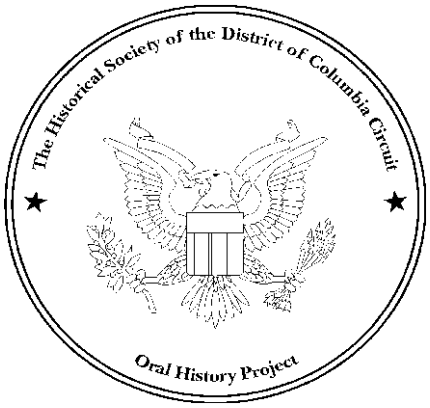

THE HONORABLE
THOMAS PENFIELD JACKSON

Oral History Project
The Historical Society of the District of Columbia Circuit

Oral History Project
The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

THE HONORABLE THOMAS PENFIELD JACKSON

Interviews conducted by:
Professor Myles V. Lynk
March 28, April 26 and May 24, 1995
Eva Petko Esber, Esquire
July 1, 2003 and March 4, 2004

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Interviews are conducted by volunteers, trained by the Society, who are members of the Bar of the District of Columbia.

Indexed transcripts of these interviews and related documents are available in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Library of Congress, and the library of the Historical Society of the District of Columbia. With the permission of the person being interviewed, oral histories are also available on the internet through the Society's web site, www.dcchs.org.

Such original audio tapes of the interviews as exist, as well as the original diskettes of the transcripts (in WordPerfect format) are in the custody of the Society.

INTERVIEWEE ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Judge Thomas Penfield Jackson

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit,,Washington, D.C., and its employees and agents (hereinafter "the Society") I, Judge Thomas Penfield Jackson, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and computer diskettes of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the tapes, transcripts, and diskettes are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tapes, transcripts and diskette and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

Thomas Penfield Jackson 9/7/07
Date

SWORN TO AND SUBSCRIBED before me this 7TH day of AUGUST, 2007.

Lori L. Humiston
Notary Public

LORI L. HUMISTON NOTARY PUBLIC MY COMMISSION EXPIRES 03-07-09 ST. MARY'S COUNTY, MD

My Commission expires 3/7/09

ACCEPTED this 10th day of September, 2007, by Stephen J. Pollak, President of the Historical Society of the District df Columbia Circuit.

Stephen J. Pollak
Stephen J. Pollak

Schedule A

Tape recordings and transcripts resulting from five interviews of Judge Thomas Penfield Jackson on the following dates:

Date	Interviewer	Number of Tapes	Pages of Transcript
March 28, 1995	Myles V. Lynk	2	1 - 24
April 26, 1995	Myles V. Lynk	1	25 - 45
May 24, 1995	Myles V. Lynk	1	46 - 67
July 1, 2003	Eva Petko Esber	1	68 - 90
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The transcripts of the five interviews are contained on six diskettes.

Standard Form

INTERVIEWER ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Judge Thomas P. Jackson

1. Having agreed to conduct an oral history interview with Judge Thomas P. Jackson for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Myles V. Lynk, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings, transcripts and computer diskette of interviews, as described in Schedule **A** hereto, including literary rights and copyrights.

2. I authorize the Society to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

Myles V. Lynk 1/29/07

[Signature of Interviewer] Date

SWORN TO AND SUBSCRIBED before me this 29 day of January, 2003.

Roselda A. Graham

Notary Public

OFFICIAL SEAL
ROSELDA A. GRAHAM
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires Feb. 27, 2007

My Commission expires 02/27/07

ACCEPTED this 1st day of April, 2007 by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Stephen J. Pollak

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INTERVIEWER ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Judge Thomas Penfield Jackson

1. Having agreed to conduct an oral history interview with Judge Thomas Penfield Jackson for the Historical Society of the district of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"),I, Eva Petko Esber, do hereby grant and convey to the Society and its successors and assigns, all of my right, title and interest in the tape recordings, transcripts and computer diskette of interviews, as described in Schedule A hereto, including literary rights and copyrights..

2. I authorize the Society, to duplicate, edit publish, including publication on the internet, or permit the use of said tape recordings, transcripts and diskette in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I received permission from the Society.

Eva Petko Esber

SWORN TO AND SUBSCRIBED before me this
13th day of January, 2005.

Moira Ricketts

Notary Public

Moira t. Hicketts
Notary Public, District of Columbia
My Commission Expires 03-14-2008

My Commission expires _____

ACCEPTED this 2d day of February, 2005, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Stephen J. Pollak

Schedule A

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ORAL HISTORY OF THE HONORABLE THOMAS PENFIELD JACKSON
Myles V. Lynk, Esquire, Interviewer
First Interview - March 28, 1995

MR. LYNK: Judge Jackson, my name is Myles V. Lynk. I am interviewing United States District Judge Thomas Penfield Jackson. The date is March 28, 1995. This is Tape I of the interview in the series of the Oral History Project of the Historical Society of D.C. Circuit. Judge Jackson, when we spoke briefly before, you had indicated that you were born actually in the District of Columbia; is that correct?

JUDGE JACKSON: That's correct. I was born at the Columbia Hospital for Women.

MR. LYNK: How long did you live in D.C.?

JUDGE JACKSON: Probably for about the first year, year and a half of my life, and then my family moved out to Montgomery County, Maryland. We were one of the first suburban families and, I grew up in the little town of Kensington, which was then a little country town.

MR. LYNK: When you say "a little country town," did you actually live on a farm – or in a suburban —

JUDGE JACKSON: No, no. It was a suburban house.

MR. LYNK: Suburban house?

JUDGE JACKSON: It was a suburban house, but we were the, I think probably the third house on a residential street, which is now perhaps 50 houses. My parents built their own house out there.

MR. LYNK: What was the address?

JUDGE JACKSON: It started off as 111 Franklin Street and then it was changed to 4221 Franklin Street, many years after we first got there. We had woods on both sides, woods across the street.

MR. LYNK: What was it like growing up there?

JUDGE JACKSON: It was really a wonderful experience. The whole area between what is now Cedar Lane and Rockville Pike was all undeveloped forest land and it was a wonderful place for kids to play. Rock Creek wandered through the whole tract, which probably was a thousand acres or so and so we had all of that forest area to play in. My dad used to commute in. He would take a bus to Chevy Chase Lake and then get a trolley car that ran into Chevy Chase Circle.

MR. LYNK: The famous old trolley cars of the District.

JUDGE JACKSON: Oh, yes.

MR. LYNK: Did you have any brothers or sisters?

JUDGE JACKSON: One brother – younger brother, who is an engineer.

MR. LYNK: And how long did you live on Franklin Street?

JUDGE JACKSON: Oh, I grew up there. We lived there until I and my brother went away to college, and my parents then moved back into the District of Columbia and lived on MacArthur Boulevard. Both of my parents are native Washingtonians.

MR. LYNK: As are you.

JUDGE JACKSON: As am I, yes.

MR. LYNK: Where did you go to school?

JUDGE JACKSON: I went to Kensington Elementary School in Montgomery

County, part of the Montgomery County school system and then, after I graduated from sixth grade, I went to St. Albans School. I had a scholarship as a choir boy to the Washington Cathedral Choir of Men and Boys and with appointment to that choir comes a scholarship to St. Albans. So for the next three years while my soprano voice held, I was a choir boy at the Cathedral and attended St. Albans. And, then after my voice would no longer support me as a scholarship student, I went back to B-CC High School in Bethesda. Well, it was a wonderful experience. The education at St. Albans is splendid. But, I think perhaps that the lasting memory of that experience for me is working with the Cathedral Choir. It is a very, very accomplished group of musicians and the choir boys, small as they are, are expected to live up to the professional standards of the choir master at the Cathedral. You may have seen in the paper, I guess just over the weekend, that Paul Calloway died.

MR. LYNK: Yes.

JUDGE JACKSON: Paul Calloway was the choir master when I was there and he was a very vigorous and demanding task master, but in being so, he gave us an absolutely splendid education in classical and choral music. It was a rigorous routine that we followed. We had rehearsals twice a day, as I recall; we sang two services on Sunday; we sang evening song services during the week and I can't remember what days – not every day, but several days during the week. And, much of my spare time as a student, as is true of all choir boys, was spent doing rehearsals, doing things with the choir. So the choir boys were somewhat isolated from the remainder of the student body at St. Albans.

MR. LYNK: Do you continue to have a love for choral music? Is that something you —

JUDGE JACKSON: Yes, although I don't sing any more. I haven't done any singing for a long time. Primarily because it does take a sustained commitment. You have to be available for rehearsals over a period of weeks or months and you have to be certain that you are going to be there whenever the performance is going to be given and I just haven't been prepared to make that sustained commitment. I love to listen to it still.

MR. LYNK: Now when you left St. Albans, you were in the ninth grade?

JUDGE JACKSON: Ah, I would have entered the tenth grade; I finished the ninth grade at St. Albans.

MR. LYNK: So you were entering the tenth grade?

JUDGE JACKSON: And then went to B-CC starting in the tenth grade.

MR. LYNK: Bethesda-Chevy Chase High School?

JUDGE JACKSON: That's right.

MR. LYNK: And how long were you there for?

JUDGE JACKSON: I was there until 1954 – three years – and graduated from B-CC in 1954 and went directly from B-CC to Dartmouth College.

MR. LYNK: Can you talk a little bit about your experience at B-CC?

