then we'd come back and battle all the rest of the afternoon. So there was a difference in the bar. I don't know if it's still that way, but that's one thing that I noticed.

Of course the other thing I noticed is that my introduction to civil law was fascinating. The first case I had was an agreed-boundary case, and there hadn't been an agreed-boundary case for a long time in California. In fact, the cases we looked at were from the 1850s.

What is in an agreed boundary? It is an agreement between two property owners as to what the dividing line will be on their property. For example, a stone outcropping and perhaps the edge of the river in a straight line between those two, they would shake hands and say, "Okay, we agree this is the boundary."

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Well, I had a case in the late 1960s in Pasadena where there were no metes and bounds, there was no record, and

somebody 100 years before had shaken hands and agreed to divide the property.

Well, a more recent property owner, not knowing that, put up a deck and a patio 25 feet onto the other man's land. Somehow he found out about the agreed boundary, and so there was a lawsuit as to whether the man would have to destroy his patio.

Judith Ashmann-Gerst: Jury trial or nonjury?

Arthur Alarcon: Nonjury.

Judith Ashmann-Gerst: Nonjury.

Arthur Alarcon: Yeah.

Judith Ashmann-Gerst: And what did you decide?

Arthur Alarcon: Well, I decided that I had to go along with the agreed boundary. They didn't, by the way, raise laches as a defense. They might well have.

One of the interesting things about it was that the third house—there were three houses in a row—and the third house was Warren Ettinger's house. So I had to tell the lawyers on both sides, "I know your neighbor. He lives a house or two away from you." But they said, "We still want you to try the case."

Judith Ashmann-Gerst: So you were on the superior court for . . .

Arthur Alarcon: 14 years.

Judith Ashmann-Gerst: . . . 14 years, and then—

Arthur Alarcon: I spent about two years, by the way, on the California Court of Appeal. At that time they didn't have staff working on writs, and so they would bring over a superior court judge or two to handle all the writs. So I came over on assignment for two years as a writs judge—handled habeas corpus, mandamus, prohibition, and so forth.

Judith Ashmann-Gerst: Uh-huh. And you also sat in the appellate department of the superior court.

Arthur Alarcon: Yes. Just before I left, after I worked the writs job, I was appointed to serve on the appellate department of the superior court, and I served on that court for about two years.

I then was returned to trials, and I tried once again a criminal trial. They had a criminal trial in Van Nuys, and the 10-day period was up; the case had to be dismissed unless the judge could come over that day and take over.

Another judge selected the jury, and then I appeared on the 10th day and we started the trial. It was an interesting trial, because one of the jury . . . It was a murder case involving a drug dealer who apparently was believed to be an informer. So his suppliers killed him, and they buried the body in Ventura Beach.

So in voir diring the jury, I would ask after the initial voir dire, I asked a juror, prospective juror, "Would your answers be the same as those of the other jurors who are sitting here?" He said, "No." He said, "I feel very strongly—" And I said, "Just a moment." And I said, "I think we'll excuse the other jurors."

So we excused the other jurors, and he sat there alone in the courtroom with the lawyers and I said, "Now, what do you feel strongly about?" He said, "I think anybody involved in drug dealing who kills somebody should get the death penalty, and there's no way that I would change my view on that. That's how I feel." So I said, "Thank you very much," and I said, "Counsel, would you like to stipulate?" And they stipulated that we should excuse him for cause.

Now, the defendants were convicted of first-degree murder. At that time, the death penalty had not been restored in California. The defendants appealed, because there had never been a case up to that time where there had been the voir dire of an individual juror without the others present, and they claimed that was a due-process violation and so forth. And the Court of Appeal affirmed what I did, and that was my last case as a superior court judge.

Judith Ashmann-Gerst: It's interesting that they appealed on that basis because, of course, when the death penalty was reinstated, for many years you had to . . .

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: . . . question jurors outside the presence of the other panel members.

Arthur Alarcon: Sure. Yes, yeah.

Judith Ashmann-Gerst: And that was your last case as a superior court judge.

Arthur Alarcon: As a superior court judge, yeah.

Judith Ashmann-Gerst: So being in the appellate department, sitting here on the Court of Appeal by assignment—that piqued your interest in an appointment to the Court of Appeal?

Arthur Alarcon: Well, I had hoped that I would get on the Court of Appeal because, as I said, my goal then was hopefully someday to be on the California Supreme Court. So, sure, I felt that might be

an open door to it, and Jerry Brown called me and did appoint me.

(00:39:57)

In fact, it was funny. When he called me, he had been Governor for several years, and he said, "I hope that you will accept an appointment to the California Court of Appeal." And I said, "Governor, I've been waiting for this call for several years." He said, "Yeah. People say I'm a little slow at appointments." *[laughing]*

Judith Ashmann-Gerst: *[Laughing]* So before we talk about how you wound up on the Ninth Circuit instead of the California Supreme Court . . .

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: . . . let's talk about your experience here on the Court of Appeal.

Arthur Alarcon: Well, I was on this court approximately 15 or 16 months, and I had to finish a trial; and so I stayed as a superior court judge for several months before I took my oath of office.

So I came over in late September of 1978, and at the time, under California law if you were appointed to the California Court of Appeal, you had to stand for election at the next general election, which was two months away. So my name appeared on the ballot in 1978 before I wrote one opinion. And, let's see, 30 percent of the voters felt that I was not qualified, even though they had not read any opinion that I wrote; but 70 percent thought I was great. *[laughing]*

Judith Ashmann-Gerst: And you were in Division Four.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: And who were your colleagues at the time?

Arthur Alarcon: My colleagues were Gordon Files, Robert Kingsley, and Bernard Jefferson. One of the delights for me was that Bob Kingsley was the dean of my law school. So not only did he give me my L.L.B., but I also got to sit with my former dean.

Judith Ashmann-Gerst: That was an amazing panel.

Arthur Alarcon: It was. Oh, I think we've talked in the past about what are the differences between the way . . . my experience on the California Court of Appeal and my present experience on the United States Court of Appeal. One of the things that I found out almost immediately is that in your court, the panels do not change. You have now four or five?

Judith Ashmann-Gerst: We actually have eight in this district.

Arthur Alarcon: No, but on each panel.

Judith Ashmann-Gerst: Four on each panel, right.

Arthur Alarcon: Four on each panel, so that for part of the year at least, you sit with the same people, the same two other people, and then occasionally one is substituted.

And on the United States Court of Appeal, we never sit together as a panel. We change every month. There are some of my colleagues that I haven't sat with for seven years, because we have new panels every month. So that's different.

