

ORAL HISTORY OF THE HONORABLE HENRY H. KENNEDY, JR.

Ninth Interview 5 August 2008

This is the ninth interview of the Oral History of Judge Henry H. Kennedy, Jr. as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Tuesday, August 5, 2008.

Mr. Granof: Judge, we were talking last time about your experience on the federal district court, and this time I'd like to ask you about a case that you gave me, *Vann v. Kempthorne*. I'm curious why you singled it out.

Judge Kennedy: Well, you should know first of all that the U.S. Court of Appeals for the D.C. Circuit just made a decision in that case. My ruling in the case was remanded to me. And so I still have some work to do in that case. To answer your question, I found it very interesting for two reasons. One, just historically. This case inspired me -- if inspired can be the word -- and required that I learn some history that I did not know about. Most people, of course, know about Native Americans and something about their existence, what they did throughout history, but I did not know that Native Americans owned slaves. I did not know about this Trail of Tears that I mentioned in the opinion, which was the moniker -- the name given to what must have been a horrific experience for Native Americans -- being forced out of their lands on the East Coast of the United States and made to march to Oklahoma. And so it's interesting just from the perspective of a person who's interested in history, particularly history of

the Civil War. I may have mentioned at some point during our talk that my favorite professor in college was Professor James McPherson, who is an authority on the history of the Civil War. And I remember taking his course -- he was my thesis adviser -- but I don't recall any discussion during his lectures regarding Native Americans and African slaves. And so that interested me. Frankly, it also interested me just because, from my perspective, this case was an example of the continuing legacy of the stain on this country's history, the stain being slavery. I use that term now because that's the term that the court of appeals used in talking about this case. The opinion came down last week. And it seems to me that, even today, this very day -- here we are in 2008 -- we're still dealing with the race problem in a most dramatic way. This case was brought against, initially, the Department of the Interior, and the case is premised upon the assertion that the Department of the Interior simply is not doing its job in, basically, supervising the Cherokee Nation. And putting a stop to what the plaintiffs in this case say is just a blatant, just blatant, violation of the treaty that this country entered into with the Cherokee Nation at the end of the Civil War wherein it was promised that the slaves of the Cherokee Nation would become members of the Cherokee Nation. Just like what has happened here in the United States, of course, in that the former Black slaves -- African slaves -- were made citizens of the United States. And that is clearly what was intended by this treaty. By the way, the Cherokee Nation fought on the side of and supported the Confederacy.

Mr. Granof: Yes, I thought that was interesting.

Judge Kennedy: Yes, I didn't know that. So this treaty, the Treaty of 1865, basically said, "the Cherokee Nation will take on its African slaves and their descendants as members of the Nation." Well, you know, fast forward over the years and there have been attempts by the Cherokee Nation to turn back the clock with respect to that promise, clearly. Just clearly. And this case was brought by plaintiffs trying to do something about it. Trying to basically force the Interior Department -- the Bureau of Indian Affairs, which is a division of the Interior Department -- to do something about it. But, of course, I ran into this very interesting legal issue as to whether or not the case could go forward in the absence of the Cherokee Nation, which said, "Well, we have a right to be a part of this suit, and we are an indispensable party. However, we cannot be sued because of the doctrine of sovereign immunity. So, while we should be a part of the suit, we can't be sued, and therefore the suit should be dismissed." I ruled otherwise. The court of appeals ruled that I was wrong in my ruling that, for various reasons, there had been an abrogation of sovereign immunity, the doctrine of sovereign immunity as it might apply to the Cherokee Nation under these circumstances. However, that doctrine of sovereign immunity does not apply to the officers of the Cherokee Nation. Now the case has been remanded to me to determine whether the suit can go forward in the absence of the Nation on the ground that the officers of the Nation, who also were sued, in fact can be sued.

Mr. Granof: So the court of appeals thought the Nation couldn't be?

Judge Kennedy: Oh, that's what they ruled. They ruled that sovereign immunity operated to prevent a suit from being brought against the Nation. However, that doctrine does not prevent suit against the head of the Nation -- the Chief of the Nation -- and other high officials. Now the question is whether, given those two rulings, the case can go on. And I can assure you that there will probably be some very interesting litigation on that issue.

Mr. Granof: I was not aware that the court of appeals had ruled on the case, but I thought your opinion on that point was very persuasive.

