

Oral History of Judge Thomas Penfield Jackson
by Eva Petko Esber, Esquire
Fourth Interview - July 1, 2003

MS. ESBER: This is a continuation of the oral history of Judge Thomas Penfield Jackson. I am Eva Petko Esber. I am here with Judge Jackson at the E. Barrett Prettyman United States Courthouse in the District of Columbia

MS. ESBER: Good morning Judge Jackson.

JUDGE JACKSON: Good morning.

MS. ESBER: As I mentioned, this is a continuation of your oral history. Considerable ground has been covered, but there is quite a bit left to go. But I thought I might begin by asking you about some more recent events. Most notably, I understand that your portrait ceremony was just held here at the courthouse. Is that right?

JUDGE JACKSON: Last Thursday.

MS. ESBER: Maybe you can just tell us what that experience was like for you? I imagine you've been to many such ceremonies in your time on the court. Did you imagine that your own time would come, finally?

JUDGE JACKSON: I've been to a number of them. Some of the judges do not have portrait presentation ceremonies. Several of them, I know, just arrange privately to have their portraits painted and presented to the court without a ceremony. The portrait itself was sufficiently costly so that I could not afford to do it by myself and had to ask my law clerks if they would form a committee to arrange to have contributions made.

MS. ESBER: That's a custom that has developed?

JUDGE JACKSON: It's a very common thing. Several of the other judges, I think probably more of the judges have done that than have privately arranged for their own portraits to be presented. But I was gratified at the alacrity with which my law clerks agreed, and the enthusiasm that they put into it, and overwhelmed by the number of contributions, and the variety of my friends and acquaintances who felt that they wanted to contribute to it.

MS. ESBER: Did you have a program of speakers at the portrait ceremony?

JUDGE JACKSON: I did.

MS. ESBER: Who did that include?

JUDGE JACKSON: I looked at the portrait ceremony that had been done for Aubrey Robinson, Chief Judge Aubrey Robinson, and for Judge Tom Flannery, and, following the formats that they had used, asked four people if they would be speakers. I selected them on the basis of variety of experiences – variety of the relationships that we have had with one another. The first speaker was one of my former law partners, Nick McConnell, with whom I practiced law for a number of years at Jackson & Campbell.

MS. ESBER: He's still at Jackson and Campbell, is that right?

JUDGE JACKSON: He is. He's now president of the Bar Association. He has had an extraordinarily distinguished career of his own. But he and I have become fast friends not merely by being law partners, he having been something of an understudy to me during his early years of practice, but also a boating partner. He and I are co-owners, along with a third former partner, of a sailboat, a 34-foot sailboat we kept at Solomon's Island on the Chesapeake Bay. We had a number of years of good fun and fellowship as sailing companions.

MS. ESBER: Now I'll have to ask about the sailboat, because lawyers always

have interesting names for their sailboats.

JUDGE JACKSON: Well, interestingly, it's something that Nick talked about at the ceremony. The name of the sailboat is *Nisi Prius*.

MS. ESBER: Is that —

JUDGE JACKSON: Do you know what *nisi prius* is?

MS. ESBER: I don't. Is it Latin?

JUDGE JACKSON: Yes, it is Latin. I'm astounded that lawyers today, younger lawyers today, have never heard the term. *Nisi prius* means trial court. It's Norman French/English Latin from the early days of the common law. A *nisi prius* court was a court of first impression. Spelled n-i-s-i p-r-i-u-s. We all thought that was an entirely appropriate name and didn't realize that many people would be confused by it, and have no idea what it meant.

MS. ESBER: Certainly not my generation. I had one semester of Latin, not enough to have gotten that far.

JUDGE JACKSON: You didn't learn it in Latin. It was in law school, old common law cases. It came from a *nisi prius* court, as distinguished from an appellate court. Have you ever heard of an order *nisi*?

MS. ESBER: I don't think so.

JUDGE JACKSON: You never heard of that?

MS. ESBER: I don't think so.

JUDGE JACKSON: It's a show cause order. It's a conditional order. It operates only if a condition is fulfilled or not fulfilled.

MS. ESBER: I see. What I was going to say was that I have not yet met a lawyer

who had not named his sailboat with some legal term or another.

JUDGE JACKSON: I know your senior partners' boat is named *Acquittal*, as I recall.