JUDGE JACKSON: Well, B-CC was then, as I understand it is now, a very fine high school. The quality of the education we got was comparable to what I had received at St. Albans. So, I did not suffer any in terms of the education I was getting at B-CC, after having left St. Albans. One of the circumstances that I remember and I remember it, unfortunately, unhappily, was that B-CC was, as all Montgomery County Schools, all Maryland Schools were then, a segregated school. And, so, all of my classmates were white. I didn't have a black

classmate until I got to college.

MR. LYNK: The fact that all of your classmates were white, was that something that you noticed at the time?

JUDGE JACKSON: No, no, which I also regard as unfortunate. It seemed to us to be a very natural state. It seemed at that time to be as natural as it seems unnatural today.

MR. LYNK: Outside – you say you didn't have any black classmates. What would you say would have been your contact with anyone who was black at that time? This is the early '50s to 195 —

JUDGE JACKSON: Yes, early '50s. Of course, *Brown v. Board of Education* was decided the year I graduated from high school. Very limited. There was – I can't say that there was – there surely was no sustained contact with the black community and the contact was usually with those who were domestic servants or laborers.

MR. LYNK: So, is it fair to say, and, again, this is, I think is interesting to get a sense of what the Washington community was like in the '50s because that, in fact, there were at least two and maybe others, but at least two communities divided along racial lines and there was very little interaction between the two.

JUDGE JACKSON: Very much so. And, and overtly so. I remember that newspaper classified advertising for housing would be divided into “white” and “colored.”

MR. LYNK: When you would come into the District for shopping, or for visiting, or for shows, or anything, movies, or anything like that, did you come in contact with blacks just as part of a crowd scene? I understand that even some of the major department stores at that time were also, you would not necessarily come in contact with —

JUDGE JACKSON: It's possible. I don't remember having any extended contact, or any significant contact with the black members of the community and we did come into the city. That was where we went. There were no shopping malls and none of suburbia as we know it today, so a shopping trip was a trip down to F Street and G Street. A trip to the movies was a trip to the Warner or the Palace Theaters downtown. Restaurants, of course, they were all in the city.

MR. LYNK: There was no Beltway in those days,

JUDGE JACKSON: No, no Beltway.

MR. LYNK: So I guess commuting from one suburban area to another was fairly – I guess you would just have to travel on the surface roads —

JUDGE JACKSON: Yes, yes.

MR. LYNK: – and hope for the best.

JUDGE JACKSON: Yes, the Beltway made a major difference, I'm sure. Rockville Pike, when I was growing up, was a two-lane country road that went virtually through uninhabited farmland from the Naval Medical Center all the way out to Rockville. On both sides of the road were farms and little country stores – distinctly rural civilization and I remember that one summer when I was working in a nursery, pulling weeds out of plants, I used to ride my bicycle from Kensington, out Rockville Pike, along the shoulder of Rockville Pike, to the nursery where I was working, and really had no fear of traffic because there wasn't much traffic out there. Something that no one could contemplate doing today.

MR. LYNK: I get the sense that one of your memories of growing up in your teenage years was that there was a sense of spaciousness, a sense of nature was very close to you.

JUDGE JACKSON: Yes.

MR. LYNK: Do you feel a sense of loss, that that's no longer —

JUDGE JACKSON: Oh, yes, very much so. Washington's a big metropolis now; it was, I wouldn't say a small town, but it certainly was a small city when I was growing up. I was here, of course, and remember the World War II years and observed Washington grow during that period of time. There was no question that it expanded perceptibly during the World War II years.

MR. LYNK: In the World War II years, you would have been – about —

JUDGE JACKSON: Oh, I was born in 1937, so I was 4 to 9.

MR. LYNK: What do you remember of those years?

JUDGE JACKSON: Well, I remember the "Back the Attack" rallies on the Monument grounds where all the military equipment was assembled, and if you bought a $25 war bond, you could come down and crawl around tanks and planes and things like that. For a little boy, that was a wonderful experience. My dad was in the Navy at the time; he did not get sent overseas and was stationed in Washington, but he was in uniform, as were most of my neighbors' parents. I remember the scrap metal drives where in local communities people would collect scrap metal and there would be great heaps of metal debris on the street corner, waiting to be picked up to be made into munitions and weapons. But, of course, the war didn't touch us significantly. I do remember lying on the living room floor with my dad plotting out on a map the advance of the Allies up the Italian peninsula, and the events of D-Day, and after that, I was old enough to understand what was going on. I do remember stories of my mother's cousin who was a B-24 bomber pilot and who made many missions over Germany during the war. But these

really are the peacetime, home front-type recollections of a small boy.

MR. LYNK: And, of course, during that time Washington was full of a lot of people and a lot of very colorful people, men in uniform, things like that.

JUDGE JACKSON: Yes, yes.

MR. LYNK: Do you know what your father's duty station was, or what his position was in the military?

JUDGE JACKSON: You know I really don't. He had something to do with the allocation of raw materials between private industry and the munitions – the wartime industries. And he – much of his working time was spent with economists; he was a lawyer by training, and he was dealing with a bunch of Ph.D. economists and it was an interesting experience for him. Oh, I also remember rationing, too. I remember the stickers that you'd have to put on your windshield which would announce to a gas station owner your priority for getting gasoline. I remember my mother going to the commissary – the military commissary – and stocking up on groceries, many of which were C-rations and K-rations, which I liked. I thought they were great! And Spam; Spam was an ever-present staple.

MR. LYNK: Wasn't Spam introduced during World War II?

JUDGE JACKSON: I think so; I think so, yeah. Celebrated its 50th anniversary or something like that just a few days ago, few months ago.

MR. LYNK: Judge Jackson, what was your father's name?

JUDGE JACKSON: Thomas Searing.

MR. LYNK: Now he was a lawyer at that time. When did you first become aware of what that meant – to be a lawyer and that your father was a lawyer?

JUDGE JACKSON: Oh, I think I was aware of it fairly early on. My father was a lawyer in the sense that one could be a lawyer anywhere in the country. He practiced the sort of law that you would practice in Cleveland, or Detroit, or Philadelphia, or wherever. He was not in any sense a Washington lawyer; he was also a trial lawyer. He went to court and tried cases and usually, although not by any means always, represented insured defendants. He was a very, very capable trial lawyer, very able trial lawyer, and very much respected by his peers at the bar, and my memories of him are of enormous pride in my father. He had a very highly developed sense of the ethics of the profession – of being a principled advocate and lived that sort of a life – had no patience with dishonorable conduct by lawyers. He also had a very, very wonderful camaraderie with his colleagues at the bar. They were all good friends, vigorous adversaries in court, but good friends and very respectful of one another and they had little traditions that were – I gather are not observed today. One being, for example, if you won a case then it was the gracious thing to do to go to your adversary's office to pick up the check. Or, as a defense lawyer, if you lost a case, to go to your adversary's office to deliver the check to the winning lawyer. My dad also tells many stories, which reflect, I think, very well on the profession of that era, and maybe on society of that era. He used to tell the story about a client of his who was involved in a dispute, a boundary dispute with a neighbor, and the case was very nearly ready to go to trial when the deposition was taken by my father of the adversary who testified directly in contradiction to what his client said. And he came back and reported to his client what his neighbor had said on deposition. And his client said to him, "Well, if he says that, it must be true, because he would not tell a lie, and so we'll have to settle this case with him and dismiss our claim. I didn't know that he would say that and if he said it, I accept it." It's hard to imagine an

event like that occurring today.

MR. LYNK: Do you think the community back then – there were more shared values, more shared —

JUDGE JACKSON: Oh, I'm absolutely certain of it, absolutely certain of it. It's – we've lost a large sense of community, I think – for whatever reasons. But certainly there was a sense of community within the practicing bar in the city of Washington at that time.

MR. LYNK: When you were in high school – when you were of high school age, back at Bethesda Chevy Chase, did you know then that you wanted to be a lawyer?

JUDGE JACKSON: I probably had a pretty good idea of it. I was torn, at that point – once I got beyond wanting to be the second baseman for the Washington Senators – I was torn between being a lawyer and wanting to be a journalist. I've always loved writing and I still love the writing part of being a lawyer and being a judge. But, I think that I had the conviction fairly early on that I was probably going to be better at being a lawyer than I would be anything else, including a journalist – and, with a few digressions along the way, I think that that's what I was planning to be from about the age of 15 or 16 forward. I also, during those years, got to watch the Army-McCarthy hearings on television and got absolutely fascinated in the whole process.

MR. LYNK: What was your impression of the lawyering in those hearings?

JUDGE JACKSON: Well, of course, Joseph Welsh was the maestro who put everybody else to shame there and I remember thinking that there isn't anybody in this hearing room who is of his caliber and I kept trying to think of ways how I would like to be on the other side – how could I oppose Joseph Welsh better than the people who were in the hearing room –

that were in the hearing room. But the whole idea of interrogation and cross-examination and points of order and motions to do this or that really got to me. It looked like fun. I thought I'd enjoy doing it.

MR. LYNK: Were there any fictional lawyers on television or anything like that in the early '50s?

JUDGE JACKSON: Perry Mason may have been around —

MR. LYNK: Okay.

JUDGE JACKSON: There was a program that I thought was pretty good but I think that that came somewhat later. It was a program called "The Defenders." I don't know whether you remember that or not.

MR. LYNK: Yes, yes I do.

JUDGE JACKSON: A father and son trial team.

MR. LYNK: With E.G. Marshall as the father.