And one of the things that is kind of a funny fallout from that is, when I sat with Gordon Files and Bob Kingsley on a search-and-seizure case, when we discussed the case, I said I felt that the officers had violated the Fourth Amendment, that they didn't have probable cause. And as I was talking—and I was brand-new on the court—I noticed that Gordon had turned his back and was looking out the window in one direction, and Bob Kingsley was looking out another window. And I talked and talked and slowed down, and Gordon Files then said, "Have you finished?" I said, "Yes." He said, "I don't agree with you," and Bob said, "I don't agree with you."

So when the conference was over, I raced over to Bob Kingsley's office and I said, "Bob, I thought I had a point there that you might at least wanted to talk about." He said, "Arthur, 13 years ago Gordon and I considered that question, and we agreed that it wasn't a violation of the Fourth Amendment."

So one of the differences between the two courts is that I get exposed each month in the Ninth Circuit to a different judge, who may give me an argument that I never thought of before, that might open my eyes and change the position that I had thought was a valid one before; and hopefully I can do the same thing for some of my colleagues.

Judith Ashmann-Gerst: How's the workload different? How are the cases distributed? How do you decide who actually writes the opinion?

Arthur Alarcon: Sure. The workload is about the same; but when I was on the California Court of Appeal, Gordon Files was the presiding judge of our division. He would send us one-third of the cases that were to be argued six weeks or so in the future, and our responsibility was to draft an opinion and to circulate it approximately 10 days before oral argument.

(00:45:11)

My colleagues would then make comments and send it back and indicate that they had problems with this part of it or "What about this?" or "This isn't persuasive," and I would work more on the opinion.

We would then sit down the day before argument and sometimes spend the whole day going over the cases to be argued and agreeing or disagreeing on the draft. Sometimes in the conference there would be questions raised by one of my colleagues, where the colleague wasn't totally sure: "Yeah, maybe I'll go along; but I'm troubled by this."

The next day, then, when we would get on the bench on this court, the California Court of Appeal. The lawyers know or at least at that time knew it . . . is it approximately, by the way, the same way now, the procedure?

Judith Ashmann-Gerst: Yes.

Arthur Alarcon: Yeah. So the lawyers know this, that appear before the California Court of Appeal.

Judith Ashmann-Gerst: Right.

Arthur Alarcon: They know that we've talked about the case, they know that we may have drafted something on the case.

Judith Ashmann-Gerst: Right.

Arthur Alarcon: So they're prepared to argue, and hopefully they will ask questions so they can reassure us as to their point or strengthen their point.

Judith Ashmann-Gerst: Right.

Arthur Alarcon: And one of the things that I noticed sitting on the California Court of Appeal is sometimes my colleague who in conference said, "I have some questions that I'm troubled by" would not ask those questions; so I would ask those questions, and sometimes the lawyer would get red-faced and angry at me, even though I thought his point was well taken.

So when I talked to lawyers I said, "Don't get mad at the judge who asks you a question. He may be trying to get you to develop your point and to reassure another judge who has some problems with it."

Judith Ashmann-Gerst: Right.

Arthur Alarcon: Now, what's the difference? On the United States Court of Appeal, as I said, we change panels every month. And number two, we do not talk about a case until after our oral argument. It's just totally forbidden; it's part of their tradition and philosophy.

I asked one of my chief judges one time, "Where did that come from?" because he knew about the California procedure and asked me what I thought of it. And I told him I was very

comfortable with it. And he said, "Well, the reason that we don't do it here is that Joe Ball," who's a wonderful lawyer in California, said, 'I would rather talk to you and have you listen to me before you talk to the other judges and before you're influenced by your law clerks, so that I can talk to you and that you have an open mind.'" So I thought, "Gee, that's interesting."

Well, Joe Ball happened to be a friend of mine. I had tried cases against him as a prosecutor. So one evening at a cocktail party I said, "My chief judge said that the reason that we never talk on the Ninth Circuit about a case until after argument is because of your complaint." He said, "I didn't make that complaint." He said, "I don't care." *[laughing]*

Judith Ashmann-Gerst: Do you circulate a bench memo before oral argument?

Arthur Alarcon: Yes. What we do is circulate a bench memo prepared by our law clerks, and we divide the cases into thirds, and our presiding judge decides which cases go to which judge. And then we turn it over to our law clerks.

In my chambers at least, I tell my law clerks, "I want you to give me an independent analysis of this case. Look at the briefs, be fair to both sides, give their best arguments as well as you can, do independent research, and then"—and this was kind of an innovation that I brought into the bench-memo process—"give me your recommendation." Because when I got there we were receiving bench memos, but there was no recommendation; but sometimes it was pretty obvious what the law clerk wanted us to do. So I said, "Just go ahead and at the last part of it say 'I recommend' and summarize your reasons. We may agree, we may disagree; but at least we know where you stand and what you feel strongly about." So that's what we do.

Now, one of my colleagues—and even though I think he's a wonderful human being, but I won't disclose his name—works differently. The rest of us pretty much operate the way I do. We do hands-off in the bench memo, because it's my view that the law clerk is working for all three judges, not just for me, in doing a bench memo; so he shouldn't try to please me or guess what I might think would be the correct result.

(00:50:03)

But one of my colleagues tells us, and he is very open about it, he said, "I tell my law clerks, 'Here's another example of the LAPD storm troopers breaking down somebody's door without a search warrant, so you write a bench memo and, by god, we'll show that district court judge who made a mistake in this case.'"

Judith Ashmann-Gerst: I might be able to guess who that person is. *[laughing]*

Arthur Alarcon: But I give him credit. We know he does that; so whenever we get a bench memo from that court, we push it aside and we have our own law clerk go through it.

Judith Ashmann-Gerst: Start over.

Arthur Alarcon: Because I think sometimes his law clerks may be intimidated—after all, he's been a judge for many years—and so they give him what he wants. I've seen other bench memos that appear not to have agreed with him, and that's what I'd hope my law clerks would do: give me their honest view.

Judith Ashmann-Gerst: Do you feel there was more collegiality here on the Court of Appeal or there on the Ninth Circuit, or is it just difficult because the process is so different?

Arthur Alarcon: I think the collegiality on the Ninth Circuit is good. Is there more collegiality, or was there more on this court? I would say yes, and the reason is many-fold. One of the reasons goes to the fact that in this court I felt free to go in and talk to Gordon Files or Bob Kingsley or Bernie Jefferson and say, "I'm having trouble analyzing this case, and here's what I think might be a way to go. What do you think? Let me bounce that off of you." And in a few minutes he would respond, and then I'd go back across the hall and continue working on it. We can't do that here. I don't know, except for one judge, where my colleagues stand until after argument, and we are really prohibited by tradition from talking.

So I felt that brought us closer together, and I like the idea of sitting down and going over the cases and tentatively agreeing on what we thought was the right result, then to be tested with the lawyers the following day.