MS. ESBER: There have been several with various different names. I think the *Fifth Amendment* was one of the names. At least it was a name under consideration. I recall that.

JUDGE JACKSON: I think the current boat is called *Acquittal*. It may be *Acquittal II* or *Acquittal III*.

MS. ESBER: That's probably right. But it shows something about how all-pervasive the law becomes in your life, I think. It takes over your personal passions as well.

JUDGE JACKSON: I remember that. I remember addressing a group of newly admitted lawyers to the bar, at some sort of ceremony that celebrated their admission, telling them that their lives have changed forever. They are now and will forever more be known as lawyers. It doesn't – it's something like being ordained. Once ordained, unless defrocked, you are forevermore a priest.

MS. ESBER: That, at least, is particularly true in this town. I don't know if it's so true in other cities.

JUDGE JACKSON: I think it is. I think you always think of yourself as a lawyer, if you are asked to describe yourself. You say, "I'm a lawyer."

MS. ESBER: That's very true.

JUDGE JACKSON: And it's an appellation of which I have always been very proud.

MS. ESBER: Now, we digressed. We were talking about your portrait ceremony

and the speakers.

JUDGE JACKSON: The second speaker was Judy Retchin, the Honorable Judge Retchin, who is now an Associate Judge of the Superior Court. I asked Judge Retchin to speak because she was the lead prosecutor in the *Marion Barry* case. She did an absolutely superb job. A young and relatively inexperienced prosecutor, up against certainly one of the foremost defense lawyers in this city, Ken Mundy. And she and her co-counsel, Rick Roberts, who is now a judge on this court, did a splendid job in presenting that case, a case that was totally convincing to me and I thought should have been convincing to the jury. It may have been convincing, but they didn't convict on most of the charges.

MS. ESBER: That had been discussed in one of the earlier sessions of your oral history and I know that you had commented that you had thought the prosecutors had tried the case exceptionally well. And certainly under difficult circumstances.

JUDGE JACKSON: Oh, no question about it. It was an unpopular prosecution and they had very little public sympathy. But they soldiered their way through the case and they did it with a great deal of aplomb. In any event, Judge Retchin and I have had considerable regard for one another deriving from that experience, primarily.

MS. ESBER: Had you seen her try other cases, before the *Marion Barry* case?

JUDGE JACKSON: I was reminded that she had appeared before me on other occasions. But that, of course, is the most memorable for me.

MS. ESBER: And you've remained in contact since she's taken the bench here in Superior Court?

JUDGE JACKSON: More or less. We certainly have not been close friends, in

the sense of frequent contact. But we've always had a great deal of respect for one another. Since I thought that was a significant event in my life, it was appropriate to ask her if she would speak, and she did.

The third speaker was Joel Brinkley of the *New York Times*. Joel Brinkley is an experienced – he's now a Washington correspondent for the *Times* – but he's very much an experienced journalist. He and I became acquainted and developed a rapport during the trial of the *Microsoft* case. He ultimately was a co-author of a book published by the *New York Times* about that trial. He and I conversed *in camera* during the course of that trial, while he developed insights about the case as it was being tried, and about me. Of course, that was one of the contacts that was roundly denounced by the court of appeals as something that I should not have done. I still disagree, however, and thought it was an appropriate thing to do. I think Joel behaved very honorably with respect to everything that I told him and revealed nothing until the case was over. Then I thought he very accurately summarized the judicial reaction, if you will, to the case on the basis of insights that I provided to him while we were conversing in chambers.

MS. ESBER: Was this someone who provided support to you during the time when the court of appeals decision came down that was critical of you?

JUDGE JACKSON: Joel wanted to take responsibility for having induced me to speak indiscreetly about the case while it was still in progress before me. And I told him that it was my decision. I was perfectly well aware that there would be some questions asked about the propriety of my having talked to him. But it was my decision, and I undertook to talk to him advisedly, because I thought the case was sufficiently significant, and of great public interest, such that it was highly desirable that responsible members of the media have some genuine

insight into my approach.

MS. ESBER: How is it that you came to know him, or that you came to be speaking to him about the *Microsoft* case?

JUDGE JACKSON: He approached me, initially. I have since come to know him as an alumnus of Sidwell Friends School where he remained active in the alumni organization. Of course, I think I told you that my wife is head of development at Sidwell. So I've gotten to know him and his wife, Sabra, in that context as well. But, initially, it was his approach to me with a request that I undertake to talk to him from time to time while the *Microsoft* case was in progress before me. And he agreed that nothing would be published until after the case was over.