JUDGE JACKSON: E.G. Marshall was the father. And they raised – it was a very mature, sophisticated program. They raised issues that were very ambiguous and allowed for a good deal of sympathy either way. Ethical dilemmas that lawyers confront every day that you never had heard of before. But those were I think of a later era. I think that was the late '60s or early '70s.

MR. LYNK: So in 1954 you were about ready to go to college. How did you come to Dartmouth?

JUDGE JACKSON: Encouraged by my father who knew a number of Dartmouth alumni and had been very impressed with not only these men – Dartmouth was all

male at the time – but also with their loyalty to and love of the college. There was an esprit on the part of the Dartmouth alumni of his acquaintance which he admired. He had gone to school at night at G.W. and while he enjoyed G.W. and did well there, there was no sense of college spirit as such and he always wished that he had seen that. So he introduced me to a number of Dartmouth alumni who were indeed very enthusiastic about the college and encouraged me to consider it. I applied to several other schools, but it also turned out that I received a Navy NROTC scholarship and Dartmouth was the only school of those that I had applied to which had an NROTC unit so that was pretty much foreordained once I was accepted both by the Navy and by Dartmouth.

MR. LYNK: Tell us a little bit about your experiences in Hanover, those four years there.

JUDGE JACKSON: Well it was —

MR. LYNK: Or, in New England generally, I guess.

JUDGE JACKSON: I had traveled through New England with my family before but had not spent any time there.

MR. LYNK: You were saying that you had visited New England with your parents, but you'd never spent any time there before you went up to Dartmouth.

JUDGE JACKSON: Going to Dartmouth was a brand new experience and not altogether a happy one. Hanover, New Hampshire, was a lot more remote from centers of civilization then than it is today. There were no interstate highways and the public transportation to and from Hanover was very sporadic and very primitive. I remember going up there during my freshman year from Washington, leaving on the Montrealer at three o'clock in the afternoon

here and arriving in the railroad station for Hanover, which was White River Junction, Vermont, at two o'clock on a bitter cold – 2 a.m. – on a bitter cold February morning, and thinking, why am I doing this? Dartmouth was also all male at the time and, at least for freshmen, the opportunities for socializing with members of the opposite sex were few and far between. Freshmen weren't allowed to have cars and so it was a rather spartan existence during the freshman year. From freshman year forward it was a wonderful experience. A splendid education; a very fine group of men, of young men, and I, from the sophomore year on, enjoyed Dartmouth very much and still feel a great loyalty and affection for the college. I still have a picture of it on my wall and have done things with the alumni organization both at the college and the Washington Dartmouth organization.

MR. LYNK: What was your major?

JUDGE JACKSON: Government.

MR. LYNK: Did you do any extracurricular activities? Well, you were in ROTC.

JUDGE JACKSON: I was in ROTC and that probably was my primary extracurricular activity except for my fraternity, which was very important to me then as fraternities are now. And as much matters of controversy on campus then as they are now, because their influence is decidedly both positive and negative. I happened to have the good sense to join a very good fraternity which I suppose would be described as a straight-arrow fraternity. We were always academically first or second on campus. We had very fine intramural athletic programs. We competed in all the other areas in which the fraternities competed with one another: intra-fraternity plays, debate tournaments, things like that, and

always did well.

MR. LYNK: What fraternity?

JUDGE JACKSON: Delta Upsilon. It is now defunct at Dartmouth.

MR. LYNK: During the summers while you were at college, did you come back to Washington, or did you work in the New England area?

JUDGE JACKSON: The Navy required that you undergo naval training during the summers. So, my first summer between freshman and sophomore years I was a midshipman on a cruise on the U.S.S. Albany, a cruiser, which went from Norfolk, Virginia, to Scandinavia. It went to Oslo and Stockholm, and I fell hopelessly in love in Stockholm, and came about this far from deserting the Navy which would have ended my naval and legal career shortly. But I had sense enough to get back on board ship. We went then from Stockholm to Guantanamo Bay, Cuba, and then back to Norfolk. But that left only about three or four weeks at the end of the summer before college started again.

MR. LYNK: How long did the ship stop in Stockholm?

JUDGE JACKSON: Oh, I guess about five, six days.

MR. LYNK: So in five, six days you were able to fall hopelessly in love?

JUDGE JACKSON: I ran into a girl on the street. We were – it was a mutual attraction and the last night we were there, I besought her to let me take her out to dinner at the best restaurant in Stockholm and, she was very reluctant to go, which I discovered was because she had another date that she would have to break and she didn't know whether – she didn't expect me to ever be back again. But she did agree to go out to dinner with me, and it just so happened that the reporters for the feature page of the Stockholm daily newspaper were looking

for a photo opportunity for the American midshipmen who were about to depart the following morning, and they took a picture of us having dinner in a restaurant in Stockholm, and I discovered later on that it was published the next morning in the Stockholm newspaper and the date that she had broken saw the picture. I don't know what that did to her romance, but it was a lot of fun for me. Then, the summer between sophomore and junior years, the Navy introduces its NROTC scholarship students to the Marine Corps, so we spent three weeks in Little Creek, Virginia, being taught how to be Marines, or what it was like to be a Marine. Then the next three weeks were spent in Corpus Christi, Texas, where they gave us an introduction to naval aviation and we were given the rudiments of flight training there. When I got back to Washington that summer between sophomore and junior years, I managed to latch on to a three-week job at NIH as a laboratory animal. They used me as an experimental guinea pig measuring the tidal volume of my lungs. I spent much of it underwater breathing through a long tube while they measured my oxygen consumption and how far I had to respire; they would increase the length of the tube which would increase the amount of dead air I would have to inhale in order to get fresh oxygen. That was an interesting experience.

MR. LYNK: You had indicated before that the first time you had a black classmate was at Dartmouth.

JUDGE JACKSON: Uh-huh.

MR. LYNK: Do you remember who that person was?

JUDGE JACKSON: I don't remember who the black classmates were, but I do remember that we were the first fraternity on campus to pledge a black man.

MR. LYNK: Really?

JUDGE JACKSON: Yeah. And it was a big event because in the national fraternity structure, there was an alumni blackball mechanism which enabled an alumnus of any other school to cast a blackball on a pledge to the fraternity on any campus in the country. It was also a requirement that the candidates all be reviewed by the national office which would then disseminate information about the pledges to the alumni. Ray Johnson, who was also a Washington kid, was the pledge that we desperately wanted to take, and ultimately did, after having pulled all sorts of machinations to get blackballs removed. When the final blackball had been removed, we "sank" him, or whatever it is you call it, we swore him in at two o'clock in the morning so that nobody could throw another blackball. Ray was an absolutely great guy and I'm so glad that we did that. He ultimately went on to Howard Medical School and became a physician. He entered the Navy as a physician and when I last talked to him, he was the head of cardiology at the Naval Medical Center out in Bethesda.

MR. LYNK: My goodness that's a nice story. How did you feel going through that experience in light of simply not having any contact with blacks before then, and now – *Brown v. Board of Education* was decided in 1954 – all of sudden your consciousness must have been made aware of all of these issues out there and then you had this presented in a very real way at your fraternity as you tried to do this. What were your reactions and thoughts and feelings as all of this was swirling around you at this time?

JUDGE JACKSON: I don't remember it swirling, other than the situation with Ray which was an immediate matter. Here was a terrific guy that we wanted and these redneck alumni were preventing us from taking a guy that we wanted in our fraternity. I remember feeling an enormous amount of resentment at them for putting us through this and putting Ray

through it. Ray was just a hero through the whole thing. He just gritted his teeth and stuck it out and I'm so glad that he did. But, it was a very personal thing and an immediate event without any really larger overtones. Nobody was on a great crusade; we just wanted to get Ray.

MR. LYNK: One of the points you made earlier was that, and I think it's harder for people looking back to understand but that things seemed there was a natural order to things and that was just how things were, and it was no conscious malice or malevolence, it was just the natural order —

JUDGE JACKSON: I think that that's true.

MR. LYNK: Now, when you went to college, did you see that natural order challenged or did you just say, "Well, at college things are different?"

JUDGE JACKSON: I think that's what we said.

MR. LYNK: Okay.

JUDGE JACKSON: And there really were not that many blacks. I don't – I really don't know what the proportion of our class was, but I would guess that it was less than five percent. And that really seemed very natural too. These were all very fine young men who were, who were, in every sense of the word, our peers. So, it was as natural to have them there as it had been not to have them there when we were in high school. They really fit in pretty well. I have the sense that there is probably a much wider gulf between black and white and other minority students on campus today, generally, than there was in those days. The blacks who were in our class just fit in and did everything with everybody else.

MR. LYNK: As we're looking just at the college years and your experience in the Navy, as part of the NROTC, and your summer excursions, would you say that you found that

to be a very positive experience?

JUDGE JACKSON: The Navy?

MR. LYNK: The Navy part of it.

JUDGE JACKSON: Oh, yes, absolutely. I'm sorry that more young people don't do it today. Even today when I get applications for law clerks who have military experience, as far as I'm concerned they get one leg up. I will try to interview those who have had military experience. I've had several former military officers as law clerks. I think it's a very maturing experience for young people. It certainly was for me. The idea that at the age of 22 or 23, I guess when I qualified as a officer of the deck, that I was suddenly during my watch in charge of a 2200-ton destroyer running around the ocean at 35 knots and chasing aircraft carriers and dropping depth charges and whatnot; that's heady stuff.

MR. LYNK: That really is.