So was I more comfortable with that? Yes. But are my colleagues collegial? I would say yes, even though I have colleagues . . . one of them is in Fairbanks, Alaska.

Judith Ashmann-Gerst: I was just going to say you're spread out physically as well. That's a major difference.

Arthur Alarcon: Sure. And we are also at a disadvantage for collegiality, I must say, in that because we can't talk to a colleague alone. We have another tradition that if I want to say something to a panel member after argument, I have to send a copy to the other panel member.

Judith Ashmann-Gerst: Uh-huh.

Arthur Alarcon: So I can't just pick up the phone and say, "What do you think about dropping that last sentence? I think it's dictum, and maybe we don't need it." I have to write a memorandum, and

sometimes because of the workload they get a little tart, and so there's bristly feelings.

Judith Ashmann-Gerst: Do you conference after oral argument?

Arthur Alarcon: Yes, each day we conference after oral argument.

Judith Ashmann-Gerst: Do you have a week of oral argument a month or—

Arthur Alarcon: We have a week a month, yeah. We have about 30 cases a month, which I suspect is fairly close to the number of cases that you handle here.

Judith Ashmann-Gerst: Actually, the workload's down a little bit now, so ours for oral argument might be around 18, 20 cases a month?

Arthur Alarcon: Well, we have 30. Now, some of those 30 end up to be, to use a basketball term, slam-dunks. They end up to be cases that there is clear Ninth Circuit authority to dispose of them. So I would say that perhaps 18 to 20 are the difficult cases, and maybe 10 to 12 are easy; so it's fairly comparable to what you're doing.

Judith Ashmann-Gerst: So each day after oral argument, do you conference on cases that were heard?

Arthur Alarcon: Yes, immediately after oral arguments, yeah. And that can be a problem, depending on the presiding judge. I had a presiding judge at one time who we'd sit down after argument, and he'd say, "Well, my plane is going to leave in an hour and a half, so we have 10 minutes to talk about these six major securities-violation cases." Most of my colleagues will spend as much time as needed to hear each judge's views.

Judith Ashmann-Gerst: One of the things you and I talked about was the difference in approach between the deputy attorneys general . . .

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: . . . and the assistant U.S. attorneys in their written briefs and also oral argument.

(00:54:58)
Arthur Alarcon: When I was on the California Court of Appeal, I really admired the policy of the Attorney General's Office. The Attorney General, I should explain, is the appellate lawyer for all 50 ADAs in the state. So they would look at the work of the prosecutor and the decisions of the judge and instructions of the judge after a conviction. The Attorney General's Office, at least at that time, would come in with a deputy attorney general and say, for example, "We concede that there was prejudicial error, and we ask the court to send it back for a new trial." Or they would say, "We think that the prosecutor stepped over the line and the comment that was made to the jury was

erroneous; but we also believe that the evidence is overwhelming, and notwithstanding the error that was committed—and we concede there was error—we think the court should affirm." With that kind of an argument, you sort of lean forward as a judge and say, "Wow. These people really are trying to help us, and they're confessing where there are mistakes."

In most of the federal districts, the U.S. attorneys do not have a separate appellate unit. And so the prosecutor who tried the case and may have made a mistake appears before the Ninth Circuit to defend the conviction. And it's very hard for them to say, "I made a mistake." We point it out to them, and some of them stammer and try to justify something that's not justifiable instead of being able to say to us, "Yeah, we made a mistake; but the evidence is overwhelming, and you confirmed."

I have kind of tried to make a change in that, and I think the U.S. Attorney's Office here now is having more and more cases done by an appellate unit.

Judith Ashmann-Gerst: Right, they have an appellate division. I don't know if all of their appeals go through that.

Arthur Alarcon: Yes. Not all of them go there; but they are taking over more and more, and I think that's a much better approach, and it helps us.

Judith Ashmann-Gerst: So let's get back to the Court of Appeal, California Supreme Court, Ninth Circuit. You had hoped to go to the California Supreme Court.

Arthur Alarcon: Yeah.

Judith Ashmann-Gerst: You were offered a position.

Arthur Alarcon: Well, I was offered the position to the Ninth Circuit, and at the time the California Supreme Court was having a lot of problems with the death penalty; and there were many, many, many reversals in death-penalty cases, and I did not agree with some of the reasoning of the California Supreme Court's cases. And I decided, "Uh-oh. If the Governor were to call me and ask me to sit on that court, I might end up spending the rest of my life dissenting," and I didn't really look forward to that.

But again, Warren Ettinger said, "Nobody's called you from the Governor's Office to put you in the Supreme Court." Well, the Governor did call me and asked me if I would go to the California Supreme Court.

Now, by that time, in addition to not wanting to have to write dissents on every case, every criminal case, I also liked the kind of cases that we receive on the Ninth Circuit. When I sat

on the California Court of Appeal, I did a calculation after the first year, and 40 percent of my cases were drug cases, and about 20 percent were rear-end collisions; and on one calendar, two of them occurred at the same point on the 101 freeway, rear-end collisions. *[laughing]* And many of the rest were what appeared to me trumped-up cases between insurance companies to have us tell them what language we agreed with so that they could go out and rewrite the policy and get rid of the problem. And I found it a little boring to have that kind of a load.

On the Ninth Circuit on a given calendar I may have an Indian-law case, an admiralty-law case, a securities-law case, an environmental-law case, a sex-discrimination-on-the-job case, and so on. And so the variety is terrific, and I feel like I'm a student for life, learning these various fields. So I found that very attractive.

So I thanked the Governor, but I said no. I think I'm one of three people, by the way, that has turned down a direct request from the Governor. Sam Williams was the other.

(01:00:03)

Judith Ashmann-Gerst: I was going to say, one of the other ones was Sam.

Arthur Alarcon: Was the other.

Judith Ashmann-Gerst: Right, right.

One of the other advantages of the Ninth Circuit is that you're able to travel around all of the other circuits and sit with them. What's that experience like?

Arthur Alarcon: Well, actually, the active judges are not allowed to sit with other circuits. If they're asking for help—and the Ninth Circuit has been in trouble since I've been on it, in the sense of being understaffed—so when I became a senior judge 14 years ago, I was then allowed to travel. So I've been sitting with other circuits part of the time for the last 14 years, mostly with the Third Circuit in Philadelphia and the Eleventh Circuit in Miami, Atlanta, and Montgomery, Alabama, and that's fun. It's fun because they have different . . . It's all federal law, but they had different problems there. For example, with the Third Circuit, they have a lot of securities-law violations and admiralty-law violations. In the Eleventh Circuit, they have Indian-law problems; but they also have a lot of discrimination in hiring and in promotions, one of the reasons being a tremendous influx of factories that went to the South from the North when in New England there was a closedown of a lot of the clothing factories. This brought with them not only the factories, but also lawyers who specialize in job discrimination. Some of the best job-discrimination lawyers in the country work out of Atlanta. So I've enjoyed that very much.

