

Oral History of Judge Thomas Penfield Jackson
by Eva Petko Esber, Esquire
Fifth Interview - March 4, 2004

This is a continuation of the oral history of Judge Thomas Penfield Jackson. I am Eva Petko Esber. I am conducting this oral history on behalf of the D.C. Circuit Historical Society as part of its oral history project. I am here with Judge Jackson in his chambers at the United States Courthouse in Washington, D.C.

MS. ESBER: Good morning, Judge Jackson. It's nice to see you again.

JUDGE JACKSON: It's nice to have you back.

MS. ESBER: We've talked in the past about a number of your cases. You've certainly had a number of very high profile cases. The four that come to mind most immediately are the *Mayor Marion Barry* criminal prosecution, the *Michael Deaver* criminal prosecution, the *Newton Street Crew* case, and the *Microsoft* case. We've either talked about them, or we will talk about them some more.

But I asked, when we first met, about other cases that were particularly memorable for you that might not be so well known, or have been so high profile. You mentioned three, in particular. Let me summarize those, and then we can pick up our conversation:

You mentioned the *Tune v. Walter Reed Hospital* case, which involved the right of a terminally ill patient to terminate life support at a federal medical facility.

You mentioned the *War Babes* case, in which there were British citizens who believed themselves to be the children of World War II veterans who had served in Britain, and

wanted to receive contact information concerning their putative fathers. The Pentagon was refusing to disclose that information. You issued a ruling that the Pentagon could not presume that the putative fathers did not wish their contact information to be released, and according to press reports, that paved the way for a settlement.

JUDGE JACKSON: And further that the Freedom of Information of Act imposed the burden of proof with respect to privacy matters justifying the withholding of the information by the government.

MS. ESBER: And according to the press reports I saw, that paved the way for a settlement in which some contact information was released.

And the third case you mentioned was *Higgs v. the Attorney General of the United States*, which was an adoption case. A local couple wished to adopt Philippine children that were related to the wife from the United States – her niece and nephew from the Philippines. Their natural parents were alive, but were unable to care for them. The INS stood in the way of their entering into the United States, saying that they were not orphans. And you issued a ruling finding that the children had been effectively abandoned, within the meaning of the Act, paving the way for their entry into the United States. I find all three of those cases very interesting, including that they are so memorable for you. I'm wondering if you can explain why, in particular, those three cases were the ones you thought of.

JUDGE JACKSON: Because in each of those cases I solved an immediate personal problem, an immediate conundrum for people who needed relief, and were deserving of getting some relief. Whether from a recalcitrant bureaucracy as in the *Higgs* case, or for that matter in the *Tune* case, and in the *War Babes* case. In each instance a technicality, if you will,

stood in the way of doing something that was genuinely helpful to people and did no harm. The technicality, in other words, was protecting no interest that was deserving of protection. I got no publicity for any of them; no public acclaim for anything that I did. I know that after each one was over – and none of them was appealed – after each one, I was aware of the fact that some people had genuinely been helped by the decision that I had rendered.

MS. ESBER: All three of them strike me as very unusual to come before a federal judge: adoption issues, paternity issues, the right to life issues, if you will.

JUDGE JACKSON: Amazing. You get all sorts of issues here, and in different contexts. In the *Tune* case, we were dealing with the Department of the Army, and its regulations governing medical practice. The Army had – and because it's a federal facility, it goes to the federal court. And, in the *Higgs* case, you're dealing with the Immigration and Naturalization Service. In *War Babes*, you're dealing with the Department of Defense, maybe it was the Federal Records Center, the archives facility.

MS. ESBER: I don't recall, off hand, who was the defendant in the *War Babes* case.

JUDGE JACKSON: The National Archives and Records Administration, because all of the service records for these former servicemen had been transferred to Archives. I was told afterwards that the British citizens who believed themselves to have been fathered by American servicemen, at least those who were able to actually make contact with their putative fathers, were never rebuffed. In each instance, the contact was genuinely welcomed and everybody was gratified that it turned out the way it did.

MS. ESBER: And as I recall there was a sense of urgency, in terms of the

plaintiffs making the case that the putative fathers were aging at the point in time when this case came before you. There wasn't much time left.

JUDGE JACKSON: That's right.

MS. ESBER: It's a very, very interesting case.

JUDGE JACKSON: I thought it was fascinating and was delighted I was able to find what I thought was a rather ingenious way of making the government divulge the information.

MS. ESBER: The next matter I'd like to talk about is the *Newton Street Crew* case.

JUDGE JACKSON: Okay.

MS. ESBER: First of all, how did it come to be known as the Newton Street Crew matter? Was that a term that the group used themselves?