JUDGE JACKSON: And that, I think, exacerbated my general sense of dissatisfaction when I got back to law school. I was a lowly 1-L. I could, and did, reflect on those days of yore when I had been in charge of a ship and was a pretty important person out there on the ocean.

MR. LYNK: How long did you serve on active duty?

JUDGE JACKSON: Three years.

MR. LYNK: After college you served on active duty for three years before you went to law school?

JUDGE JACKSON: Yeah.

MR. LYNK: Okay.

JUDGE JACKSON: Uh-huh.

MR. LYNK: And where did you serve?

JUDGE JACKSON: On a destroyer that was home-ported first out of Norfolk, and thereafter, or later on, out of Mayport, Florida. But we saw relatively little of the home port. We were at sea most of the time. I had two tours to the Mediterranean and one tour down to the Caribbean. So we spent most of the time at sea.

MR. LYNK: Was it unusual to be attached to one ship for three years?

JUDGE JACKSON: Not as an initial duty assignment.

MR. LYNK: Okay.

JUDGE JACKSON: If I had been a career officer, I probably would have been transferred off after two years. But, for those that are not going to be careerists and who are at their first duty station, it was customary then to simply keep you there for your entire tour.

MR. LYNK: Were you still single at that time?

JUDGE JACKSON: No, I got married my second year in the Navy to a girl that I had met, actually at NIH, and who was at Mt. Holyoke, and who I dated all my senior year. We got married after I returned from my first Med cruise.

MR. LYNK: So after three years in the Navy, you now go to law school?

JUDGE JACKSON: Uh-huh.

MR. LYNK: Did you feel that now you were beginning the real part of your life or career?

JUDGE JACKSON: I think so. I think so, although I had enjoyed the Navy and had a great deal of respect for what it had done for me, and the opportunities it had given me, not

the least of which was travel. I really saw much of the world that I would never have seen otherwise. And got my acceptances to law school while I was in the Persian Gulf. I developed the usual short-timer's sense of impatience about completing this interval between college and what would be my career. When I started off to law school I had a sense that, sure, this is where I'm beginning the rest of my life, and the occupation that will carry me through.

MR. LYNK: What was your father's reaction to your Naval years?

JUDGE JACKSON: He was very envious. During the war he had tried very hard to get assigned overseas but he had a physical disability resulting from an accident that he had which prevented the Navy from assigning him to sea duty. But he had always coveted sea duty and when I got assigned to a sea-going warship, he thought this was really – he told me several times, "You say you want to be a lawyer, but don't be too hasty about this thing. Take a long look at the Navy." Even to the point of saying, "Well you know, you can serve 20 years in the Navy and then come out and go to law school." But, I think he was ultimately pleased when I elected to follow in his footsteps.

MR. LYNK: You and I were talking briefly while I was changing the tapes about just the role of fathers in their children's lives, and although we will talk later on about your practice with him, one of the points you were making was how important and often unrecognized the importance is of a father in formulating the son or the child's life.

JUDGE JACKSON: I certainly think so. I certainly think it is awfully important. My father was a role model from my earliest years. He was a man that I admired, respected, trusted, learned from, and I do not intend to diminish the role of my mother, who was equally important in her own way. But for a young man or a boy to have a father to model his

character and his behavior on is awfully important. And dad taught me the things that in those days boys had to know. He taught me how to throw a baseball, he taught me how to play football, he taught me – he had been an enthusiastic Boy Scout. I had not, but he taught me things that he had learned as a Boy Scout. He taught me Morse Code, he taught me woodcraft and things like that. How to recognize birds, he had an enormous influence on my growing up.

MR. LYNK: Do you think that's carried over to your influence on your own children?

JUDGE JACKSON: I hope so. I take great pride in the fact that I have taught both of my daughters how to throw a baseball and throw it like a boy. (Laughter.) I watch them today and I think, "I taught them how to throw that ball."

MR. LYNK: What year was it when you entered law school?

JUDGE JACKSON: Sixty-one.

MR. LYNK: And where did you go to law school?

JUDGE JACKSON: Harvard.

MR. LYNK: What was it like?

JUDGE JACKSON: Well, you know. (Laughter.) Law school was not fun. I can't think of it in the same emotionally satisfying terms that I think of my undergraduate experience. It's hard to work up any warmth for Harvard Law School as I think most people who have been through that experience will confirm. I was just reading the most recent *Harvard Magazine* which describes the era of Stephen Breyer at the law school. He was in my class. He and Mike Boudin were both in my class and there is no question that they are brilliant, brilliant people. And I will give them credit for having a level of intelligence that I will readily

acknowledge is superior to mine. But there is no question in my mind in reading that article in the magazine that there was then an aristocracy of intellect that was carried to absolutely ridiculous extremes when you would separate ten places or twenty places in a class by a decimal point grade, when a failure to be on the law review was like the scarlet letter of failure. On the other hand, of course, you know as well as I, that the education that we got there was absolutely superb. I will never for a minute detract from the quality of the education that I got and I remember thinking when I got out of law school with an academic record that was somewhat less distinguished than Stephen Breyer's, that I knew enough to be a good lawyer. And I was going to be a good lawyer, and that the training that I had been given there and the intellectual discipline that I had gotten from my law school gave me confidence that I could handle anything. That, with sufficient application, I could learn to do anything in the law, eventually. Fine education, but not necessarily a happy experience.

MR. LYNK: Do you remember any particular faculty members that made a particular impression?

JUDGE JACKSON: Oh sure. Ben Kaplan, I think was a – he was my civil procedure professor. He also taught a course – I don't know if they teach it any more – but it was called simply "Equity." Not just "Equitable Remedies," but "Equity." I, probably through that course, got a sense of the enormous range of things that could be done in the law to produce the right results, that I would never have had if I hadn't taken that course. Ben Kaplan was influential. My contracts professor was Bobby Braucher. I don't know – was Braucher there?

MR. LYNK: I know the name.

JUDGE JACKSON: Louis Jaffe.

MR. LYNK: Yes, I did.

JUDGE JACKSON: Taught torts. Arthur Sutherland taught commercial transactions. Herwitz taught business planning. Remember business planning?

MR. LYNK: Yes.

JUDGE JACKSON: Did you take that?

MR. LYNK: I did.

JUDGE JACKSON: Did you ever take legal process?

MR. LYNK: Yes, I did. With, I think, Abram Chayes taught it while I was there.

JUDGE JACKSON: I never took that course, and that's one of my great regrets. I would have loved to have taken it and I missed out. Now, I don't know what it was that I took in lieu of it, whatever it was it didn't stay with me, so I'm sorry I missed that.

MR. LYNK: Judge, I'm going to stop us for right now.

JUDGE JACKSON: Okay.

MR. LYNK: We were talking about the lawsuit – do we have any time?

JUDGE JACKSON: I've got to go on the bench at ten o'clock.

MR. LYNK: I just wanted to get this on tape.

JUDGE JACKSON: All right, well I can't remember what the years were, although I could recover them, but Carl Hansen had established this track system, a three-track system in which students who were college-bound got an absolutely splendid secondary education in the public school systems of the District of Columbia, but there were proportionately fewer blacks in the honors track than white students and, conversely, a

proportionately higher number of black students in the lower tracks. And that was thought to be discriminatory and unfair and was attacked in a lawsuit which became something of a cause *cel˜ebro* here. The thrust was that a disproportionate amount of resources was being expended on the honors track with a correlative neglect of the lower tracks. This isn't a bussing issue; it had to with whether or not it was fair to divide students up into vocational, general, and honors or college-prep tracks. It was tried ultimately before Skelly Wright as the trial judge. And the reason it came before Skelly Wright, who was then on the court of appeals, was because back in those colonial days the school board was appointed by the district court. The district court, as I recall, nominated or appointed the members of the school board who I think then, in turn, chose the Superintendent of Schools. But – and there has always been a suspicion that this was engineered in just this fashion – because the district court appointed the school board members, each of the district court judges was named as a defendant in this lawsuit, which resulted in the judges of the district court all having to recuse, leaving it to the Chief Judge of the Circuit to appoint a trial judge to hear the case, and David Bazelon appointed Skelly Wright to try the case. There are those, Carl Hansen included, who thought that once Skelly Wright was appointed the judge, then the result was foreordained. And he became a sort of victim of the whole process. It was the concept of the track system which was thought to be discriminatory and unfair, and Carl Hansen simply happened to be the guy who was in a position of authority at the time. It destroyed Hansen. Absolutely, the man, who was an honorable guy, and was well-intentioned and was trying to do the best he could for everybody, ended up being the villain of the piece. He never recovered from what happened.

Oral History of Judge Thomas Penfield Jackson
Myles V. Lynk, Esquire, Interviewer
Second Interview - April 26, 1995

MR. LYNK: Judge, when we were last together, you had talked about how, after your service in the Navy, you had picked up your life after that and pursued what for you had been a long-term interest in following your father into the law. Would you talk a little about that?

JUDGE JACKSON: Well, of course, finishing law school, I had to decide where I was going to go to work and, of course, the conventional learning in those days, and it may be still, is that it's not generally a good idea for father and son to practice law in the same law firm. And with that in mind, I had to give some serious thought as to whether or not I would want to come back with the family firm. And, ultimately, I resolved the issue in favor of coming back and joining the family firm.

MR. LYNK: Now, you had clerked there during your summers at law school?