I've had fun also with the fact that I sit with other circuits, because we don't have to follow in each circuit the decisions of any other circuit. We must follow, of course, the Supreme Court; but there are circuit conflicts which develop. And I've had the experience of sitting with the Tenth Circuit on one case where I didn't agree with the Ninth Circuit law, and I was asked to write the opinion. So I wrote an opinion for the Tenth Circuit, pointing out all the flaws in the law of the Ninth Circuit in that case. *[laughing]*

Judith Ashmann-Gerst: Do you remember the details of that case? *[laughing]*

Arthur Alarcon: No, I don't; but we felt that the Ninth Circuit had gone wrong, and I had the job of explaining where it had gone wrong.

Another case that I had that was fun sitting with another circuit, in this circuit I had a tax case. What happened is that an insurance agent in Northern California applied to represent a major insurance company in his county, and the insurance company hired a private investigator to check into this man's background. The private investigator completed his report, sent it to the insurance company, and said that this man had a prior conviction for fraud.

So the insurance company contacted the man and told him, "I'm sorry, we can't hire you because of your record." And the man said, "What do you mean, my 'record?'" And he said, "Well, we can't talk about it; but you have a criminal record." Well, other people came forward—I suspect the police chief of the county or the sheriff of the county—told this agent, "You know, they have you confused with somebody else with the same name who committed fraud."

Well, the word spread through the county, and he lost business. So he filed a lawsuit in state court, which was removed to the federal court, and it was a defamation action, because everybody in his church, his country club, his service clubs, heard that he had committed fraud.

So the case went to trial, and the jury came back with an award of $600,000. The lawyer for the insurance agent did not ask the jury to separate the emotional distress that he suffered in having been lied about and the loss of business, but he said he's entitled to recover for both. So the jury came back with a lump sum and didn't segregate it. What was the lost business? What was the suffering that occurred?

(01:04:58)

So he went to a tax lawyer and he said, "How do I treat this tax-wise?" And the tax lawyer said, "Well, let's cut it in half. You claim $300,000 as deductible because of the emotional distress and pay $300,000 for the award for loss of business."

So he got an appellate lawyer after doing that, and the appellate lawyer said, "No, no, no, no. You don't have to pay any taxes on that."

Now, the appellate lawyer just had a theory that we should apply tax law, which said that if you're in a personal-injury situation and you lose wages, the tax division said you don't have to segregate it, it's all nontaxable. So a lawyer argued to us it should be the same.

So I had a law clerk who had had a master's in tax law, and I sat down with her and I said, "You know, I'm intrigued by that argument. Personal injury is a tort; so is defamation a tort, and it's not property, because the lawyer said, 'Well, that was a loss of property.'"

And she said, "Well, you really can't go that way, because the tax people in the country will laugh at you." And I said, "Well, let's research it." So she said, "What do you want me to research?" I said, "Well, start off with where did trade libel came *[sic]* from?"

So she was a fabulous researcher. It turned out that the notion of trade libel come out of England back in the 13th or 14th century, and at that time the merchants—let's say the tin makers—would all have a fair periodically. They'd all gather and they would display their work, and during the fair they would sit down and say, "You know, you have told people my product is inferior, that my welding isn't proper, and that's lying about me, and I want you to stop." And from that developed a group of senior tin makers, for example, who would resolve the case, would mediate and say, you know, "Don't do that anymore; we've checked his welding, and it's okay."

Those courts were called in French *pieds poudrés*. My clerk came in and said, "I have found out that they have these fairs, and they had what were called the Dusty Feet Court." And I said, "Dusty Feet?" And she said, "Yes." I said, "Why were they called Dusty Feet?" She said, "Well, probably because they had to walk over the roads, and their feet were dusty when they got there." *[laughing]* And then I said, "Well, were they called anything else?" And she said, "Yeah, *pieds poudrés*." Well, that's dusty feet, and that's where it comes from.

So that's where trade libel came, and then it developed into English law, the notion of . . . it's part of defamation; it's trade libel.

So I wrote an opinion saying that it was not taxable; my colleagues agreed with me. Ultimately, a numbers of years later the whole Tax Court unanimously agreed with that theory. But before the Tax Court agreed, I sat in the Eleventh Circuit several years later, and the same poor lawyer from the

Department of Justice stood up and looked at me, and he had exactly the same issue.

Now, at the time—and I think it's still going on—the Department of Justice had, to me, an offensive policy. They call it non-acquiescence. And what it would mean is, if they lost a case, a novel case in the Ninth Circuit, they would not seek certiorari from the Supreme Court. Therefore, that would only be the law in the Ninth Circuit, and they wouldn't give any other circuit a chance to adopt that, because they just swallowed it in the Ninth Circuit.

So here I am in the Eleventh Circuit. This poor lawyer stands up to argue, and he said, "Judge Alarcon, it's my fate to have you before me again." And I said, "Counsel, this was done by chance. I had no idea." *[laughing]* So he argued the case and I again was not impressed, and I wrote the opinion for the Eleventh Circuit. *[laughing]*

Judith Ashmann-Gerst: That's certainly a unique set of circumstances. *[laughing]*

Arthur Alarcon: Yeah, and that's part of traveling to other circuits. *[laughing]*

Judith Ashmann-Gerst: That's really funny.

Off the bench, you have for many, many years been involved with the community and the betterment of the community—your work with Alice Callahan, among others. Which of those activities have you found to be the most rewarding? What are you still involved with at this time?

(01:10:11)
Arthur Alarcon: Well, when I was still in law school, I became very concerned with the lack of equal enforcement of the law and equal treatment of people in Watts, but also people in East LA. So I was involved in founding a couple of groups, not-for-profit groups, that kind of lobby the city, the county, the state, and the national government to enforce the laws there.

Part of this started because I took my first child to see *Godzilla* in a theater on what was then Sunset, but in East LA, and that's now César Chávez, at least for part of it. And we walked in and we sat down on the seats, and the springs were coming through; so we had to move several times to find seats that were okay. During the movie, he had to go to the bathroom. We walked in; it was filthy.

So I went to the manager and I complained and he said, "Well, you know, we don't get much revenue here; we can't afford it." So I went to the city council. Well, being a judge, the council person listened, and I thought, "These people need to complain, they need somebody to do that." So I worked on that, and that was really satisfying.