JUDGE JACKSON: No. No. This was a sobriquet, if you will, that the law enforcement authorities appended to it. Gang activity, in that sense, in the District of Columbia has since then been branded with the name "crew." The gangs are called "crews" rather than gangs. And I think the Newton Street Crew was the first gang that was so denominated.

MS. ESBER: Let's put this in a little context for the discussion I'd like to have about it. This was a trial you had back in 1994. I understand that it was a very lengthy trial, five months or more?

JUDGE JACKSON: I think so. At least five months, it may have been six. It was a long case.

MS. ESBER: And this was a trial of one of the city's most violent drug groups.

JUDGE JACKSON: They were the first in these hyper-violent, bloodthirsty gangs. I'm not sure that they didn't pre-exist. But this was the first one that attracted enough law enforcement effort to bring it, *en masse*, to trial.

MS. ESBER: The five-month trial I referred to was of four principal leaders of this group.

JUDGE JACKSON: That's right. There were, I guess, maybe five or six satellite cases, a couple of which went to trial, and also took, all told five months' time. A number of defendants who were indicted then agreed to cooperate. I think the significance of it was that this was the first gang prosecution that was a product of the joint FBI/Metropolitan Police Department collaboration. They had what they call the joint task force. But up until that time the FBI had done its thing, and the Metropolitan Police Department had done its thing. And the MPD really had very few resources, and was not prepared to commit the resources necessary to fund one of these protracted investigations and lengthy prosecutions.

One figure, actually several figures, stand out in particular from that case. One was a Metropolitan police sergeant. I think he was a hero.

MS. ESBER: In what respect?

JUDGE JACKSON: Dan Wagner. Dan Wagner lived up in the Mt. Pleasant area, or at least he did at that time. So he was personally aware of this gang activity and he had beseeched his superiors to let him commence an investigation that would make some inroads on getting these drug salesmen of vast quantities of cocaine off the street. He met with, so he said, indifference from all of his superiors. So, on his own initiative, on his own time, he went out, bought a video camera with his own money, and he and a partner rented an apartment, an

un-airconditioned apartment, that overlooked one of the locales where all these drug sales were going down.

MS. ESBER: Again, with their own funds.

JUDGE JACKSON: With their own funds.

MS. ESBER: Amazing.

JUDGE JACKSON: They spent the summer without airconditioning, standing in the bathtub of this apartment, filming the drug activity on the street, sometimes when the temperature was 110 degrees in the apartment. It was his effort, in that regard, that ultimately contributed to getting the FBI interested. Once the FBI was involved, then the resources were committed to this joint task force to wrap up all of these guys. I think, probably altogether, there were 20 or 25 of them. But the big trial involved just the four principals.

MS. ESBER: It appears to me, from reading about the case, that what makes it particularly noteworthy among drug prosecutions are two things. Number one, how much brutality and violence was involved with this particular gang's activities. As I understand it, the trial that came before you involved a triple homicide, kidnapping allegations, and the like.

JUDGE JACKSON: Oh yes, and maybe a dozen different murders. But the one that captured everyone's imagination was one that was referred to by the prosecution team as the Triple Duct Tape, where on the same evening, three rival drug dealers were lured, independently, to the basement of a home and assaulted, kidnapped, tortured, wrapped from head to toe in duct tape, and shot to death. The bodies were left in abandoned cars —

MS. ESBER: Judge Jackson, it appears we had a problem with the tape as you were speaking about the *Newton Street Crew* case. The tape shut down just as we were

discussing how violent the allegations were, in terms of murders and kidnapping, and what not. You were describing, as particularly heinous, one particular evening where there was a triple murder.

JUDGE JACKSON: That was referred to by the prosecution team as the Duct Tape Triple. One evening, three rival drug dealers were lured to the basement of one of the gang member's, and independently assaulted, robbed, beaten, tortured and, at the end, wrapped from head to toe with duct tape. When the evening was concluded, each independently was taken out to an automobile, a scrap automobile the gang had procured, and driven to remote parts of the city. Each of them was shot through the head several times, and the bodies left in abandoned cars. All [of this was] graphically described by one former gang member who was induced by the prosecutors to cooperate.

MS. ESBER: I think that's the other most noteworthy thing about this case. The prosecution was built with the cooperation of a lot of insiders. Given the nature of the allegations, quite extraordinary.

JUDGE JACKSON: That, of course, is how the lead prosecutor got into the trouble that he is in right now, having to do with alleged misuse of witness fees.

MS. ESBER: Well, let's talk about that a bit, because this case, ten years later, is still in the news as a result of a controversy that arose after the case concluded. After the defendants had been sentenced by you to multiple life sentences, and the case otherwise appeared to be concluded, an informant stepped forward and raised allegations of prosecutorial misconduct, correct?