MS. ESBER: Was that your condition, or his offering initially?

JUDGE JACKSON: I think we mutually agreed. I'm sure that I insisted on it, because it was something that was incumbent upon me, not upon him. But he had no compunctions about that.

MS. ESBER: I think you said there was a fourth speaker.

JUDGE JACKSON: The fourth speaker was my former law clerk, who was the *de facto* head of the committee that arranged for the portrait. That was Ken Wainstein, Kenneth L. Wainstein, who is now a Chief of Staff to the Director of the FBI, Robert Mueller.

MS. ESBER: Was he one of your earlier law clerks?

JUDGE JACKSON: Yes, in the 1980s. He has since gone on to a very distinguished career of his own. He was an Assistant U.S. Attorney in the Southern District of New York for several years. Then he returned to Washington as an assistant in the office here.

He was acting U.S. Attorney between the current U.S. Attorney, Roscoe Howard, and the lady who preceded him, Wilma Lewis. But for about a sixth month period, close to a year, he was acting U.S. Attorney here. And then he went to the Office of Legal Counsel, Department of Justice, as the head of that office.

MS. ESBER: Now, I understand that in addition to the portrait ceremony you had a law clerk gathering. Was it the next evening?

JUDGE JACKSON: No, it was that evening. After the ceremony here we had a reception in the judges' dining room for about an hour, hour and a half. And then later on that evening we had a law clerks' reunion dinner at the Metropolitan Club.

MS. ESBER: Were a number of your law clerks able to attend?

JUDGE JACKSON: Yes. I think the majority of them were able to attend. There were several who were, for one reason or another, prevented from attending. All of them sent regrets. Some of them I hadn't seen for a number of years.

MS. ESBER: Is that right. Well I guess after, it's been 20 years that you've been on the bench?

JUDGE JACKSON: Twenty-one.

MS. ESBER: Twenty-one.

JUDGE JACKSON: Twenty-one next week.

MS. ESBER: So, by now a number of your former law clerks are no longer feeding lawyers, they're established in their careers?

JUDGE JACKSON: Yes. Very prosperous and very successful.

MS. ESBER: Do you have reunions with them regularly.

JUDGE JACKSON: Pat and I have tried to have picnics, annual picnics. The law clerks are invited to come down to St. Mary's County where we have a place of our own, and bring their off-spring. Some of their off-spring are nearly fully grown now. The picnics have been almost annual; they have been quasi-annual.

MS. ESBER: Missed a few years here and there?

JUDGE JACKSON: We'll miss a year or two, but then try to have a picnic at what we think is probably the most propitious time during the summer months for as many people as possible. And we usually have a whole lot of people come down. Some law clerks come one year and not the next. And for those who are local, who are in the Washington metropolitan area, we periodically have lunch or dinner together.

MS. ESBER: Have the majority of your law clerks stayed in the area? Or have they scattered to the four corners of the country?

JUDGE JACKSON: About half and half.

MS. ESBER: And have you had others go into the government or public service?

JUDGE JACKSON: Oh yes. Several of them have become Assistant U.S. Attorneys. One is now an assistant in Los Angeles. One of them is in the New York Attorney General's office. She also was an Assistant U.S. Attorney in Minneapolis. There are several who are in the Department of Justice now. Several are in other public offices, one now on Capitol Hill as a staff member. Two actually. Several are corporate in-house counsel. Several have gone to Williams & Connolly.

MS. ESBER: I know, several.

JUDGE JACKSON: Several have departed.

MS. ESBER: Alan Waxman was a partner of ours, and has now moved into an in-house position.

JUDGE JACKSON: Yes, assistant general counsel at Pfizer.

MS. ESBER: That's right. He's a wonderful lawyer.

JUDGE JACKSON: He is, and a fine guy.

MS. ESBER: Was your family in attendance at the portrait ceremony?

JUDGE JACKSON: One of my daughters, who lives locally, and my son-in-law, and our two local granddaughters.

MS. ESBER: Have any members of your family gone into law? Your father was a lawyer, of course, as I know.

JUDGE JACKSON: Neither one of my two daughters became lawyers. One of them is a journalist, the other one is now a full-time mother, but before that she was a civil servant.