JUDGE JACKSON: Yes, yes I had. The considerations against, of course, were all the considerations having to do with not going into a firm in which your father was a dominant senior partner. But, counterbalanced against that were a number of considerations, one of which was that I knew the firm because I had clerked there, I knew the sort of law that they practiced and knew that I would be, if I came to the firm, doing the things that I would like to do. Not the least of which was getting into court early and often. I have always wanted to return to Washington to live, so I didn't want to look at firms other than in Washington. And finally, it was a small firm where there would very likely not be much in the way of jealousy on the part of other people in the firm. I really had no immediate contemporaries as an associate. I fit right

at the very bottom of the pecking order. There wasn't anybody who had any worries about my being favored. Finally, the firm, I think, did something very smart. They assigned me to one of the other partners as my mentor and I did not, for a number of years, work with my dad at all. I was assigned to work under the tutelage of John Laskey whose specialty was at that time defense of medical malpractice cases, and so I worked under John and got probably as good a grounding in how to become a trial lawyer as I could possibly have. John was a very experienced, very able, very well-respected trial lawyer and I discovered that I was utterly fascinated with the business of learning medical law. I very much enjoyed getting into the mental mode of thinking, if you will, of a co-profession that was at least as sophisticated as the law in terms of its intellectual rigors and learning how to think like a doctor, which you have to do in order to handle these cases. I found it to be an absolutely fascinating experience.

MR. LYNK: Today we often hear of tensions between the medical profession and the legal profession, just because many lawyers sue doctors. Was that true when you were practicing law?

JUDGE JACKSON: I think less so then than it is today, and there are a number of reasons for that, the major one I would ascribe to being the rise of the professional expert witness who, for one reason for another, has decided that he is willing to make his living testifying against his professional colleagues. There were fewer of those in those days. Of course, that was referred to by the plaintiffs' bar as the "conspiracy of silence," and I think there was an element of that in it, but most physicians of my acquaintance, and I've met a number of them, would have been perfectly willing to testify against a colleague if they thought the man or woman was a malpractitioner – had in fact been negligent. But so often these cases are not

attributable to any dereliction. Certainly a dereliction of a major proportion on the part of the physician. They just happen to be poor outcomes or adventitious mishaps that cannot be laid at the feet of the attending physician, or for that matter, the hospital. And so there were a number of physicians that I knew who, of course, were willing to testify against colleagues if they found meritorious cases. And it was interesting to me that they did. The best of the plaintiffs' lawyers invariably did not bring cases unless they had a reputable physician to testify for them. And in those cases in which a reputable practitioner, and not a professional witness, was prepared to implicate his colleague in malpractice usually settled – almost always settled. In any event, I think that the rise of the expert witness – professional expert witnesses – has increased the antipathy. That and the absolutely exorbitant verdicts that have been rendered. An interesting footnote to that, I think, is that while most physicians in the days when I began practice were resigned, but reluctantly so, to having to participate even in the defense of a case – their own or someone else's – it was a distraction from their professional activities. My impression was that the very best of those physicians, once they got into the case, became fascinated with the law, and they began to think of trial strategy and they began to think of various theories on which the case could be brought. I'd have the best of the doctors that I've defended writing me notes about questions to be asked to opposing experts and things of that nature. And once they got involved in it – once they had become intellectually absorbed in the business of litigation – they very often were available thereafter as expert witnesses for either side in appropriate cases, and no longer felt the antipathy that they had had at the outset.

MR. LYNK: How long did you work with Mr. Laskey primarily?

JUDGE JACKSON: I probably worked under his tutelage until about I guess

1970 or '72.

MR. LYNK: And that would have begun in 196 —

JUDGE JACKSON: Well, '64 was when I left law school. Right. I became a partner in 1967 and becoming a partner in a small firm which was then probably about 12 lawyers, was not nearly the big event that it is in big firms. It was just the ordinary rate of progression. But even as a young partner I operated very much under the tutelage of John Laskey.

MR. LYNK: Were there any other lawyers there during that period that you worked closely with that you can recall?

JUDGE JACKSON: Not really. Most of the work that I did was under John Laskey and then, of course, I began to bring in a few cases on my own. I did three or four plaintiff's cases on my own, but really so long as I was in an instructional mode I was working under John Laskey.

MR. LYNK: And then in 1972?

JUDGE JACKSON: Well, the early 1970s. I more or less began to take over what had been John Laskey's practice. I was regarded able to do so and John was in the process of retiring to go to Florida and I was fortunate in having the major insurance carriers and the major hospitals we represented willing to look to me as the heir to John's practice and to continue to employ our firm to do that. So by that time I had younger lawyers working under me.

MR. LYNK: In terms of the major – can you give me a sense of the hospitals that were your clients, for example, in this area?

JUDGE JACKSON: It varied from time to time and it became – well let me put

it this way – we represented at one time or another and for considerable periods of time, the Washington Hospital Center, Sibley, Georgetown, Greater Southeast, Capitol Hill, the old Doctors Hospital. And from time-to-time when other counsel for various hospitals or physicians had conflicts, we would represent physicians from George Washington and I think we represented the Seventh Day Adventist Hospital on occasion.

MR. LYNK: What was the firm's name at this time?

JUDGE JACKSON: It was then Jackson, Gray and Laskey. And the firm was a successor, if you will, to a firm that had begun during the last half of the preceding century called Brandenburg & Brandenburg and occupied offices in the old National Savings and Trust Company Building, that big red brick building with a spire on the top, at the corner of 15th & New York Avenue.

MR. LYNK: I know it well. Our offices are a few blocks down.

JUDGE JACKSON: It's a wonderful building. And my dad had started there as an associate at Brandenburg & Brandenburg back when he finished law school.

MR. LYNK: Now, did you ever do any work with your dad, after, say in the early '70s or in the '70s at all.

JUDGE JACKSON: Toward the end of the '80s or rather the end of the '70s, I began to work with him on one of his major clients which was the American Land Title Association. I also did work on – a fair amount of work as a matter of fact – not strictly under his direction, but after having acquired a certain amount of expertise on my own, handling cases on my own, for various title insurance carriers. I did work for what was known as District Realty Title Insurance Corporation, the old Lawyers Title Company, later on for Chicago. Most of that

being litigation arising out of real estate transactions, either transactions being directly settled by the title insurers – these title underwriters – or claims on title policies. My father had become, over the years, quite expert in the field and he was recognized, I think, nationally, as an expert in title insurance, and ultimately became General Counsel of the American Land Title Association, which is the trade association for all title insurance underwriters and at the time all title agencies, not qualified to write insurance, but nevertheless doing title searches and making settlements of real estate transactions. A good deal of the activity in those days for the title companies had to do – and for the land title agencies – had to do with the assaults by the organized bar on the title insurance industry as being engaged in the unauthorized practice of law. And all over the country, various state bars were claiming that to make real estate settlements, to record title instruments, and to advise on real estate transactions was, in fact, the exclusive province of the legal profession. So, periodically we would be confronted with one of the members of the American Land Title Association being sued for the unauthorized practice of law and —

MR. LYNK: Here in D.C. or around the country?

JUDGE JACKSON: Around the country. Usually it would be handled by local counsel, but we would be advising on strategy in meeting the suit.

MR. LYNK: It's interesting, because here in the District I chaired the Clients' Security Fund of the D.C. Bar some years ago where a lot of – in the boom '80s – a lot of lawyers did get involved in doing it and were not really prepared to do it —

JUDGE JACKSON: And went south, too —

MR. LYNK: And went south with their client's money and we had to —

JUDGE JACKSON: That was a perennial problem for the title insurance

companies. The title insurance companies were very ambivalent about lawyers. Title insurance companies, on the one hand, knew that they could do in-house, using paralegals or the equivalent, virtually everything that the real estate settlement lawyers were doing. On the other hand, the real estate settlement lawyers were an enormous source of business and would develop relationships with title insurance underwriters in which they would send major clients to these title insurance companies who made a fair amount of money on these people. The upshot of it was that the title insurance companies would appoint a lawyer, particularly in the suburbs – I think at all times in the city the insurance underwriters did most of the real estate settlement work – but in the suburbs in particular, and that's where the big development was occurring in the '70s and '80s, they would appoint lawyers as agents for these title companies. Some of them were well established and very reputable practitioners who developed practices given over exclusively to real estate settlement work and they were, in effect, factories for making settlements with their lawyers doing 10, 12, 14 settlements a day and millions and millions of dollars in their escrow accounts at any given time. But they had been appointed agents for the title insurance companies and they were, as agents, authorized to issue title binders and thereafter to pronounce on title, the state of title, and to certify title to the title company which would then issue a policy on their certification. So they were in a principal-agent relationship and occasionally the less established of these practitioners were tempted, and in most cases, succumbed, to the temptation to take this big escrow account and apply it to their own ends. Then the title companies would be sued as principals for an agent to recover this money. And lots and lots of money was involved. These were big sums of money that these people had. The standard technique was to accept a lump sum payoff of a seller's mortgage by the new mortgagee of the buyer of a house, hold onto it in

the escrow account, without ever releasing the mortgage, and then make monthly – just keep up the monthly payments on the mortgage with the mortgage then placed on for the purchaser of the house being, in effect, the second mortgage.

MR. LYNK: That's interesting.

JUDGE JACKSON: That generated a lot of litigation and I got to do that. I think by this time my father was spending more time working on national title insurance problems and so I was available and was able to do it, so I took over the representation of individual title companies. There were other partners in the firm who did the same thing. Ben Dulaney, who joined the firm when our firm merged with Ed Campbell's firm, Douglas, Obear, & Campbell, which would have been in the mid-1970s.