I have a wonderful friend who is now an Episcopal priest, Alice Callahan; used to be a Catholic nun, so I call her Father Alice. But Alice Callahan, when she became an Episcopal priest, her church allowed her to be what in France used to be called a worker-priest. She has a not-for-profit group on Seventh Street that deals with the families on skid row and deals with the poor people that surround that area. And we not only have child care there at our office there, but we also bring in people to give them legal advice. We have people that teach them how to speak English. We have people to advise them about getting their immigration papers taken care of, and now we've branched off from that and we have another not-for-profit corporation which has set up charter schools. And we have three charter schools that are educating primarily Hispanics, because Alice found out that in the schools in the area they were putting these kids in remedial classes, and the kids were okay, they were bright; they just were not being attended to.

Judith Ashmann-Gerst: These are charter schools in the downtown area?

Arthur Alarcon: Yeah. And so now these kids are doing beautifully, and some of them are graduating from us and going and doing well.

They were being also treated in a bilingual-education concept, and Alice and I believe in total immersion. I think I mentioned to you that I didn't learn to speak English till I was five. I had total immersion, and my classmates taught me how to speak English. And I think that at least with the younger kids—and our kids are kindergartners and first and second—that they can learn English fast. They have that ability. I think it gets harder when you're older.

Judith Ashmann-Gerst: Other community activities at this point?

Arthur Alarcon: Yeah. Well, right now I'm involved with Alice's groups. I think that's it.

I did have . . . you mentioned Burt Pines. Burt Pines, when he was assisted by Judith Ashmann *[laughing]*, belonged to a dinner club that I belonged to of lawyers and judges, and we didn't have any women in that group. And at one of our meetings Burt Pines said, "We should have women in this group." And I seconded the motion, and we lost. So Burt resigned from that.

And at a subsequent meeting at a banquet, I sat next to three or four of the people who voted not to have women in this group, and one of the wives said to me, "Why aren't there women in this group?" And I said, "Because your husband said that you would be very upset if he met from 5:30 to 8:00 once a month with male [*sic*] lawyers." And she said, "That's outrageous."

So at the next meeting women were invited, and women are now part of that group.

(01:15:04)

Well, at the time I was on the board of the Los Angeles Boys Club, and I stood up and said, "You know, there are no Girls Clubs in this area"—that's in the Lincoln Heights area. And I said, "The nearest Girls Club is in Pasadena or in Hollywood, and I don't want these 10-, 11-, and 12-year-old girls taking buses to go there; so let's open up our club to girls."

Well, the director said, "Oh, this is terrible; this is against national policy." And fortunately, the *LA Times* was the biggest contributor to the LA Boys Club; so one of the vice-presidents of the *LA Times* said, "Why don't we form a committee and let Judge Alarcon chair it, and let's come back with a recommendation and let's vote on it formally."

So we did form a committee, and sure enough, not only did the Boys Club of the United States oppose it, but the Girls Club of the United States opposed it. They said, "It would be awful if these 11- and 12-year-old boys and girls swam in the same pool or played in the same gymnasium." And I said, "It would be wonderful; they could get to know each other and relate." So both the Boys Club nationally and the Girls Club nationally opposed it.

So we turned in the report and I moved that it be adopted, and it was seconded by the *LA Times*' vice-president who said, "Not only do I second it; but I want to tell you that if you don't change the name to the LA Boys and Girls Club and invite girls, we are withdrawing all funding from you." So the motion passed, and it is now not only in Los Angeles, but nationally they've joined together; they are the United States Boys and Girls Clubs. So that was fun.

Judith Ashmann-Gerst: Significant accomplishment.

Arthur Alarcon: Yeah, thanks to Burt and a young lady named Judith Ashmann.

Judith Ashmann-Gerst: Going back to a time when you were on the bench, now you mentioned to me the *Silverman* case.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: And it's an interesting case, because it dispels the myth that former prosecutors are always pro–law enforcement as judges.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: Can you talk to us about the *Silverman* case?

Arthur Alarcon: Sure. Let me back up a little bit with this point. I think it is wrongheaded that just because a judge may have been a

criminal-defense lawyer, a public defender, or even in the ACLU that they are always going to rule in favor of the defendant or in favor of the plaintiff in a claim of discrimination. It's just not true, and it's not fair. Judges, when they put on the robe, the ones that I know and I respect put their past experience aside and try to follow the law. Sometimes they may go home and have an extra glass of wine because they had to write the case the way they wrote it; but they try to follow the law.

So there is, however, that belief, and there are a lot of lawyers who think if you were once a prosecutor, you're always going to support the government and you're going to vote either guilty as a trial judge or affirm as an appellate judge.

But the *Silverman* case was a fascinating case. I'll try to summarize it briefly, but basically what was involved is Mr. Silverman's sister was involved in selling drugs in Reno, Nevada, and she got a request for a large amount of drugs from a dealer who had his own private plane. So she and the man who had the private plane and a third person flew to Van Nuys Airport on three occasions, and the record was remarkably the same on each occasion. The third person became a government witness, and he got immunity for his drug dealing. And he said, "When we arrived at the Van Nuys Airport, Mr. Silverman's sister went to the phone and phoned for a cab. And I asked her, 'Whom did you phone?' and she said her brother." Now, the records show that she had two brothers in the San Fernando Valley. On three different occasions, that was the testimony from this informant.

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The government brought in the records of the cab company that on those three occasions they had picked up a woman—they couldn't identify her—and they said that they had driven her to three different locations, two of them many miles from David Silverman's home, the appellant in my case; the third occasion she did go to David Silverman's house, and on the third occasion he drove her back to the airport. And this informer saw David Silverman, and he said, "I saw her bring him back." Nobody ever saw David Silverman with narcotics or involved in any way, and that was the whole record.

So when the case was argued before our panel and then we went into conference right after the argument, one of the panel, the presiding judge, said to the junior judge, "What do you think about this case?" And the junior judge said, "Well, we have to affirm in this case." And the presiding judge said, "Well, I agree. The evidence is sufficient, so let's go on to the next case." And I said, "Oops, stop. I don't agree."

Now, by the way, he may have thought because I was a former prosecutor that I would affirm, and I told him my view. I said, "There is not enough evidence here to connect this man; and most of what this man said is hearsay, and it should never have

been admitted." And the basis for the admission by the district court judge was, "Well, that only explains what he heard," which is an interesting rule.

And so I said to them, "Do you know that when the United States Constitution was drafted, they got rid of a concept that they had an England, which was called corruption of the blood. And under English law if you were convicted of certain felonies, not only did you lose your property, but your heirs could not inherit from you." And I said, "You are finding this man guilty of a crime just because his sister talked to this guy and said she was going to see the brother." I said, "Suppose she had gone to the San Fernando Mission and talked to the Franciscan brothers there. Would you also find that the evidence was sufficient?" They disagreed with me.