MS. ESBER: Did you have any interest in seeing your children go into the law? Was there disappointment at all when they chose not to?

JUDGE JACKSON: I would have to say no. Not that I wouldn't have been pleased to see them do it. But I want them to do what they wanted to do. Neither one of them, for one reason or another, decided she wanted to go to law school.

MS. ESBER: Do you think the fact that your daughter is a journalist had any influence on your decision to speak with journalists during the *Microsoft* case?

JUDGE JACKSON: I'm sure that is true. There was a time when I thought I'd like to be a journalist myself. I was editor of my high school newspaper and worked for a time

on my college newspaper. I've enjoyed the writing part of any job that I've been in that called for writing. And I have a number of friends who are journalists. I have a great deal of respect for some journalists of my acquaintance. The press in the abstract, sometimes, I find to be very exasperating, but individual journalists I have found to be very honorable, very trustworthy, intelligent, thoughtful, interesting people.

MS. ESBER: Do you think your attitude towards journalists and the law has evolved over the time that you've been on the bench?

JUDGE JACKSON: I'm sure it has. Still evolving.

MS. ESBER: I read some comments that you gave earlier in your oral history about some of your frustrations during the *Deaver* case in dealing with the media.

JUDGE JACKSON: Oh yes. The media *en masse* can drive you to distraction, absolutely obsessive about trying to insinuate themselves into a case, sometimes in very offensive ways. But then there are other individual journalists who don't comport themselves that way, and with whom I'm willing to be forthcoming when it's appropriate for me to do so.

MS. ESBER: As I recall, in your earlier comments, you spoke about the fact that the press had challenged the questionnaires done during *voir dire* and – was it in the *Barry* case or the *Deaver* case – and had caused you to have to set aside a panel.

JUDGE JACKSON: It was in the *Deaver* case. They didn't challenge the questionnaires but they challenged my decision not to release them to the public.

MS. ESBER: The confidentiality of them, yes. And as a result of that —

JUDGE JACKSON: And then they also challenged my decision to conduct part of the *voir dire* in private, when I pursued answers with respect to questions having to do with

jurors' experience with substance abuse, either personal or of family.

MS. ESBER: So do you think that your experiences in the *Deaver* case had an impact on your thought processes when it came to *Microsoft* on how to manage the media or deal with the media?

JUDGE JACKSON: I think that several high profile cases that I have had contributed to the evolution of my thinking about the media. They've become a brooding omnipresence in any high-profile case. The courtroom is filled day after day after day. You have to allocate seating. You have to make provisions for their access to the exhibits and evidence that is actually admitted but not placed under seal. You try to accommodate their deadlines schedule to as much an extent as possible: knowing that certain journalists must meet a deadline, to recess the trial at a convenient point to enable them to get to a telephone to do so. I would try to accommodate them.

Periodically I would have a complaint that the courtroom is either too hot or too cold. And there's always a committee around who want to make representations to the judge about various conditions that they're finding onerous. Those who don't know better overwhelm the switchboard here, asking if the judge has a comment about the testimony of such and such a witness.

MS. ESBER: Do you think these are, if not burdens or distractions, at least impositions on a trial court that the court of appeals doesn't have an appreciation for?

JUDGE JACKSON: Absolutely. They have no appreciation for it at all. They live in a secretive world of isolation. They do not have to deal with the public or press.

MS. ESBER: Do you think that the district court here is equipped to deal with

these types of demands from the media?

JUDGE JACKSON: I think we do very well. I think we probably do better than most courts because we have had so much experience in dealing with them. Someone as conscientious as our current clerk, Nancy Mayer-Whittington, goes out of her way to accommodate the press and to make sure that her staff does, as well.

MS. ESBER: So you have to call on the clerk's office, or the administration of the court, to assist?

JUDGE JACKSON: And the administrative assistant to the Chief Judge.

MS. ESBER: Your own staff, of course, is very limited. You have a law clerk or two and yourself and a deputy clerk.

JUDGE JACKSON: In chambers we've had to develop an answering system for the telephone which diverts calls automatically because so many of them come in from the front.

MS. ESBER: I'm not sure I understand. It diverts them to an answering machine?

JUDGE JACKSON: Yes.

MS. ESBER: So that you will not be disrupted in your ordinary business?

JUDGE JACKSON: Yes.