Judge Kennedy: Well, the opinion of the court of appeals was a very substantial opinion that was penned by Judge Thomas Griffith. Judge Merrick Garland was on the panel, and Judge David Tatel was the third judge. I was actually gratified that they did such a thorough job in parsing my opinion. And, you know, they have the final word, and frankly I see it as somewhat of a victory. I really do. When I wrote the opinion, I knew that I was swimming upstream. There had been several opinions that had said that the Cherokee Nation enjoys sovereign immunity that would prevent it from being sued except to the extent that it consented to being sued. It certainly hadn't consented to be sued in this case. But, for the reasons that I indicated, I thought there had been an abrogation of the doctrine.

Mr. Granof: That point that you made really rested on the purposes of the Thirteenth Amendment?

Judge Kennedy: Yes.

Mr. Granof: And saying as well that it was the treaty that passed just about the same time or shortly afterwards, and that you really couldn't, consistent with the purposes of the Thirteenth Amendment and the treaty, say that sovereign immunity pertained, at least in this context.

Judge Kennedy: Yes, that's what I said. And the court of appeals in its decision wrestled with my analysis and came out differently. But, again, they obviously wrestled with it and the suit remains. As we speak, it remains and we'll see how things go. To me, this suit should be unnecessary. Absolutely should be unnecessary. Under the law, any changes in the way elections are conducted by the Cherokee Nation are subject to the approval of the Secretary of the Interior. The Secretary of the Interior, if he wanted to, could stop this, but for some reason has not. I do not understand it

Mr. Granof: I guess one of your colleagues has had trouble with the Bureau of Indian Affairs and the Department of the Interior, and it doesn't seem to make any difference whether you have a Republican administration or Democratic administration. But certainly the judges in this court who looked at it have been extraordinarily critical of the relationship.

Judge Kennedy: Yes, they have. I think you're talking now about the case that Judge Robertson has which, as I understand it -- and I haven't followed it very closely -- has to do with the calculation and monitoring of the royalties to which certain Indian nations are due for certain lands that they are sovereign over. And that case was at one time before Judge Lamberth, and he was very, very critical of the Department of Interior and the Bureau

of Indian Affairs, given their performance with respect to that case. This shouldn't be a hard call. It really shouldn't be a hard call. Now, again, I don't know the details about the case that was before Judge Lamberth and that's now before Judge Robertson. And it might have to do simply with the difficulty of determining royalties, which, I suppose, could be a difficult thing to determine. But the basic issue of Interior Department responsibility is not a difficult issue at all.

Mr. Granof: I was fascinated by the history you set forth in your *Kemphorne* opinion. On a broader scale it indicates what federal judges do and the problems that they face, and how they go about their work. But, in the end, I sort of reflected on it and said, "What is this case really about? It's about the Thirteenth Amendment and this treaty." And then it seemed perfectly clear.

Judge Kennedy: Perfectly clear. Perfectly clear. And I don't know what's going on there, what motivates the Department of the Interior. I'm just a judge and I handle the cases that come before me.

Mr. Granof: Well, as I said, it indicates how federal judges go about doing their business. I mean the legal principles involved -- sovereign immunity, and whether individual officers can be sued, and whether the Nation and the officers are independent principal parties, and whether there was a final decision by the Secretary of the Interior -- those principles, you know, they are fairly established principles of law. But everything is context. And to develop that context, you had to really go through the history.

How did you do it? If you had to start from scratch, it would be a thesis. You could write it for your graduate thesis. So did you have help from the briefs, and to what extent?

Judge Kennedy: The lawyering was quite good, so I did have help from the briefs. But then I went to texts which were not cited in the briefs. There is an authority -- Cohen's *Handbook on Federal Indian Law* -- which is the kind of treatise that I consulted, and then I did some basic research in the history books.

Mr. Granof: And how did you do this? I mean, did you go to the Library of Congress? Did you have your clerks do this?

Judge Kennedy: Actually, I went to our library here, and did a search for Indian law. I forget exactly what my search topics were. I got some periodicals from our library, and I posted some things off of the internet.

Mr. Granof: And did you personally do this?

Judge Kennedy: Oh yes. The historical stuff I did myself. My law clerk did what she always does, which is to do the legal research and take a first crack at the writing. I'll tell you that my law clerk had recommended that I dismiss the case because of this sovereign immunity.

Mr. Granof: And were there precedents in other district courts?