So one of the judges wrote the majority opinion and I wrote a dissent, and there was a petition for rehearing. And almost a year went by, and my two colleagues did not respond to the petition. Finally, the judge who wrote the majority opinion came across the hall and said to me, "I've changed my mind. I think you were right. Would you write the majority opinion?" So I am in the books forever dissenting in the case and then two years later writing the majority opinion in the same case.

Judith Ashmann-Gerst: You are a prolific writer, and you've written just amazing amounts of articles. First of all, how do you find the time; and, secondly, is there an area of law that you really enjoy exploring in your writings?

Arthur Alarcon: How do I find the time? I get to the office early and sometimes I work on into the evening, and I garden on Saturdays, and I write on Sundays. I used to play golf, but now I spend four or five hours in the garden and really enjoy that; and because I have a split-level lot, I get a lot of exercise carrying stuff up and down.

The area that I like to write in basically is criminal law because of my nine years' experience as a prosecutor. I've written, for example, an article criticizing the federal rule that permits a conviction based on the testimony of an accomplice. Under California law, the accomplice has to be corroborated, and I'm astounded that the federal law goes a different way and I've written about that.

Judith Ashmann-Gerst: You've written on evidence, evidence of other—

Arthur Alarcon: Yeah, I've written on evidence as well.

Judith Ashmann-Gerst: Uh-huh.

Arthur Alarcon: Most recently, this year I've had the fun of having two law review articles accepted for publication. One of them has to do

with a recommendation that there be an ombudsman, a person in each of the California state prisons, to listen to the complaints of the prisoners.

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Many of the prisoners come into prison angry. They're not the nicest people in the world or the politest people, and prison guards sometimes are very hostile to them or feel that they're whiners and complainers. And so they tend to overlook sometimes legitimate complaints, about medical care, about excessive force, and so forth.

And in other states, in a handful of other states, the states have created a person they call an ombudsman, a person who will listen to the complaints of the prisoners and then go to the warden or the superintendent and say, "There is a problem here that needs to be resolved, and I think that we can resolve it without getting into the federal court system. Here is what this person is trying to say." And in those states, they have had a reduction in cases brought into the federal court system or the state court system, which I think would be a tremendous savings of money.

In the article about the ombudsman, I used an illustration—two illustrations. One of them is a case that came before me. A man went to prison who had had an accident, and so he had an eye that was floating and he had to wear some special goggles to protect him and also to be able to see well. They were destroyed on the prison yard. So he went to the guard and said, "I need some goggles." And the guard said, "Contact your optometrist. We don't furnish goggles." He went to the doctors, and they said, I'm sorry, we can't furnish them."

So he filed an action in the federal district court. The federal judge looked at the complaint and then made a phone call to the warden and said, "You should give him his glasses"; the warden said no. So the case proceeded, and the federal judge turned the individual down.

So the case came up to the Ninth Circuit. We are now tens of thousands of federal tax money with attorneys and judge time and law-clerk time, and they come up before us and we conclude that he should have gotten the $200 glasses, and they could have saved a fortune. And that's what I think an ombudsman could do.

The other case is kind of funny. There is a man in the state prison system in California who practices some strange religion which requires him to burn sesame seeds periodically and then meditate with the aroma of the sesame seeds. So he asked his prison guard, "Would you get me some sesame seeds?" and the prison guard laughed at him and walked off. And he went to the federal district court. This time the federal district judge in that case called the warden and said, "I've read the complaint. I'm

prepared to have it served on you, and if it's true what he says in the complaint, I'm thinking a punitive damage of, say, $500,000, or you could buy a little jar of sesame seeds, keep them in your office, and when this man has his little religious rite, give him the sesame seeds." *[laughing]* But that's the kind of stuff that I think should be happening, and I think it's compassion. These people . . . the ombudsman saying, "I'm sorry; but, you know, that's contrary to the law, and you can't go forward." Or he may resolve it.

The other article I've written, which is going to be published in June—the first one has just come out—and that's with my former law school, USC; the first one was published by Hastings. That has to do with delay in capital cases in the California court system. And I've done the statistical examination of everybody on death row since the death penalty was reinstituted in 1972. There are now about 100 people who have been on death row over 20 years. There are over 300 people who have been on death row for 300 (*sic*) years.

Judith Ashmann-Gerst: For how many?

Arthur Alarcon: I'm sorry; there are 300 who have been there over 15 years, and a huge amount, close to 500, over 10 years.

Worse, the California Supreme Court is now taking on the direct appeal well over 13 years; and in fact last year they issued two opinions where the prisoners had been awaiting a direct appeal, the first appeal, over 17 years, and one of them, the *Ramirez* case, over 20 years before the direct appeal.

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Now, following the direct appeal will be state habeas corpus, and then federal habeas corpus, plus trips to the U.S. Supreme Court. So we're very close to the time when people are going to be serving well over 25 years on death row before there's a termination of the case.

Now, picture a person where the evidence was insufficient or there was prejudicial error. To sit on death row for over 20 or 25 years is unconscionable. On the other hand, if the person is guilty and should have been punished, the poor family has been waiting for closure for a quarter of a century; and that's just absurd.

I have recommendations in the law review article which may not totally please members of the California Court of Appeal, because I recommend that the well over 100 members of the California Court of Appeal are fully capable of handling death-penalty cases. Your court now handles first-degree murder cases where it's life without possibility of parole. I see no reason why you couldn't handle death-penalty cases. And if that were true, the backlog would collapse.

Judith Ashmann-Gerst: Isn't part of the problem, though, getting lawyers to take the cases?

Arthur Alarcon: Sure.

Judith Ashmann-Gerst: So there's a huge backlog. My understanding is that there is a huge backlog of cases that simply don't even have lawyers yet.

Arthur Alarcon: Absolutely, and I point that out in the article. It's terrible that the California Supreme Court can now only pay $163 an hour. I don't know if you see lawyer's fees in civil cases; we do, and lawyers are now charging $500, $600 an hour and upwards, and that's to represent, let's say, a corporation that may have terminal-illness problems. And I think that somebody who represents a person on death row who may die should get more than $163 an hour. So that's part of the problem.

The other part of the problem . . . and I have a recommendation—that there ought to be training in the law schools for lawyers who want to, are willing to, handle death-penalty appeals and who are properly compensated.

And I also think that there could be institutes at the law schools to train law students who want to specialize in habeas-corpus law or death-penalty law and perhaps be trained by the lawyers who now handle that kind of a case. I mean, sure, there's a dearth of attorneys; but I think that can be remedied, and part of the problem, the biggest part of the problem, I think, is the fact that they're paid so badly. Can you imagine being appointed to a death-penalty case by the California Supreme Court and having to stick with that case for 13 or 17 or 25 years? I mean, that's terrible.