MS. ESBER: I imagine that hit its pinnacle during the *Microsoft* case?

JUDGE JACKSON: It did. We were just overwhelmed. That case attracted worldwide attention. We were not dealing with simply the American press. We were dealing with the foreign press as well.

MS. ESBER: Putting aside the issues concerning your contacts with the media in

the *Microsoft* case, was antitrust something you had an interest or a background in prior to that trial?

JUDGE JACKSON: Not really. I had had four or five antitrust cases in the past but I did not – by no means – consider myself sophisticated in antitrust law.

MS. ESBER: Was there anything in particular you did to prepare yourself for one of the largest antitrust trials in U.S. history.

JUDGE JACKSON: It was preparation while the case was in progress. I read the legal memoranda that were filed. I read analysis of them done by my law clerk. I had one law clerk – ultimately I had a third law clerk assigned to me who worked exclusively on the *Microsoft* case. I discussed the issues with my law clerk repeatedly. We had intense discussions about what cases were significant, what were meaningful, what areas we should concentrate on, and which areas were probably less significant than one side or the other wanted us to think. It was a learning experience just doing the case. As I say, I've had several antitrust cases, all of which I have found interesting for several reasons. One, because the issues were interesting and intellectually challenging. Second, because as is usually the case in any significant antitrust case, there were good counsel. Any case that is well presented, any significant case that is well presented, is likely to attract my attention. Probably the attention of most judges.

MS. ESBER: And, again, setting aside all of the issues about the media surrounding the case, was it a well-trying case from your perspective?

JUDGE JACKSON: Oh, absolutely. Splendidly tried case. Not to say that the trial strategy was necessarily the wisest trial strategy on the part of Microsoft. But in terms of the courtroom presentation, both sides were extraordinarily skillful.

MS. ESBER: Of course, that case would have presented not just the challenges of the complexities of antitrust law but of technology as well.

JUDGE JACKSON: Oh yes. That I also had to learn as I went along too.

MS. ESBER: Did you consider yourself a technologically savvy person?

JUDGE JACKSON: No. No. And still don't. But I learned enough. I learned enough to decide the case, and to know what the issues were, and what it was I was deciding. To understand the technology of it, even if I don't pretend to be proficient in its use.

MS. ESBER: Alright, now shifting gears a little bit, Your Honor, if you don't mind. You and I had a chance to meet one another prior to getting starting on this oral history today. At that time, I had asked you whether there were certain cases that you found particularly memorable that were not the high-profile cases that we've read about in the paper. You immediately mentioned three that came to mind. And I wanted to talk about those a bit. The first one was *Tune v. Walter Reed Hospital*. Why don't you tell us about that a little case?

JUDGE JACKSON: That came to me fairly early on. I had not been here all that long and it started as a *pro se* case. Actually it went all the way as a *pro se* case.

MS. ESBER: 1985, I think it was.

JUDGE JACKSON: That sounds about right. The case started when, as I recall, the son of an elderly woman who was a patient at Walter Reed Hospital – he himself was either retired or still an active army officer – filed the suit on behalf of his mother for injunction or declaratory relief against the hospital. The United States becomes the defendant in such a case. He had prepared the complaint himself. I don't know whether he had any help or not. But, in essence, the complaint was that his mother had gone into Walter Reed as a military dependent for

what was thought to be —

MS. ESBER: Cataracts, I think it was.

JUDGE JACKSON: I don't recall what her presenting medical complaint was. She went in for what looked to be fairly routine care. And while she was in the hospital, as it turned out, she had terminal cancer of the pericardium.

MS. ESBER: I looked at a little bit of the opinion. It appears that she went in for I think it was cataract surgery and developed some complications.

JUDGE JACKSON: She had respiratory problems, as I recall.

MS. ESBER: And they put her on a respirator. They put her on life support, not knowing that she had terminal cancer.

JUDGE JACKSON: That's right. She had respiratory problems. They put her on a respirator, and then it developed in the course of her work-up that she had a terminal malignancy.

MS. ESBER: They thought they were perhaps treating pneumonia, you had written in your opinion, when they had first put her on the respirator.

JUDGE JACKSON: But in any event, when she learned that she was going to die – that she would not recover from the illness from which it had been discovered she was suffering, but would be kept alive indefinitely by the respirator – she asked to be taken off the respirator and was told we can't do that. Army policy does not permit us to terminate the life support treatment once it's commenced. The patient can refuse the treatment initially. But once having commenced, then Army regulations, Army medical policy requires that life support continue indefinitely.