Judge Kennedy: Yes. There were precedents in other district courts and other circuit courts. The Ninth Circuit, as a matter of fact, had written an opinion -- I forget the name of the opinion now -- but it was pretty clear that if this case had been brought in the Ninth Circuit the circuit precedent would

have been binding and would have resulted in my dismissing it. But we did not have any precedent from the Supreme Court, we did not have any precedent from this circuit, and my legal analysis brought me to the place that I was. But the law clerk saw it otherwise, and so -- because I always come to my own, independent decision -- I did more of the basic research into the history than I would ordinarily do. And I was much more proactive in directing my law clerk as to where we should go with the law.

Mr. Granof: So who says a good liberal arts education isn't valuable?

Judge Kennedy: Oh, absolutely. I mean, it's absolutely valuable. What you said is absolutely true. Certainly in this case, but in actually so many, many cases that come before me. Once they get here, context makes a huge difference, a huge difference. It is virtually impossible to articulate a principle of law that regardless of the context should hold sway. One of the guarantees of the First Amendment is free speech. Don't you have the right to speak freely? Well, "no," is the answer. It depends. There's a concept embodied in that principle, but the words taken out of context only get you so far. It's the principle that is important. But when it comes time to apply the principle, context makes all the difference. The standard example that is given to show that all speech is not free is you can't shout "Fire" in a crowded theater. So, yes, I think judges need to be educated, need to know about how the world works.

Mr. Granof: From everything we've said, not only today but in prior conversations, this notion that judges are simply umpires calling balls and strikes, or that

it's just a matter of applying the law, that's not what federal judges -- or any judges -- really do.

Judge Kennedy: No. Well, first of all you'd be surprised at the number of times that judges are called upon to rule within the interstices of the law. So many times there is no principle that directly applies to a particular circumstance. What you have to do is determine, again, what concept applies and then you do the best you can. I don't want to overstate the case because there are times when it is very clear as to what the law is that applies to particular factual circumstances. But oftentimes it's not, and certainly not often in the federal district court here in the District of Columbia.

A perfect example is that the judges on the United States District Court for the District of Columbia will now have to adjudicate the merits of the petitions for writs of habeas corpus that have been brought by persons who have been designated as enemy combatants who are now in Guantanamo Bay, Cuba. We will have to determine what process to use, what standard to use, in determining whether the person is an enemy combatant. We've never done that before, but we're called upon to do it now. There are principles of law that we will have to consider, but I defy anyone to say, "Well, it's very easy to determine what the law is that should apply." It isn't. But that's what we are required to do. Which is why some people say that the best thing with respect to this whole issue now is for the Congress to perhaps create a separate court and to step in

and to do what it can do regarding certain procedures, which would be within the legislative realm.

Mr. Granof: *Kemphorne* seems to be a case in which, even with good lawyering, apparently not all the arguments were made. Does that happen often?

Judge Kennedy: I can't say it happens often, but it happens more than I think you would expect.

Mr. Granof: So, now in *Kemphorne* you'll have to determine whether the case can proceed with just these individual who are Cherokee officials?

Judge Kennedy: Yes, that's right. And, by the way, the rule in the Federal Rules of Civil Procedure that is applicable here, which has to do with joinder of parties, has been changed since the time that I ruled in the case. There's a linguistic change in the rule that I'll have to deal with. But, yes indeed, I'll have to decide whether, although the Indian Nation cannot be sued because it is protected by the doctrine of sovereign immunity, this suit that was brought originally against the Department of the Interior -- but then the plaintiffs amended their complaint to name the Nation and the high-up government officials of the Nation -- can go forward with the defendants being the officials and not the Nation itself. And, as I recall, the question is would it be in the interest of justice for the suit to go forward in the absence of the Indian Nation? And so now I'll have to decide just that,

Mr. Granof: I know we've talked about the two cases that you've given me. One was the *Porter* case that you did as a Superior Court judge, in which you became a biology expert. Second was *Vann v. Kemphorne*, which we've

just talked about. Both of those were interesting. I know that you've had a lot of cases that don't particularly come to mind. But I thought I'd give you the opportunity to talk about any other cases.