So that's what I deal with there, and I'm very confident that you can handle a death-penalty case beautifully.

Judith Ashmann-Gerst: Not that any of us care to, but . . . *[laughing]* I think that part of your article—and you and I talked about it in the past—you do indicate that it will be useful to hire more research attorneys to assist with.

Arthur Alarcon: Oh, absolutely, absolutely.

Judith Ashmann-Gerst: Right.

Arthur Alarcon: You would need to have research attorneys. We have some now in the federal system, and they're called death-penalty clerks.

Let me give you an example. When I first started thinking about turning the job over to the California Court of Appeal with discretionary review by the California Supreme Court so that if the California Supreme Court felt you were wrong or there was

a novel question that they wanted to deal with, they could take the case over . . . but the cases decided on existing law, they wouldn't have to take over.

Now, when I first thought about this, I said to one of my law clerks, "Find me another state that permits the intermediate appellate court to handle death-penalty cases." Well, it found that only one state does that, and it's Alabama. There are reasons why I would feel uncomfortable writing an article citing Alabama practices. For example, they pay their lawyers $2,000 for a death-penalty appeal.

So I really worried about that until finally I woke up one day and said, "Wait a minute. The guy that blew up the courthouse in Oklahoma was tried in a federal district court. His case went to the Tenth Circuit. It went from there to the United States Supreme Court, and from the date of judgment until his execution was under three years, going to each level."

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So that is the example that you'll find in my article *[laughing]*; it can be done. And nobody can say that turning it over to the intermediate state courts would violate the Constitution. That's exactly what has been approved by the United States Supreme Court for federal death-penalty cases.

Judith Ashmann-Gerst: You've also written on the judicial-appointment process. You have feelings about election versus appointment.

Arthur Alarcon: Yeah, I wrote an article a few years back when there was a problem in California. And at the time I was on the Ninth Circuit, and one of the states of the Ninth Circuit is the state of Alaska. And in the state of Alaska, they have both a judicial appointment and retention system. A commission appointed by members selected by the Legislature and the Governor and the Chief Justice accept applications for appointment to the trial and the state court. They are given an examination by . . . at least at the time I studied this, by the University of Michigan, a psychological testing to see if they have . . . psychologically they're fit to be judges. They then evaluate the applicants, and they then send to the Governor a list of names. The Governor has to select one of the persons on the list of names, and if the Governor chooses not to, then the Chief Justice makes the appointment. That's followed up in six years by a report to the voters saying, "This is how Judge X has performed." Let's say that Judge X gets on the bench late, maybe has a drinking problem. They will put that in a pamphlet that goes to every voter so that they have an evaluation. I think that is a superb system. It takes politics completely out of the process.

Under the California system, where a Governor can choose the persons on the Supreme Court, the Court of Appeal, and the trial court for any reason that the Governor fancies, it's no wonder . . . you shouldn't be surprised that if a Governor is

opposed to capital punishment and appoints people who are opposed to capital punishment that the voters are going to say, "This Governor is opposed to capital punishment; he appoints people that are opposed to it. I'm not going to vote for their retention"—if we're talking about the appellate level. And I think that's what happened in California to three members of the Supreme Court. If we went to an appointment and retention system we would take that out of it completely, and we would get highly qualified people. That's what I said in the article.

Judith Ashmann-Gerst: You've also taught at the judges' college, lots of CJER programs. Are you still teaching?

Arthur Alarcon: I just resigned from teaching. I started off teaching at the judges' college to new judges, and I did that for about 15 years until I went on the Ninth Circuit. I then taught at USC for a couple of years. I then taught at Loyola for several years, and then I have finished teaching over 10 years at Southwestern. But I decided I want to do some other kind of writing, and it takes a lot of time; so I just quit last year teaching "federal courts."

It was funny, because I was called by the dean at Southwestern to teach federal courts, and I said, "You know, I never took that course." He said, "Well, you're doing it on the job." I said, "Okay." So I taught it. *[laughing]*

Judith Ashmann-Gerst: Technology has evolved over the years since you were first appointed to the court.

Arthur Alarcon: Yes.

Judith Ashmann-Gerst: Have you kept up with technology, has it impacted your work at all, or do you just leave it to the law clerks? *[laughing]*

Arthur Alarcon: I have to confess that I have not kept up with technology, and I happen to know that you are highly skilled in technology. I tell people, "I still write with a quill pen in every other line." And my law clerks do the computer research for me, and I find the results of it wonderful. I used to have to go to Shepard's and pull it down and paw through that, and now they can do it in seconds, and it's marvelous; but I let them do it.

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And one thing that I do to make sure that my law clerks are doing their job properly is when they do something for me and after they've done the work, to make sure the citations are okay and the quotations are okay, I hand that paper over to a different law clerk and have that law clerk go over it critically to make sure that we are correct in what we've said.

So I use my law clerks for the technology; I do the writing and the analyzing and the groaning and moaning about how do I

get there from here myself, and then I give it back to them and say, "Okay, give me a case that says this, because I think I know there's one out there."

Judith Ashmann-Gerst: And that system works well over the years.

Arthur Alarcon: Well, I don't want to toot my horn; but about 23 years ago, I had a backlog at the end of the month of six cases at the end of December. And I sent my law clerks on a week's vacation and I was at the office alone, and I decided, "I'm going to try to kill my backlog." So I sat down in that week and wrote three opinions and filed them, and I haven't had a backlog for 23 years. In other words, every month . . .

Judith Ashmann-Gerst: Right.

Arthur Alarcon: . . . all the cases I'm assigned that month are out. So my system is working.

Judith Ashmann-Gerst: It works. *[laughing]*

So let's talk about your family, your children, your wife, Sandy. I know them all, but . . . *[laughing]*

Arthur Alarcon: Sure. Sure. Well, let's start with my first child. My first child is Jan Marie, and Jan Marie is a psychologist. She went to San Marino High School, graduated barely 16, and then went up to Santa Cruz and then went on and finished her Ph.D. for psychology. She works at the Atascadero State Hospital, which is a hospital for mentally ill and sex offenders and so forth. And I'm hopeful for her that she retires—because that's a tough job—and enjoys a private practice wherever she wants to live.

She told me one day, "I think I'll be ready for private practice, and having worked in the Atascadero State Hospital, I have seen the far extremes of mental illness; so having a private practice is going to be easy." *[laughing]*

Judith Ashmann-Gerst: Piece of cake for her. *[laughing]*

Arthur Alarcon: Yeah.

Judith Ashmann-Gerst: Does she have children, you have grandchildren?

Arthur Alarcon: No, she is not married.