JUDGE JACKSON: One informant, in particular, who was somehow related to

several members of the gang and who was feeling remorseful – in fact he had cooperated and testified – made allegations of misconduct on the part of the prosecution team which included allowing prisoners and cooperators to have sexual favors provided for them by girlfriends in the courthouse, and being allowed to watch pornographic movies, being fed meals, and paid certain sums of money.

The allegations led to an investigation by the Office of Professional Responsibility, Department of Justice. They came up with a lengthy report which found the allegations of personal favors unsubstantiated, at least insofar as prosecution complicity in providing them.

But they did find that the lead prosecutor had, in the Office's judgment, made extensive misuse of witness fees paid to various people involved in the preparation of the prosecution case. The short answer is yes. Probably he was profligate in dispensing these sums of money, although none of them were ever of any great magnitude. It was in the aggregate that the figures became alarming.

MS. ESBER: Just recently, this report has been released for the first time. It had been under seal for some time. Just at the end of last year; the government no longer pursued keeping it under seal. It's been back in the news because of that. I've read the news reports recently, and it looks like the total sum of money involved was about \$142,000, the total of various smaller amounts that were given to various witnesses.

JUDGE JACKSON: I don't remember how much it was. The investigation took several years, and there were any number of people involved. But the payments to individuals were never in any great order of magnitude. One recipient who I remember, and who was

absolutely indispensable to the successful prosecution of this case, was the grandmother of the gang's principal killer. [He] had already been convicted of murder, and was serving a 20-year sentence pursuant to a judgment of the Superior Court, with no possibility of any commutation or parole, or anything else other than serving 20 years. While in prison, he was visited regularly by his grandmother, who was the principal moral influence in his life. [She] persuaded him to begin to cooperate with the prosecution, which he did. His name was Forgy.

The grandmother, as I recall, lived in Richmond, or at least she lived at some distance, and had no independent means of support. She was a poor lady. Paul Howse would dispense sums of money which would enable her to travel to visit with her grandson, and reinforce his determination to do the right thing. If he had not been able to do that, she would not have been able to visit, and Forgy would not have persisted in his resolve to do what he did, and testify to the killings that he did on behalf of the gang.

MS. ESBER: Now, ultimately, this came before you, – or I should say, initially, this came before you with respect to the new trial motions, and you recused yourself.

JUDGE JACKSON: I did.

MS. ESBER: And you made a finding, as it was reported in the *Legal Times*, that having presided over the trial you had formed strong opinions about the defendants' guilt and developed a high regard for the integrity of the prosecutors and the credibility of their witnesses. And you said that you were unable to put that aside sufficiently to enable you to decide the matter impartially.

JUDGE JACKSON: That says it all.

MS. ESBER: What I found noteworthy, having looked at this, is that a number of

defense attorneys in town – uninvolved in the case – found your comments to be remarkably candid. And questions were raised as to whether what you were expressing happens with more frequency, but is not acknowledged. What do you think about that? That the judge becomes —

JUDGE JACKSON: I really don't know. I know that I could not have passed on their 2255 motions with the judicial detachment that I think it demands. I had been absolutely convinced of the guilt of each of these guys who was in jail. I am absolutely convinced that the government's witnesses did not lie. Indeed, they were all vigorously cross-examined and did not budge. They took a lot of punishment on cross-examination, and in many instances acknowledged that they had gotten favorable treatment, not perquisites, but had negotiated a plea with the government which resulted in their doing little or no jail sentence. But I was convinced of the veracity of every one of them; was convinced that such sums as may have been dispensed by Paul Howse to them had not, in fact, influenced the truthfulness of their testimony. And I could not sufficiently detach myself to be able to do justice to what was obviously an arguably meritorious argument for a new trial or some judicial relief.

MS. ESBER: Now, what ultimately became of the defendants, as I recall, is that deals were struck after the case was reassigned to a new judge?

JUDGE JACKSON: I recused, and it was reassigned to Judge Kotelly.

MS. ESBER: And deals were struck where sentences were reduced.

JUDGE JACKSON: That's right.

MS. ESBER: The new trial motion itself was never ruled on.

JUDGE JACKSON: I'm sorry.

MS. ESBER: The new trial motion itself was never ruled on.

JUDGE JACKSON: No. I don't think she did. I think the plea bargains mooted it.

MS. ESBER: And I take from prior conversations you and I have had, that you've remained sympathetic, at a minimum, or supportive of Paul Howse, despite the findings of the report.

JUDGE JACKSON: Yes.

MS. ESBER: Can you explain why that is?