Judge Kennedy: Well, I must tell you, again, I still feel so privileged, just so privileged to have been appointed to this court to be called upon to handle cases. You know the majority of them are not of great public interest, but many of them have enormous public interest, are enormously challenging, and I'm called upon to handle them. You know this case that I handled at the end of last year -- end of 2007, beginning of 2008 -- where certain petitioners for writs of habeas corpus who were being held in Guantanamo Bay, Cuba, asked me to conduct a judicial inquiry into the destruction of tapes. That is, to conduct a judicial inquiry given the fact that the now-Director of the CIA had disclosed that certain taping of persons suspected to be members of Al Qaeda had been destroyed. And the petitioners asked me to conduct a judicial inquiry for the purpose of determining whether my protective order in their case perhaps had been violated because my order had instructed the Department of Defense not to destroy any evidence of mistreatment of the people being held in Guantanamo Bay, Cuba. Well, that was a very, very interesting issue. I remember getting the papers. I had never been presented with anything like this before. It raised all kinds of issues, and I finally did what I did. I made the ruling. So, the point is over the time that I have been a judge on this court, and before, I have had

some very, very interesting and significant cases. And I feel very, very privileged to be called upon to handle them.

Mr. Granof: What was the name of the case that you just talked about? Was it against the head of the CIA?

Judge Kennedy: No, it's *Abdah versus George Bush*. It's Mahmoad Abdah, A-b-d-a-h, versus George W. Bush, because he was the president of the United States and the head of the executive branch that has detained these people. So, it was a very short order but it pretty much explains exactly what happened.

Mr. Granof: What would you say is the hardest part of your job?

Judge Kennedy: I can't pick out one thing that is the absolute hardest. There are several aspects of the job which are very, very challenging and difficult. One of the most challenging and difficult is to impose sentences on persons who have broken the law.

Mr. Granof: You talked about this in the context of the Superior Court as well.

Judge Kennedy: Yes. Just today I had before me a man who is 66 years old. A 66 year old who was convicted of stealing money from a program that was funded by the government. This man was the chief financial officer of an organization in the Pan American Development Corporation that had a contract with the government to do good things in Panama and some other Central American countries. He actually lived in Panama. He was given money for rent, but instead of using the money for rent he actually used the money to buy property, something that he was not supposed to do. It was a part of the contract that while he could be reimbursed to pay rent, he

could not use the money to buy property. Well, he did, and he lied about it. Also, he had a furniture allowance. Well, he spent more money than he was supposed to in order to provide furnishings for this apartment where he and his family lived. Now let me just tell you some other things about this man. I received so many letters from people who told me about the great things he had done down in Panama. That he was really interested in helping the people in Panama. Got letters from Panamanians. This man has four daughters, two are physicians, one is a lawyer, I think, and another does something else. But, obviously, he and his wife had been good parents. He had never done anything like this before. Nothing on his record. The question becomes, what sentence do you impose upon this man?

Mr. Granof: You are bound by sentencing guidelines?

Judge Kennedy: Well, there are these advisory sentencing guidelines which, by the way, called for a sentence of 18 to 24 months in prison. And that's what the prosecutor asked for. He said, 18 months in prison. The defense attorney made an eloquent plea that to put this man in prison was just not warranted under the circumstances. And there I was. So, what did I do? Well, one, I ordered that he make restitution. That is, he pay back all that he stole.

Mr. Granof: How much was involved?

Judge Kennedy: Almost \$200,000. Two, I placed him on probation. However, as a condition of probation, I required that he spend 15 consecutive weekends

in jail. Basically, Saturday and Sunday in jail. And for six months I ordered that he be on what is called home confinement. After he was arrested and charged with this, this man -- and he's not a wealthy man -- could not find work. He and his wife now run a bed and breakfast in Virginia. And he actually does the heavy lifting and changing the bedding for the guests. Does that kind of thing. And so, in any event, that was my sentence. Fifteen consecutive weekends in prison, he had to pay the money back, and he was basically not jailed but he was on home confinement for six months. And I placed him on three years' probation, so after the home confinement he still has to report to a probation officer.

Mr. Granof: Sort of a Solomon-like decision.

Judge Kennedy: As I said in that sentencing, I defy anyone to tell me the one sentence that this requires. By the way, it's a wonderful thing that we do have these advisory guidelines to give judges some idea of what other judges have done in the past, given roughly similar circumstances. But, yes, I thought long and hard about that. I really did. It wasn't lost on me that the man was over 60. You know, these ages now really don't seem that old anymore to me, but he certainly was much older than most of the people who come before me.