MR. LYNK: Okay. Is that when the name became Jackson & Campbell?

JUDGE JACKSON: No. It only recently became Jackson & Campbell. It's been through a number of others, and I'm thankful that they've now settled on an institutional name. It was a – an earlier merger had been with the law firm of the late Roger Robb, a circuit judge here. His firm was Robb, Porter, Kistler & Parkinson, I think, and when Roger Robb went on the bench, we merged with the remainder of that firm, the major partners of which were Ken Parkinson and Don Kistler. For a time after the firm was Jackson, Gray & Laskey, it became Jackson, Laskey & Parkinson and I think that was its last formulation. No, it was Jackson, Laskey & Parkinson and then when we merged with Campbell's firm, it was Jackson, Campbell & Parkinson and ultimately they decided that they were going to go to a two-name institutional name, and it's now Jackson & Campbell, and I think that's where it's going to stay.

MR. LYNK: Now, throughout the decade of the '70s the firm was growing in

size through the mergers and I gather through new hires.

JUDGE JACKSON: Not vastly. At the time I went on the bench in 1982, I don't think we had more than 20 lawyers.

MR. LYNK: Okay.

JUDGE JACKSON: It was still a very small firm.

MR. LYNK: And I gather you enjoyed that collegiality?

JUDGE JACKSON: Oh, yeah. There were, as there invariably are, differences as to what firm policy ought to be and differences as to who was being compensated in accordance with his true worth. But, by and large, it was a very friendly organization and we were all social friends as well as law partners.

MR. LYNK: And your practice was growing, as you described. And you were also growing in terms of your involvement in the community. You weren't just someone who was buried in the office all day, all the time.

JUDGE JACKSON: That's true. Our firm has always believed that it was important to be involved in professional activities. John Laskey had been a president of the Bar Association. That was when the Bar Association was *the* lawyers organization. My dad had been president of the Bar Association. And everybody in the firm had always been very active in the Bar Association – in bar matters; bar matters then being really primarily conducted by the Bar Association. There was no D.C. Bar. That, in and of itself, is a story. I worked my way up from the bottom ranks in the Young Lawyers Section, which was then called the "Junior Bar."

MR. LYNK: I think I like Young Lawyers Section.

JUDGE JACKSON: Me, too. But the Junior Bar was a very respected

organization. We regularly won the national competition conducted by the ABA every year, and I got in the route of progression and worked my way up and was ultimately – I think it was in '71-'72, that I was the chair of the Young Lawyers Section. I think that's when it was, '71-'72. That's the plaque we won from the ABA for being the best large city's Young Lawyers Section in the country.

MR. LYNK: Well done.

JUDGE JACKSON: I'm still very proud of that. We worked very hard on that.

MR. LYNK: You said that – I'm curious – I guess the D.C. Bar right around that time would have been created, or was in the process of being created?

JUDGE JACKSON: It was in the process, and the irony of the situation, and I'm going to give you my version of it – others may have different recollections of it – but the irony of it was that the D.C. Bar originated with the Young Lawyers Section of the Bar Association. Many years before it became a reality, George Carneal who is a partner at Hogan & Hartson, I'm sure one of their senior partners and possibly retired now, I don't know; but George Carneal as a very young lawyer had chaired a committee of the Junior Bar which had studied the idea of a unified bar as it had been manifested in other jurisdictions and had written a report and recommended that something like that be adopted in the District of Columbia.

MR. LYNK: What does the term "unified" mean in that context?

JUDGE JACKSON: Compulsory. All lawyers must belong. And the primary justification was to establish a mechanism for the administration of discipline and to control admissions and all of the other attributes that an organization which is mandatory can exact from its membership. And the idea grew in – I don't want to say popularity – but in acceptability

because the Bar Association, being voluntary, really had very little control over the profession as such. And although it spoke for what was then the organized bar in the city of Washington, its membership was probably less than a majority of the lawyers in the city. And was to a certain extent, and this was part of its loss of position, was thought of as being rather a closed club – sort of an "old boys" network in which the committee chairmen of last year nominated the committee chairmen for next year, and the president who had been the committee chairman the year before that made the appointment. So very few people were accepted as new blood for the organization. In any event, there grew up a number of organizations of lawyers in the city who were not part of the Bar Association circle. I can think of the Lawyers' Committee for Civil Rights Under Law. And even if they were not organized, there was a substantial resentment on the part of lawyers and, unfortunately, in some of the major and most reputable firms who resented the dominion that the Bar Association was exercising over its position as the spokesman for the organized bar who resented its purporting to speak for the organized bar when very often the positions it was taking were not in accord with what a lot of these other people believed and they simply lay in wait. The Bar Association decided – I can't give you the dates, but the years would be, I think, in the mid-1970s, and I guess maybe the late 1960s, early 1970s, the Bar Association had reached the point where it concluded that a unified bar would really be a good idea, with the power to discipline miscreant lawyers, the power to really speak for the whole bar for all lawyers rather than simply those who were members of the association, was attractive to it; and so it established a committee to create an organization known as the unified bar. I'm trying to remember who was the chair – the chair of the committee was – I'll think of it in time. (Albert Brault, Sr.) But he was one of the old boys of the Bar Association, a senior partner of a small, prominent, local firm, and

I was on his committee as a draftsman of the first rules of the first charter for the unified bar and a date was established for the — [End of side A of tape.]

JUDGE JACKSON: It was assumed all along, why I do not know, but it was assumed all along, by all of the members of the association involved in the creation of the unified bar, that the Bar Association would simply metamorphose into the unified bar, that the president of the unified bar would be the president of the Bar Association and it would simply be a transformation in, virtually in name only, from Bar Association to unified bar. Well, all of the people who had for many years been resenting the Bar Association and its arrogance in purporting to speak for all lawyers got together and the organizational meeting was scheduled to be held at the Mayflower Hotel. And the dissidents, if you will, staged an absolutely masterful *coup d'etat.* They packed the house with non-Bar Association lawyers and just ran roughshod over the proceedings, took it over, and, from that point forward have never looked back. It really became an organization which put the Bar Association in a very poor second place to the unified bar. And, really, as I think most people would acknowledge today, has done a very good job by-and-large; with some digressions it has fulfilled all of the expectations of it as the organization of the legal profession in the city of Washington, leaving the voluntary bar, the Bar Association, really with not that much of a function of its own. It can't even pretend to be a specialized bar such as the Women's Bar or the Washington Bar Association. It has no particular constituency other than the people who continue to enjoy the comradery of the voluntary bar association.

MR. LYNK: I was just going to say, and yet it continues, its —

JUDGE JACKSON: It does and —

MR. LYNK: – and it's Young Lawyers Section is still – is vigorous and vital.

That's incredible.

JUDGE JACKSON: Yes. The Young Lawyers Section has been the jewel in the crown of the Bar Association. But it has from the very beginning. It's got a marvelous tradition and continues to do splendid work. I don't know how the whole story is going to play out. I have, from time to time, thought that a merger of the Bar Association and the unified bar would be very much in the interests of both organizations because if the Bar Association were, for example, to become a section of the unified bar representing local practitioners, as opposed to those whose practice is national, it could then, if it preserved sufficient autonomy, speak out on public issues —

MR. LYNK: That's right —

JUDGE JACKSON: – which it does today, but would be speaking, in effect, for the whole organization. Its freedom to lobby, if you will, I think could be very much to the benefit of the unified bar, the D.C. Bar; the quid pro quo for the D.C. Bar would be to get this Young Lawyers Section, which is absolutely dynamite in terms of doing good work.

MR. LYNK: That's right. They still do —

JUDGE JACKSON: – but there's enough resistance in both organizations so that I don't think it's ever going to come to pass in my lifetime.

MR. LYNK: Judge, how are we for time?

JUDGE JACKSON: I'm going to start trial at ten o'clock, but —

MR. LYNK: Okay.

JUDGE JACKSON: How about you?

MR. LYNK: No, I'm fine. In the '70s your practice was growing, you were very

active in the Bar Association. I remember when we talked before about your early years in Washington as a student and your perception of the city and its environs as a very comfortable, not as urbanized a place as it later became. Now you've spent a number of years in New England, at sea, you've come back to Washington in '64 to practice full-time. Are you living in the city or do you live in Montgomery County at this point?

JUDGE JACKSON: Right now?

MR. LYNK: No, no, I mean in the '70s.

JUDGE JACKSON: Oh, we were living in Montgomery County.

MR. LYNK: And you were also getting involved in sort of extra curricular activities in Montgomery County?

JUDGE JACKSON: Not really.

MR. LYNK: No really?

JUDGE JACKSON: No. My focus has always been in the city.

MR. LYNK: Okay. Were you involved in any sort of charitable or other types of activities?

JUDGE JACKSON: Well, the church that we regularly attended at the time was at Chevy Chase Circle, but it was just over the District line.

MR. LYNK: Was that All Saints' Episcopal?

JUDGE JACKSON: Yeah.

MR. LYNK: Okay.

JUDGE JACKSON: And I was on a vestry at All Saints' Church for a time. But that really was the extent of my suburban activity.

MR. LYNK: And, of course, I gather you were raising two children at that time?

JUDGE JACKSON: Yeah. They went to Chevy Chase Elementary School. But I was not particularly active in the – I didn't do anything with the PTA or anything with the school.

MR. LYNK: Now, home rule was coming to D.C. during this period, and we had talked earlier about the war years in Washington and your perception of that, and in the '50s, as a student in high school in '54. What was your perception of the city – of how it was changing, growing – the issues that were taking place around home rule and other matters in the '70s?