JUDGE JACKSON: Because if he had not been able to do that, to make these little disbursements, he would have lost the support of a number of the cooperating witnesses. There is apparently no other vehicle, no other mechanism for him to have done what he did in providing transportation to and from the jail, providing a meal, for example, to a girlfriend who was convincing her boyfriend that he better take the government's offer, he better cooperate. Enabling her to bring their child to that interview. At the time, there were no guidelines; these disbursements were simply denominated as witness fees. Some of the people were, in fact, witnesses, or could have been witnesses. But many of them were made from witness fee funds because there was no other source, no other fund available to make these little disbursements that made the cooperation that Howse was able to induce possible. There were just no guidelines at all. And so what he called witness fees were in fact, in many instances, not witness fees. They, ultimately, in the aggregate, involved a lot of money. But they were expenses without which the prosecutor could not have succeeded.

I wrote a letter to Wilma Lewis, who was the U.S. Attorney at the time. I said there ought to be some sort of a fund set up, with guidelines as to what is appropriate, so that the

prosecutor can, for example, give transportation money to somebody who is assisting the prosecution. They ought to be able to buy an inexpensive meal for somebody who is functioning in this capacity. There ought to be some mechanism so that small expenditures could be made that would be scrutinized but nevertheless would not be compromising. Another problem, of course, here, is that none of this was ever disclosed to the defense. And the defense should have had this information, should have known that these disbursements had been made. But I think that to rationalize it – I think Paul Howse did rationalize it, by saying there are none of them of any order of magnitude; they are *de minimis*. They are so insignificant as to not really require disclosure of the payments to the defense. I disagree with him on that. It should have been disclosed to the defense.

MS. ESBER: Well, the press reports at the time, and even recently with the disclosure of the report, portray Paul Howse as a very high-flying independent, prosecutor.

JUDGE JACKSON: He was. I am told he was a rogue in the office. While he was admired for his trial skills – and they were considerable; he was a very able trial lawyer – he made a lot of enemies over there, rubbed a lot of people the wrong way. I think that he would be described as a bit of a hotshot.

MS. ESBER: The picture that's portrayed is that he went his own way. That, while there may have been quite a justifiable end, as you described, to what he was doing, he sensed a lack of support within the department, and he knew he was violating the rules, but saw no other alternative.

JUDGE JACKSON: I don't think he – there were no rules. There were no guidelines about how you define a witness fee. I think there are guidelines now, or are certainly

in the process of being developed. But there were, I am told, none at that time. It's just clear that some of the disbursements were not witness fees. These people were not witnesses and were never expected to be witnesses. They were simply intended to enable what reinforcement they were providing to the people who *were* testifying for the government. There were other payments to people who were also witnesses. For example, somebody who was a cooperator, who was released from jail, had no money, no job, no resources whatsoever. Some of the disbursements were payments of maybe a \$100, or something like that, to someone who had just come out of six months in jail, and didn't have enough money to buy the next meal.

MS. ESBER: There was some comment, that must have been from interviews with Mr. Howse, that he wanted to try and keep some of these recently released cooperating witnesses out of trouble, to keep them both available to him, and from being further prosecuted for other crimes themselves.

JUDGE JACKSON: Uh-hum.

MS. ESBER: The *Legal Times*, which is, of course, one of our local publications, made this statement about what was ultimately the outcome of the *Newton Street* case. They said, "The outcome means that the *Newton Street* case, once touted as a blueprint for bringing down violent drug gangs will instead be remembered by some as one of the darkest stains on the U.S. Attorneys office here." Do you think that's fair?

JUDGE JACKSON: No. No. That denigrates the work, the splendid work they did in putting together this case, in building a case that resulted in the total demise of undoubtedly one of the most violent drug gangs in the city.

MS. ESBER: Another distinguishing —

JUDGE JACKSON: It denigrates the work of such people like Dan Wagner. And there were other police officers who really devoted themselves to this case. It denigrates the work of the FBI agent who has been involved in a number of these major cases, who devoted months and months and months of his time and effort of this job. That's hyperbolic overstatement, and an unjustified indictment of the prosecution team here. They were, by and large, very capable people. This was really the only blemish on the whole process. But it should have been disclosed to the defense.

MS. ESBER: Another unique aspect of the case, if I recall correctly, is that you had an anonymous jury. Is that right?

JUDGE JACKSON: Yes.

MS. ESBER: Was that the first time you had done that?

JUDGE JACKSON: I think it was the first time I had ever used an anonymous jury.

MS. ESBER: And, I take it, an obvious reason for that would be concern about the safety of the jurors.

JUDGE JACKSON: Absolutely.

MS. ESBER: How about your own safety? Were you concerned for your own safety during this trial?

JUDGE JACKSON: I had a Marshal's detail who were looking after me. It was not a 24-hour-a-day thing. But I had transportation to and from the courthouse. I personally never felt that I was in any significant danger. But then, I did not live in that community.