You say, well, what's the most difficult thing to do? Sentencing, that's difficult. This Cherokee Indian case, to go through and to put it together, and to explain my reasoning, which was convincing to you but not to the court of appeals. Although you'd have to read the opinion --

and it's not so clear that they disagreed with everything that I said; as a matter of fact, they didn't -- but on the core issue of the sovereign immunity, they held for the Nation. To really, really understand what sovereign immunity means in a particular context is not such an easy thing. Nor was it easy to reject its application in a situation where, in my view -- as I wrote -- it should not be applied. That took, I can assure you, some real hard thinking which I'm very satisfied with. I'm satisfied that that's what it required, and I'm satisfied that I did it. That was challenging.

Mr. Granof: At the end, I suspect rewarding?

Judge Kennedy: Oh, absolutely.

Mr. Granof: I mean you had the finished piece of work at the end. Something you could really take pride in.

Judge Kennedy: Absolutely. In this judicial district we have a kind of judicial culture that results in the judges on this court doing more writing than judges anywhere else in the country. I think we take pride in that. For us the bottom-line decision is important, but it's equally important that the public -- the litigants -- know why we got there, and how we got there. To do that much writing is very challenging. Is very, very challenging. Perhaps there are others who write very, very quickly, and words just flow off their pen and they can do it easily. That's not the case for me. It takes time. I take great pride in it, and after it's done, it's very, very gratifying. I think

I may have said before that people have asked me whether I like to write and I said, “No, I don’t like to write, but I love to have written.”

Mr. Granof: I know exactly what you mean.

Judge Kennedy: We were talking about the most difficult things about my job. The writing is very, very challenging and very, very important. But, as I was saying, to find the very best word to express what’s in your head. You know, to manipulate language adequate to the task of expressing what’s in your head -- sometimes what’s in your heart; not so much what’s in your heart, but what’s in your head -- is not such an easy thing to do. And also, developing the structure of the memorandum. Now I have a certain way that I prefer, but sometimes the structure that is commonly used is not the best structure to use, given the particular issue that we’re dealing with. So, that’s a very challenging and difficult part of the job as well.

Mr. Granof: If Congress came to you and said, “Judge, what would you change? What would you like us to change if you could get your way?”

Judge Kennedy: About this job?

Mr. Granof: About anything. About any of the laws that you have to administer. I know we have talked about sentencing, and I guess that’s one area that most judges would like to have more discretion.

Judge Kennedy: Well, we have a pretty good amount of discretion now. The Supreme Court in its *Booker* ruling said that the sentencing guidelines could only be constitutional if they were advisory rather than mandatory. That was a very, very important decision. So, because the United States sentencing

guidelines are advisory they don't suffer what I consider to be the very unfortunate consequences of the mandatory guidelines.

Mr. Granof: I guess I hadn't realized that.

Judge Kennedy: Yes, they're advisory now, but there are still many mandatory minimum sentences, you know, that I think are very unfortunate. Again, it's just very difficult to legislate, to say that anyone who does this, anyone who sells a certain amount of cocaine must be put in prison for ten years. And that's what the law is. People's involvement in these crimes is just different. The person who is the courier, who is addicted out of his or her head but who is, in fact, involved, say, in a conspiracy to distribute drugs, is it right that that person should be sentenced to no less than ten years in prison? And ten years is the amount of time that you can go to college twice and law school. Without any regard as to why that person was doing what he or she did? Without any regard as to whether he or she had done it before? Without any regard for the potential for rehabilitation? It doesn't seem right to me. But we have a lot of mandatory minimum sentences on the books. I won't get into the death penalty. To me, how can it be right that a person might be put to death for something that he did not do? And it has happened. We know that. Just consider the number of people who have been on death row who are no longer on death row because of forensic scientific techniques.

Mr. Granof: DNA evidence?

Judge Kennedy: DNA evidence has shown that they're innocent. My goodness. How can that be right? It's not right in my view. Now, you know, I believe in this country and I respect it, and so I do understand that there are others who have a different view. But you know you asked me what I think might be changed.

Mr. Granof: I think your brother has an interesting view of that. I think he said that in working for Justice Marshall he saw the records of some of these death penalty cases, and he said he could understand why a death sentence was imposed because the people had just done horrific crimes.

Judge Kennedy: And some of them have done horrific crimes. Some of them have done horrific crimes.

Mr. Granof: But he still came out and said he felt it was wrong.