My second son is a superior court judge, Gregory. He has three children, all girls. One is studying to be a nurse, the other is at Cal State LA, and the third is 10 and extremely bright. They were at the house the other night. They came by pretty late; they went to the theater in the neighborhood, and I took her downstairs because she wanted to see the dogs. And the dogs came rushing over to her, and one of them jumped on her and

she was a little frightened. So I said to the dogs, using a command that I've been taught by my dog trainer, "Go to your place," and I pointed in their two pads. So each dog went to a pad. And then I chatted with my granddaughter a few minutes, and there they were again. So I turned and I said, "Go to your place," and the dogs went to a different pad. And Polly said to me, "They didn't go to their place." I said, "What do you mean?" She said, "Bonnie is on the wrong pad." *[laughing]* So I had to explain to her, that's just a command that I better think about. *[laughing]* So she's doing beautifully in school; she's at a magnet school. I have high hopes for her.

My third and my last child is Lance; or he's actually named after me, but decided not to call him Junior, so he's Arthur Lawrence Alarcon, Jr. Anyway, Lance is now a special-ed teacher. He went to Yale. He was pressured by his brother and me to go to law school, and he said, "No, I want to make my own decisions." But after a couple of years out of Yale, he took the LSAT, and he did so well that Hastings offered him a full three-year scholarship paying for everything; but he turned it down, and instead he went to the University of San Francisco and took special ed, and he's now a special-ed teacher and apparently really good at it. At the end of the first year he was teaching other teachers in the San Francisco Unified School District how to deal with kids who have special needs.

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So, those are the three and my three grandchildren.

Judith Ashmann-Gerst: And Sandy, your wife.

Arthur Alarcon: Sandy was a computer engineer. She retired and . . . well, she retired from getting paid for what she does. She now is a volunteer at the Los Angeles County Art Museum, or we call that LACMA. She is a docent; and she not only gives tours, but she also does administrative work for them. And because she's a computer whiz, she keeps being asked to do special jobs, and right now she's sort of a super-editor for all of the stuff they print out.

In addition to that, she has just completed working for three years, again as a volunteer, at the Culver City School District teaching art, because they have no art program for the elementary school; and she has really enjoyed that. So she's very active.

In fact, I used to work a lot at night, and when I was writing a law review article I would do that, and she came to me one day and she said something that husbands hate to hear, "We have to talk," which is kind of terrifying. And she said to me, "You know, it gets very lonely when you're working in the evenings all the time; I love your company, and I feel very bad about that." So I said, "Well, I'll try to cut down," and I really have cut down.

So recently I get home from work and she's at her computer, and she's working there till 8:00. So I walked in the other night and I said, "Sandy, we have to talk. I feel very lonely." I got a whack across the face. *[laughing]*

Judith Ashmann-Gerst: For a retired person, she's very busy. *[laughing]* Okay. A question—

Arthur Alarcon: But the other thing we do is walk the dogs for 45 minutes to an hour every night.

Judith Ashmann-Gerst: That's such a nice thing, a nice way to end the day, to do it together.

Arthur Alarcon: It is.

Judith Ashmann-Gerst: I think a question that our videographer here was anticipating, he may not expect the answer. What is the most important case that you have worked on?

Arthur Alarcon: I was asked that question several years ago by a reporter who was doing a profile on me, and I reached forward and I patted the file that was in front of me. He said, "Wow, what's that about?" And I said, "You know, I don't know; I haven't opened it up yet." And he stood up kind of angrily and he said, "You're putting me on." I said, "No, that's the most important case to me, because I'm going to try in working on this case to do a better job than all cases that have preceded it and to put into effect what I've learned yesterday on that case." So I don't really have any case that I say, "This was the important case."

Now, having said that, I've told you about the *Silverman* case, and that stands out to me not because I would say it's the most important case, but because it illustrates our independence and perhaps what you should expect of a judge—to not let his past experience or his pride in having been a prosecutor interfere with his job.

The other case that I like to think about is a case involving . . . it's called *Skinner*; it's Railroad Employers against Skinner. And the question in the case was whether a regulation put out by the United States Railroad Commission ordering railroads to have surprise drug tests and urine tests of employees who worked on trains without a search warrant and just random surprise tests, whether that violated the Constitution. And the argument was made to our panel that it violated the Constitution, because the railroad companies, although private companies, were acting as the agents of the United States. Now, under search-and-seizure law, a private person is not covered by the Fourth Amendment unless they are the agents of a law-enforcement officer; and they argued to us, these are agents.

And secondly, they said, it is intrusive to be required to take a blood test, a breath test, or a urine test, and there should be probable cause or a search warrant.

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My two colleagues agreed with that argument and wrote an opinion in which they said that the regulation was unconstitutional. I wrote a dissent, indicating that because railroads are heavily regulated for safety purposes, for public safety, and they go racing across the land at 50, 60, 100 miles an hour, that it's very dangerous to have them operated by people who are drunk or have used drugs. And so I said there is a compelling need for the government to regulate this industry, and the intrusion has to give way to this compelling need.

The Supreme Court took over the case, and in an opinion written by Justice Kennedy they reversed my two colleagues and did something that I like: they quoted me in passages, by name, of the decision and agreed with my analysis.

Now, there's a nice footnote here, which I think exemplifies the humility and that judges learn from their spouses. That same evening when I got the opinion, I stayed at the office past 6:00, and my wife had told me, "We're entertaining tonight. I need your help. Please be home by 6:00."

So I rolled in at 6:45, and she had a dinner party of 12 people, and she was honoring her roommate from college, who was there in the kitchen. And I said, "A wonderful thing happened today, Sandy. Not only did the Supreme Court agree with my dissent, but they quoted me by name." She said, "Okay. Take out the cat box and empty the garbage." So ended my moment of glory. *[laughing]*

Judith Ashmann-Gerst: *[Laughing]* Anything that you would like to wrap up with, any other thoughts that come to mind? I know you've been such an important role model to other Hispanic young lawyers in the community. Anything else that you'd like us to know?

Arthur Alarcon: Well, I would just like to point this out. I don't talk about . . . certainly in seeking an appointment or in writing something, I don't say, "Appoint me or publish me, because I'm Hispanic." My attitude has always been, and I used to run track, "All I want is to start at the same starting line as everybody else. I don't want to be 50 yards behind, and I don't deserve to be 50 yards in front. Just treat me equally."

But occasionally I have joined something or talked about being Hispanic, because I want the Hispanic kids to see that they can do it, they can make it; and there is room for them if they study hard and go on to graduate school and so forth.

So in that respect . . . in fact, I deliberately have an accent on my name to let people know without talking about it that I come from a different culture and it's okay.

Judith Ashmann-Gerst: Thank you so much. This was so enjoyable.

Arthur Alarcon: You're welcome!

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