MS. ESBER: And you had written in the facts of that opinion that, if it was removed, it was expected that she would die promptly.

JUDGE JACKSON: That is correct. I really had nothing other than her son's *pro se* complaint to operate on. We had no evidentiary record at the time. And we had a *pro forma* response from the government, as I recall, if we got any response at all. I'm not sure whether the time had run, but I had received nothing helpful from the government. And it was obviously a case in which time was of the essence. If relief came to her only after full breadth litigation, it would have obviously not have been any help to her at all. So I appointed one of my former law partners who is very conversant in medical issues to be *guardian ad litem*.

MS. ESBER: That was James Schaller.

JUDGE JACKSON: Jim Schaller. Schaller went out to Walter Reed hospital, interviewed the woman, her physician, her son and came back and reported that the situation was indeed as represented by the son. That she was terminal. That she wanted the life support to cease. She wanted to die a natural death. That the son and all of his siblings concurred. And the Army refused to breach its policy of maintaining life support indefinitely.

MS. ESBER: I believe you wrote in the opinion that this appeared to be a case of first impression in a federal medical institution.

JUDGE JACKSON: I think it was. I don't think that it had ever come up before.

MS. ESBER: At least you couldn't find any guidance in published opinions.

JUDGE JACKSON: No. There were some state cases, but no federal cases that I could find. And so I ended up deciding that the woman did indeed have the right – if you will, a constitutional right – to insist that life support treatment be terminated. I drew upon the

precedents of the circuit having to do with informed consent, a patient's informed consent. The patient had the right to refuse treatment once fully informed. The corollary to that proposition must be that the patient has a right, where treatment commenced without full information, to terminate it once the patient had been fully informed.

MS. ESBER: In this case she hadn't known what her medical condition was when she agreed to the life support.

JUDGE JACKSON: That is correct. And I also drew upon *Roe v. Wade* for the proposition that she had a constitutional right to autonomy with respect to her own physical body. I don't think that was a use that had ever been made of *Roe v. Wade* before, but it certainly it was a useful precedent. I ordered the Army to comply with her wishes, and to terminate her life support. The case apparently – I'm not sure whether it attracted publicity – but it certainly attracted the attention of the Army medical authorities. As a result of which, the head of the Civil Division from the U.S. Attorney's Office appeared when I held the hearing. That was Royce Lamberth who then headed the civil division of the U.S. Attorneys' Office.

MS. ESBER: He is now a member of this court.

JUDGE JACKSON: He is now a member of this court. And he had the good grace, I think, and the good judgment not to interpose any very significant objection on the part of the defendant. He did make a *pro forma* argument to the effect that it did represent Army medical policy not to abandon the patient, but that, were this court to decree that she had the right to terminate her treatment, they would of course comply.

MS. ESBER: And no appeal was taken?

JUDGE JACKSON: And no appeal was taken.

MS. ESBER: One of the other cases that you had mentioned as particularly memorable was the War Babes matter.

JUDGE JACKSON: Yes.

MS. ESBER: Why don't you tell us about that.

JUDGE JACKSON: Well, that was a Freedom of Information Act case, in which a group of middle-aged adults in the United Kingdom had joined together for the purpose of trying to locate their fathers, having been sired by U.S. citizens serving in Great Britain during World War II.

MS. ESBER: This is a group of several hundred British citizens —

JUDGE JACKSON: Quite a few.

MS. ESBER: — who understood themselves to be the children of U.S. servicemen from World War II.

JUDGE JACKSON: That's right. And what they wanted to do was to make contact with their putative fathers for all of the reasons, all the filial reasons, that children want to know who their true parents are: to establish — obviously not to rekindle a bond — to establish a bond with a natural father.

MS. ESBER: There were references in the press at the time to the feeling that time was running out, given that the servicemen were elderly. The children themselves were adults at the time, 30 or 40 years old.