JUDGE JACKSON: Well, of course, these were the Vietnam War years.

MR. LYNK: Oh, that's right, and also the Vietnam War. And you as an ex-officer probably had some strong views at that time.

JUDGE JACKSON: I probably would have been described as a hawk at the time. I was convinced, and I would argue at cocktail parties that the president has got to know what he's doing, and he knows things about this that we don't know and we're not being told about it. So, I think we have to trust our president to lead us in the right direction, which is a whole ‘nother story. Of course, there were the assassinations of Bobby Kennedy and Martin Luther King, and the riots in the city. It was a city in turmoil, there's no question about it.

MR. LYNK: Now, were you here in the city during the riots of '68?

JUDGE JACKSON: Oh yes, yes. I remember looking out an office window at 17th and K and seeing pillars of smoke rising a few blocks over to the east. I remember seeing armed troops on the street corner armed with combat rifles. Very unsettling experience. I

remember when the emergency call went out to all lawyers to come down and represent rioters who had been arrested, and were being arraigned in droves in Superior Court. We mounted a Young Lawyers Section effort to put together defense teams for these people. I represented a couple myself. So the city was very much in flux at that time, there's no question about it, and I think that the riots, of course, marked the inevitable eventuality of home rule.

MR. LYNK: Many people can discern real changes in their lives or in their perceptions of the life of the city along the fault line of the riot. There is before-the-riot and then there's after-the-riot. How do you think the riot affected you or changed your perceptions?

JUDGE JACKSON: I think for me, it was only indirectly. It affected the lives of the people who were involved intimately in the affairs of the city much more directly. My life was a professional life and the Bar Association – well my life was really primarily professional, and as a young father raising two daughters, I don't think that I can say that it ever had any direct impact on me.

MR. LYNK: Did it affect how you perceived the future of Washington, or how perceived —

JUDGE JACKSON: At the time?

MR. LYNK: At the time. Try to put yourself back in '67, '68 and '69.

JUDGE JACKSON: I think it contributed to a sense of unease that things were coming apart, that order was breaking down. But that was as much attributable to the events of the Vietnam War as it was to what was going on in the city in terms of the turmoil here. Of course, those were the years of the sexual revolution, too. Those of us in my generation were sitting around thinking, shucks, we missed the whole thing. (Laughter.)

MR. LYNK: Vietnam obviously was another fault line.

JUDGE JACKSON: No question about it.

MR. LYNK: Were you involved in any active way in either the defense, or in your case —

JUDGE JACKSON: Not really, although looking back on it, I can see that I was certainly in line for it. If I had been five years younger and had followed the same career path I probably would have gone to Vietnam.

MR. LYNK: Were you still on reserve status at that time?

JUDGE JACKSON: I was an inactive reservist at the time. I hadn't been busted out yet. If you don't do things as a reservist they throw you out. Eventually, since I had done nothing in the way of reserve activity, they wrote me, "Thanks, good luck, Lieutenant, we'll see you later." I love the story that Kennedy used to tell about when he was President. He got one of these form letters from his Secretary of the Navy which said, "Lieutenant Commander Kennedy, you have obviously not kept up with your naval service, so we are dismissing you from the Naval Reserve and you should know that, notwithstanding your failure to succeed as a naval officer, many former naval officers have gone on to successful lives, so please don't despair."
(Laughter.)

MR. LYNK: That's the kind of letter you pray —

JUDGE JACKSON: One of the wonderful things about Kennedy was his sense of humor; he had an absolutely splendid sense of humor, and you can still chortle about his felicity at making a good joke, and a joke of himself, yes. He may have had other flaws, but he certainly had a very good sense of who he was and had a good sense of humor. Let's see, that

was apropos of what we were talking about.

MR. LYNK: We were getting a sense of flux, turmoil, changes going on in the city in the late '60s, early '70s as you were getting established —

JUDGE JACKSON: Well, they were and, of course, at that time, Watergate descended upon us and that was a major watershed in my life. That would have been the summer of 1971, I guess, when the break-in was first reported, and I got a call from Ken Parkinson who said, "We have just been asked to represent the Committee for the Re-election of the President in a civil suit that Ed Williams had just filed on behalf of the Democratic National Committee. How do you feel about it?" Of course, at that time, it looked to me to be enormously exciting and a dramatic case with the chance for a lot of public exposure.

MR. LYNK: Now, had you been involved in Republican politics at that time?

JUDGE JACKSON: I had been a Republican precinct chairman in Chevy Chase which really simply involved the passing out of literature and campaign envelopes, and walking around at the polls. But that was all that I had done. And I was not a very good precinct chairman, unfortunately. (Laughter.)

MR. LYNK: I don't believe that.

JUDGE JACKSON: It's true, it really is. But, certainly my activities as a precinct chairman had nothing to do with our getting the *Watergate* case, I think, or our piece of the *Watergate* case. That came, I think, through a recommendation from Roger Robb, who was then on the court of appeals, and at some point somebody in the Republican hierarchy – Roger Robb had represented Barry Goldwater, for example – I think somebody in the Republican hierarchy somewhere said, "Well, we ought to ask Roger Robb who we ought to get to defend

this lawsuit," and Roger mentioned his old partner, Ken Parkinson – his old junior partner. And so, we were retained to represent the Committee for the Re-election of the President. That incidently coincided with the year that I was the chair of the Young Lawyers Section. So, it was the busiest year of my entire life. As things played out, it turned out to be a very traumatic time for us.

MR. LYNK: Can you talk about that, was it you and Ken Parkinson basically leading the team at your firm? Were there other lawyers involved?

JUDGE JACKSON: Well, all of us, at one time or another, save for my dad who was very chary about the whole thing from the word go, and John Laskey who was in the process of leaving the firm, I think, at that time or thinking about it, got involved. Certainly all the younger lawyers would get bits and pieces of things to do. Ken was undoubtedly the lead lawyer in the case. I was, I guess, his principal assistant. But, Ken, to his great sorrow I think, got much more involved in strategizing with the people from the Committee for the Re-election of the President and meetings with John Dean and with the officials of CREEP, which left me to do most of the courtroom work. So, whenever there was a motion to be filed or argued or whatnot, I was usually the one who went to court and did that. I think probably I developed something of a reputation, a favorable reputation in doing that. It was high profile stuff at the time. I think I did it creditably. Of course, as the situation played out – I can tell you at the outset, I certainly believed and I have no reason to think that Ken Parkinson didn't believe that this whole Watergate operation had been done by the CIA. This was, of course, at the height of the dissent over the Vietnam War, and there was a lot of suspicion of the government. Others had been, if not in complicity with those who opposed the war – well – there was a lot of suspicion around in all directions, I guess, at the time. But, it really stayed with me for a long

time that I was not being told what was going on because I didn't need to know it. But that it was done lawfully and properly by the authorities of the U.S. government and that it was simply my job to go ahead and defend the lawsuit as best as I was able and that I didn't have to be told all of the details of the whole thing. As it turned out, we were all hoodwinked and I still resent that to this day. I went to the deposition – you can see on the wall behind you under the picture of my law clerks there – there's a picture of Ken Parkinson, John Mitchell, and me in route to John Mitchell's deposition in Williams' office. I was there when Ed Williams said to John Mitchell, having been first duly sworn, "Mr. Mitchell, did you have any advance knowledge of the Watergate break in?" To which, John Mitchell, former Attorney General of the United States said, "I did not." That was enough for me, I believed my client. As it turned out, we were all deceived. But, I started to tell you, when I first began to get misgivings–serious misgivings about the rectitude of the client we were representing – I don't know whether you remember a young man by the name of Egil Krogh, "Bud" Krogh?

MR. LYNK: Oh, yes, Bud Krogh.

JUDGE JACKSON: He had been a White House functionary under Haldeman, I guess, or Erlichman, or somebody. And, in a little backwater proceeding of the Watergate affair, Egil Krogh, young lawyer, eagle scout, young father, model citizen pled guilty to a felony and was sentenced to prison. I thought, the president can't let this happen to this young man. If this is truly on the up-and-up, how can the president let this young man suffer this? He's going to lose his license to practice law, he's going to go to prison with young children. What is going on here? And I think from that point forward, I was very chary of the client we were representing and, of course, ultimately, as we all know, it turned out that they were not very reputable people.

MR. LYNK: Judge, why don't we stop on that note to be continued.

JUDGE JACKSON: Okay.

Oral History of Judge Thomas Penfield Jackson
Myles V. Lynk, Esquire, Interviewer
Third Interview - May 24, 1995

MR. LYNK: All right, it is Wednesday, May 24, 1995. This is Myles Lynk. I'm here with Judge Thomas Penfield Jackson. Judge Jackson, we have talked in these interviews for the oral history project concerning your career as a lawyer before you joined the bench and before that your life in the Washington community and your service in the Navy and your time at college and law school. I wonder if we could focus today on your career since you've joined the bench, and I want to start with your feelings, the emotions, the circumstances surrounding your appointment to the bench. Was it something that was unexpected, was it something that you had sought over a number of years? If you could just tell us how it happened that you were elevated to the bench.