Judge Kennedy: Yes, so those are two things that immediately come to mind. I really don't know that there are many others. I can tell you I really am a respecter of how the system works. So I don't spend a whole lot of my time thinking about what laws Congress should make. That is the responsibility of the lawmakers. That's why they're elected, to do what they do. So I certainly hope that they do a good job, but I don't spend a whole lot of time thinking about it.

Mr. Granof: Is there any particular problem facing this court that seems to stand out. From what you indicate, the court runs pretty smoothly, pretty collegially.

Judge Kennedy: It does, indeed, and I think that particularly over the last, say, five or six years, there has been just a wonderful collegiality in this court. Our last

Chief Judge, Judge Thomas Hogan, really can take a lot of credit. He's due a lot of credit for bringing that about. He really is a person who likes the court to operate on the basis of consensus. So even when there are things that are probably within his bailiwick, so that he could do them without anyone saying anything, he tended to try to bring everybody on board. I know I appreciated it, and I know that my colleagues did as well.

Mr. Granof: You've been on the federal bench for ten years now?

Judge Kennedy: Ten and a half years.

Mr. Granof: Has the court changed in any way? Have things changed?

Judge Kennedy: Well I think that the collegiality has improved frankly.

Mr. Granof: So that's all to the good?

Judge Kennedy: Yes, it certainly is all to the good. Other than that, I really don't know that I know of anything else that is really remarkable. I think that this court continues to be just a standout court. I think we're called upon to handle some very, very significant cases. I think every judge on this court appreciates the importance of the role that we play. We understand that, as the judiciary, we don't have the power of the purse so we don't control the money. Many people say that if you control the money, you control a lot. We don't control the army or the armed forces. What we depend upon is our credibility. Our credibility. Being forthright. Just having integrity. Being intellectually honest. So it is our credibility that is our coinage, that's our currency in government. So we take pride in making sure that we exhibit all those characteristics that I mentioned.

Mr. Granof: It seems to me that since I came to Washington in the mid-1960s this court has grown more and more important, making more and more critical decisions. That is, more focused and concentrated litigation of major national significance seems to come through the District of Columbia. And it's just been a steady increase.

Judge Kennedy: Well, your observation is absolutely true. Some of it has to do with the way the law works. And there are certain federal statutes that say certain kinds of cases are brought here in the United States District Court for the District of Columbia. There are certain states that cannot change their voting laws without the, basically, approval of this court or the Attorney General. These are called covered jurisdictions. I think this is by virtue of the Civil Rights Act of 1965. And so, we have exclusive jurisdiction. There are some crimes that are brought here if they're not committed in the United States. Then there are the cases brought by the petitioners in Guantanamo Bay, Cuba, which the Supreme Court has said are to be brought here. This being the seat of government, when a person wants information about a government agency -- whatever government agency program -- under the Freedom of Information Act, the case more likely than not will be filed here in the United States District Court for the District of Columbia. I don't know what the latest statistics show, but at one time they showed that 20 percent of all FOIA cases filed in federal court -- one-fifth -- were filed in the United States District Court for the District of Columbia, where we have an allotment of 15 active judges.

That's 20 percent of all FOIA cases filed in the country. I don't know for certain, but I am fairly sure that that percentage has gone up. And let me just tell you, the FOIA cases. You talk about challenging cases, wow. Very, very challenging cases. And the principle of the Freedom of Information Act is that the citizenry has a right to know what its government is up to.

Mr. Granof: You've been a judge for so many years now, have you found being a judge interferes with your personal life, your social life? Obviously you have a strong family life.

Judge Kennedy: There are certain constraints. Some of them are great constraints. One of the things I cannot do is participate in political activity. I cannot even give money to candidates for political office. Some would consider that to be great. But some would say it's a real constraint not to be able to be involved as fully or as much as one might like to be involved in politics. Some might say, "Well, that's a constraint." And to a certain extent it is a constraint, but I don't consider it that much of a constraint. Now, one of the things that being a judge does constrain, we cannot do fundraising for the most part. And from time to time that really is constraining. I was at one time the president of the Washington Tennis and Education Foundation. What I did, I resigned early -- before my term of office or second term of office expired -- because I found myself in the situation of not being able to attend certain fundraising events and, like most nonprofits, the Washington Tennis and Education Foundation has to raise

money. And I couldn't be a part of that because of the proscription against fundraising.

Mr. Granof: So you couldn't go to a fundraiser?

Judge Kennedy: I can go to a fundraiser.

Mr. Granof: You can't contribute?