JUDGE JACKSON: Middle-aged, or certainly nearing middle-age at the time they made their request. Their request was made to the Department of Defense, and to Veterans Affairs, I guess, and the Veterans Administration, for the last known address of certain

servicemen. The servicemen were not identified as the sires of the litigants. They simply requested the last known address of the servicemen. The government said, well, sorry, it's private information. We're not permitted to release that information. The point was made by the War Babes organization that they were not suggesting, not implying by requesting these addresses, that paternity is acknowledged on the part of these servicemen. All we wish to do is to make the initial contact. If the contact is rebuffed or if there's no interest on the part of these individual servicemen in making contact with the putative child, or if, in fact, a servicemen denies paternity, the matter would be dropped. All we ask for is the last known address. The government refused to produce it, and so the Freedom of Information Act suit was filed by the organization.

MS. ESBER: And you made a preliminary ruling on the government's basis for objection to releasing the information.

JUDGE JACKSON: Yes. As I recall, I said preliminarily that this was private information, but private only insofar as the individual service members were concerned. The government itself had no interest in maintaining the secrecy of this information. So it was incumbent upon the government, since the government had the burden of proof, to demonstrate that each of these individual servicemen had been affirmatively queried by the government as to whether or not the information should be released. Only upon presentation of evidence that there had been an affirmative election on the part of the servicemen to prohibit the disclosure of their last known address would the government be entitled to prevail on its claims of exemption under the Freedom of Information Act.

MS. ESBER: According to the press reports I saw, the War Babes organization

made an argument that they had been successful in locating some of these fathers on their own, and that they had found the contacts had been welcomed.

JUDGE JACKSON: They had. In each of the cases in which they had independently learned the addresses of these servicemen, the contact had been welcomed. But this didn't convince the Veterans Administration or the Department of Defense.

MS. ESBER: Was that part of your thinking that the government's position was essentially presuming that these fathers, or putative fathers, did not want to make contact?

JUDGE JACKSON: Sure. By the statute, the government has the burden of proof of its entitlement to the exemption claimed. And so I established by ruling, in effect held, that in order to carry that burden of proof they would have to produce affirmative evidence of a disinclination on the part of a serviceman to have his address disclosed. In the event the government presented no evidence, no affidavits —

MS. ESBER: They produced no affidavits. And what I understand from the press reports is that your ruling paved the way for a settlement in the matter.

JUDGE JACKSON: Could be. I don't know what finally happened —

MS. ESBER: I pulled some of the press reports. It appears that after your ruling, and the government inability to produce the affidavits, they did come to a settlement under which [the government] released the hometown, the state of residence, of the gentlemen that they were trying to locate. Apparently not necessarily an address, but some contact information.

JUDGE JACKSON: Could be. Could be.

MS. ESBER: And letters were to be sent to the gentlemen by the War Babes organization. If they were deceased, they were to give a last known address so that the family

could be contacted.

JUDGE JACKSON: I am aware that the case didn't go any further than my initial ruling. But I didn't follow the press reports after that. Indeed there wasn't that much press attention given in this country. I think there was a great deal more given in England.

MS. ESBER: The third case that you had mentioned was an adoption case concerning some Filipino children. Could you explain what that case dealt with?

JUDGE JACKSON: That was a case involving an American couple, a Caucasian male, as I recall, and a Filipino female. Married, stable home and ample income, living in Northern Virginia, [they] wished to adopt two of the children of a sibling of the woman who were living in Manila, whose own parents, natural parents had simply disowned them, written them off, and dispatched them to the wide world to fend for themselves.

MS. ESBER: Apparently, through dire circumstances.

JUDGE JACKSON: Oh yes. They were terribly impoverished. The children, an older girl and a younger boy, had lived for a time with the grandparents, but now, apparently, were completely on their own, and were in fact street kids.

MS. ESBER: In fact, they were abandoned by their natural parents.

JUDGE JACKSON: Completely. And the Immigration and Naturalization Service would not allow the children – the children could be adopted, and apparently they had already been adopted through the Philippine court. But they were not allowed to immigrate to the United States because they did not qualify for the preferred status of blood relatives.

MS. ESBER: Or for adoption of “orphans.”

JUDGE JACKSON: Or they didn't qualify under, I think, the orphans provisions

of the statute. It's been a while since I've read the decision. I've got it here if you would like to take a look at.

MS. ESBER: Sure that would be great. Judge Jackson I'm going to conclude this session of the oral history at this point. We will pick up again on another occasion and finish our discussion of the Philippine adoption case and move on from there.

JUDGE JACKSON: Very good.

MS. ESBER: Thank you Judge Jackson