Judge Kennedy: I can contribute, but I can't be involved in the fundraiser. I can't call people up and ask, "Listen, the Washington Tennis and Education Foundation is a very good organization. I would be very appreciative if you were to give money to the organization."

Mr. Granof: So, for example, if he or she belonged to a church here or synagogue, a federal judge could give but couldn't solicit?

Judge Kennedy: That's right. Exactly. There is a code of conduct for federal judges and it's very explicit about what we can and cannot do, and that's one of those things. In social intercourse, when you go to parties, sometimes there's information that you have. Because, you know, here in the District of Columbia and the surrounding area, you know, politics and the law and what happens in court are very much a part of the talk. When I participate in social events, I'm very closed mouth about anything that might be seen as my expressing an opinion about something that I might have to consider.

Mr. Granof: But it also seems like, in terms of a social life, that over the years you've acquired both from college days and family a lot of friends and relatives, and that you've kept up with them.

Judge Kennedy: Yes. Well, you know I am a very wealthy individual. And I'm not wealthy in terms of money, but I have a kind of wealth that really is more valuable than money. And that is just relationships with people. And my job, my profession, does not get in the way of maintaining those relationships. Just this past weekend, I went to an event given by my high school reunion, the class of '66 from Calvin Coolidge High School. And my wife and I went to the event and we had a great time. I love the idea of staying in touch with people whom I've known for a long time. Frankly, sometimes I didn't even know them that well. But now I get to know them better. My college. And yes, indeed, my family. And that's because I have taken stock of what's really important. I've taken stock of what's important. And for me, much more important than title, much more important than position, much more important than money, are the relationships that you have with people -- the people who are very, very close to you, and also your neighbors. That's how I feel, and I've lived my life that way, and I'm very pleased with that.

Mr. Granof: Doesn't sound like you have any regrets at all.

Judge Kennedy: No, I don't. I don't have any regrets about anything that I can control. I really regret not being able to play competitive tennis any more because of an injury.

Mr. Granof: Yes, but you had a pretty good run at it.

Judge Kennedy: Listen, I had a wonderful run. And I have to tell you. Even this is a good thing. Even this. This, being not able to do something that I really love.

It has actually forced me to put into practice those things which I have preached -- if you want to put it that way -- that I have thought about. How many times have I told my daughters that they should put things in perspective? How many times have I told myself and my daughters, and people that I know, it is somewhat unseemly to be regretful about things you can't have? You have all these regrets about things you can't have, when you have so much. So I get to put that into practice. Just be disciplined about this. I mean I really do appreciate that I have a body that needs to be exercised in order to have good health. So, at one time that was pretty easy because I loved to play tennis. Now, I don't play tennis so much, so what am I going to do? You do something else. You find some other way to exercise. To do what you know is the right thing to do. My wife and I were just saying yesterday, you know, "We're all mortal. We'll all die. We all will." There are some people, unfortunately, who want to die, but most people don't. So, what do you do? What you do is you live the time that you have here. You do it right. You make these relatively few days count, each and every one of them. And then also you do what you can do to, I suppose, prolong your life. So you eat right, you exercise, you don't have bad habits. I don't understand people who smoke, frankly. We know that it causes diseases, so why smoke?

Mr. Granof:

Your daughter is, I guess, entering her second year of law school. What advice would you give to her, or maybe you would give to young people going into the law? People like your daughter.

Judge Kennedy: Now, I don't know that I'd give much advice. I mean I really don't. What I told her is that so many times students go to law school not knowing what they want to do. And some of them actually do say, "I'm going to law school to keep my options open." My experience is that so many students go into law school wanting to keep their options open and then when they get to law school -- particularly if they get to one of the prestigious law schools like Harvard, Yale, and some others -- they let the expectations and desires of others start to restrict those options. So that, at least when I was at Harvard, so many of the people there really considered only a few types of jobs. Many, many of them considered the work at a Wall Street law firm to be just the thing to do. And that's fine if that's what you want to do, if that's where your heart and head leads you. That's fine. And I told my daughter that's fine. She's working for a very fine law firm this summer, Paul Weiss. She just reported yesterday that she had a great summer. But my advice to her is don't let the expectations of others start to operate on you. Try to figure out what it is that you want to do. She asked me, she said, "Dad, you know, would you be disappointed if after I graduated from law school I decided not to be a lawyer?" And I looked at her and I told her the truth. I said, "No, I wouldn't be disappointed. I understand right now you think that that's what you might want to do. And that's fine, and that's why you're in law school. But if after law school you decided that you did not want to be a lawyer, that you wanted to do something else, that you wanted to be a

teacher, that would be just fine. That would be just fine.” So my advice to my daughter is, as best you can, uninfluenced by others, determine what it is that you want to do, that the doing of it will bring you gratification. I put it that way because I know that there are some people who will do something, not because the doing of it brings gratification, but because of the rewards, the financial rewards. And I am telling you, to me that’s just not enough. That’s just not enough. It’s great if you can do both. And they’re not always mutually exclusive, but what I told her is that shouldn’t be the goal. You find out what you want to do and, believe me, you’ll be rewarded enough to be able to take care of yourself and your family. Regardless of what you do -- if you do it well -- and that’s what’s certainly the expectation. You know, whatever you do, you do it to the very best of your ability. And my daughter happens to have a lot of ability.

Mr. Granof: Both of your daughters do.

Judge Kennedy: Yes, both of them do. I always tell her I understand what she’s going through. I mean this is not an original thought: do what you want to do. The fact is many of us don’t really know what we want to do. What I tell her is this. I say, “Approach this just the way you approach taking the LSATs.” Good test taking technique is not to look for the answer. You have a multiple choice question, a question followed by possible answers. It’s not a good idea to try to find the answer. What you do is you find the wrong answer, and then you whittle it down. So, one way to go about

finding out what you want to do is to determine what you don't want to do. What is it that you don't want to do? If working with a lot of people around is something that doesn't appeal to you, then you know there are some jobs you just don't want to do. If you don't really like the idea of standing up and speaking before juries or a judge, then perhaps litigation is not for you. There are other kinds of law, such as transactional law where that's not required. So that's a technique to use in trying to get to that place where you know what it is that you likely want to do because you know what you don't want to do. And then I also tell her this, "Always remember, you know, the Thirteenth Amendment was passed a long time ago. And guess what, if you're doing something and you don't like it, you can always change. You can always change. And do have the courage to change if that's what is called for." So these are some of the things that I tell her.

Mr. Granof: It's all great advice. Well, one last question. Is there anything else that I haven't asked that you think should be part of your oral history? I know that we've covered an awful lot of ground and it's been extraordinarily interesting and educational for me, but I wouldn't feel it was complete without giving you the opportunity to add anything you want to.

Judge Kennedy: Let me just say this. First of all, I really have enjoyed talking with you, and I feel a little defensive about enjoying talking about myself so much.

Mr. Granof: That's the purpose.

Judge Kennedy: But I don't know that there's anything to add. I suppose I do want to underscore something that I think I have said. And that is that my father, Henry H. Kennedy, Sr., is responsible in large part for any good thing that I do. He's the man who had such love for me, such love for me, and who had such confidence that I would be able to be somebody. To be a contributor to this society is what he conveyed to me. Because I must tell you, I certainly didn't think that I was all that smart. But my dad, he just did. And he conveyed it to me, and there's never a day that goes by that I don't think about him, and I want any recounting of my life, anything that I've done as a judge or anything else, it simply wouldn't be complete were that not to be a part of the record.

Mr. Granof: He must have been remarkable, because it's not just you, but your brother and sister. You've all been successful and had wonderful lives. And, clearly, he must have had an extraordinary influence in a very positive way.

Judge Kennedy: He did, and he's a very complex man. A very, very complex man. He was a Black man born in Chamberlain, Louisiana. Those facts are important because they are certainly part of his life, but they just should tell anyone who just hears them that this is a man who, you know, he wasn't wealthy. He didn't come from a wealthy family. He had certain challenges to face. His mother died within a year of his birth. He was raised by aunts for a significant period of his life. And I think I told you he went to three colleges, didn't graduate from any. But for some reason

-- and maybe it's because of his own broken family -- he met my mother and just was desirous and willing to fight to have a family life. And he did. And he did some things which influenced the way we turned out, including moving from Columbia, South Carolina.

Mr. Granof: Giving you your first tennis racket.

Judge Kennedy: Giving me my first tennis racket. I don't know how he did it. I don't know why he did it, but I certainly agree that he was a phenomenal man. I should mention my mother too. She was a good mother. And so they were a team. And, boy, did he love her. So, that's it.

Mr. Granof: Well, thank you very much. This has been just a wonderful journey.

[End of ninth and final interview.]