JUDGE JACKSON: It was in a sense unexpected and I cannot to this day give you any cogent explanation of how it happened. There was a time when I, after having been in practice for 15 or so years, that I let it be known that I would be interested in being considered for a judicial position without committing myself to anybody that I would take it if offered. I started out being interested primarily because somebody else had mentioned me somewhere, you know, the "great mentioner" had suggested that maybe I could be considered for a position on the D.C. court of appeals. And, having been a lawyer for 15 years and spent my entire career trying to persuade other judges to see things as I saw them, the prospect of being able to decide things for a change looked like a very attractive proposition. And I think maybe I was mentioned in one circle or another for a year or two, maybe longer, before anything really happened, and for reasons that I am not, to this day, entirely clear on, at some point I was notified by somebody

who was in a position to know that I was being very actively considered as a district court judge by President Reagan and his staff. I traced that, to the extent that I could do so purely by conjecture, back to the time that I was doing the Committee for the Re-election courtroom work and somebody probably formed a favorable opinion of me. In any event, it did come very much as a surprise to me and it was rather sudden that I understood that I was really in consideration, being asked by an assistant attorney general to fill out one of these questionnaires, which I did. And then I waited for a long time and nothing seemed to happen. I did run into Fred Fielding from time to time and he would say, "It's gonna happen. Don't worry about it." So I really didn't worry about it, but I, my attitude was always, if it happens I'll be delighted, but I will not count any chickens until it comes to pass. And, as I say, I waited for a long time for anything to happen. So long, that when the call finally came from the President, my secretary had forgotten all about it and she picked up the telephone and was told that – the voice asked to speak to me and the caller was identified as "the President," and my secretary said "the president of what?" And then immediately blanched and sat down. But the call did come in early 1982 and then the President told me personally that he was going to send my name up to Capitol Hill and then I heard nothing further about it. And it was not announced in the newspaper. And we've all come to the point at which I think – unless we see it announced publicly, it didn't happen. We may have seen it personally, but if it's not reported, we don't really believe that we've seen it. So I waited for a long time and it turns out it was simply a glitch in the White House press office so it didn't get out for some time but my name did go up. I never really for any minute thought that I would not accept it. It was such a – I have been taught since early childhood that short of the Supreme Court that the very finest legal job in the country is a U.S. district judge. And I have

been taught, by personal experience and by example, that they are generally people deserving of enormous respect, possess enormous power. And so once I knew it was going to happen, I knew I wanted it. And matters of income really played no part in the consideration.

MR. LYNK: Did you have any anxious moments during your confirmation or was it sort of —

JUDGE JACKSON: Not really. I was interviewed at the Department of Justice and apparently I interviewed well enough so that I didn't say anything that got me into trouble. And then – the Judiciary Committee does not delve very deeply into the credentials of lower court judges. Supreme Court justices are another matter, but lower court judges, and in particular district court judges, unless they have made highly controversial names for themselves, don't get scrutinized all that closely. The investigator for the committee is a guy by the name of Duke Short or was, I don't know whether he still is – but Duke Short was very helpful in telling me what I was going to be asked, what sort of responses they were looking for. As it turned out the only question I was asked, was asked by Senator Strom Thurmond who asked me if I was going to work hard as a district judge and I assured him that I would and that was all there was to it. So the confirmation process really did not involve anywhere near the anxiety of simply waiting to see whether or not all of the authoritative rumors that I heard were true, that I would be nominated in the first place.

MR. LYNK: What was the length of time between your, if you can recall, between your conversation with the President and when you knew that your name had actually gone up to the Hill?

JUDGE JACKSON: Maybe two weeks, something like that.

MR. LYNK: Okay. And then once your name went up to the Hill, what was the length of between that and —

JUDGE JACKSON: That was – I don't remember what the interval was but it was not a very long time.

MR. LYNK: Okay. And then after that, I guess – were you in the process of winding down your practice or did you sort of wait until the confirmation before you did that?

JUDGE JACKSON: I guess you could say that I was not taking any new clients and with respect to the cases that I was then handling, even new cases coming in from old clients, I was referring them out to the junior partners who were going to succeed me in that work.

MR. LYNK: Once you joined the bench, what were your impressions the first six months and then the first year? What did you do to try to acclimate yourself to change your mode of thinking from a trial judge, an advocate, excuse me a trial lawyer, an advocate, a litigator to that of a judge? What did you have to differently, what adjustments did you have to make?

JUDGE JACKSON: I don't think I really had to make nearly the adjustments that other people have to do because I had been practicing in this court in particular, I'd done more litigation in this court than in any other. And I had done more, I had been a litigator, meaning a trial lawyer, for virtually my entire career, so over that period of time I had formed some strong convictions as to what I thought a good trial judge ought to be. How they should comport themselves, what —

MR. LYNK: What were some of those convictions?

JUDGE JACKSON: Well, patience obviously. A willingness to devote time

and attention to individual cases. Courtesy. Intellect, I'm sure is a major component of it. It's obviously essential that the judge understand what's being presented to him. And make the effort to learn, to understand what he doesn't already know. Tolerance for the foibles of lawyers and for the difficulties that lawyers inevitably confront. The unavailable witnesses, the difficulty in scheduling depositions, the lawyer who has only one case who is your adversary. To be sympathetic with and willing to accommodate the problems that the lawyers encounter. To understand that the trial judge does not have a roving warrant in our system to go out and do whatever the trial judge thinks is right. It is the lawyer's case, I mean ultimately of course it's the client's case, but the clients have lawyers and if you can have reasonable confidence in the capabilities of the lawyers, then you let the lawyers try their own cases, present them and you decide what they give you. You don't go out and conduct independent investigations. Qualities of that nature that I had learned over time, that I regarded as effective. There were judges, trial judges, that I came enormously to admire. I have always been an admirer of Gerhard Gesell. I thought he was a splendid trial judge, irascible as he was sometimes. I always was able to avoid his irascibility because I did what was expected of me. There was a judge on the circuit court of Montgomery County by the name of John Moore. I don't know if you've ever encountered him —

MR. LYNK: I've heard the name.

JUDGE JACKSON: But I thought he was an absolutely superb trial judge. In two cases that I tried before him, I think I lost them both and – no, I won one and lost one. But in each instance I felt that he had done a splendid job of presiding over the trial and his decisions were thoughtful and well reasoned and he had been invariably courteous and just a true gentleman. And every bit, however, in charge of his courtroom. It was his courtroom and he ran

it. That's another thing that I think is important for the trial judge to do. To assert his authority and be prepared to make rulings when rulings need to be made and to use his authority. Personal qualities that – Aubrey Robinson is another judge that I always thought of very highly. Excellent trial judge. And I don't mean to exclude some of my others colleagues here, some splendid judges here. In Superior Court, Leonard Braman I thought was an excellent judge.

MR. LYNK: When you joined the bench how were you asked to – how were your duties thrust upon you, or how did you assume your responsibilities? Was there any sort of gradual immersion or were you just dumped in?

JUDGE JACKSON: A new judge here is presented with a stack of 150 files. Those are his cases. It used to be the practice that sitting judges, in order to make up a caseload for a new judge, would be allowed to select the cases that they would send to the new judge, the result of which was, that the new judge for a year would be working on a bunch of dogs. That system has changed, they're now drawn at random from the dockets of individual judges. And I think I was probably in under the new system, so that I did not get a whole lot of very unpleasant cases. But there was a full caseload waiting for me when I got here. And I knew of no other way to get started on it but to get started. And take them out one at a time, those cases for which there was no trial date assigned, of course, and in no instance were you given a case with an imminent trial date. I would hold status conferences. I would get the opinions of the lawyers. Life was a lot easier for me than it might be for some other people because I had been doing this for my entire career, for 18 years.

MR. LYNK: How did your colleagues at the bench, excuse me, your colleagues at the bar, adjust to the fact that you were now on the bench? The day before your swearing in

you were “Tom,” the day after you are sworn in you're “Judge Jackson.”

JUDGE JACKSON: I don't think they had any trouble with it. Nor would I have had trouble in the reverse situation. It's the institution and the office and not the individual to whom the deference is owed.

MR. LYNK: How did you select your first group of law clerks?

JUDGE JACKSON: The minute my appointment was announced the applications started coming in. It's amazing. I probably within a period of two weeks had collected 50 or 75 resumes and I decided on the basis of resumes to interview a few of them and immediately found two very good law clerks. And, of course, today we get 500 applications every year from the finest young graduating lawyers in the country. It's very gratifying. I never had any trouble getting law clerks.

MR. LYNK: Now, what have you seen as the most significant changes in the organization and operation of this court during your term?

JUDGE JACKSON: Of this court?

MR. LYNK: Of this court. Or if you like, in general of the federal judiciary?

JUDGE JACKSON: Well, that's probably where I have perceived a greater change, which is, in turn, reflected to a certain extent in this court. Because our – the business that we do reflects what Congress is passing in the way of legislation and what is going on elsewhere in the judiciary. The jurisdiction exercised by this court now is vastly different than it was when I first got here. And that's over a period of 13 years. I was primarily a civil litigator and most of my civil litigation, my civil cases were tried in this court. It's been over two years since I've tried a civil case. We have been increasingly imposed upon. Well, imposed upon is

not the word, but we have experienced an increasing incidence of our preoccupation with criminal litigation, whether it's by reason of the nature of the cases and the number of cases that are being brought, which is not really necessarily a good indicator of the extent to which we are preoccupied with criminal cases, or by the length of the cases. I have – for over a year I have been involved in the trial of just three cases. And these are simply protracted criminal cases.

MR. LYNK: To what extent would you say the Speedy Trial Act has been a cause of this or the federalization of crime?

JUDGE JACKSON: Virtually no effect at all.

MR. LYNK: No effect. What about the federalization of crimes that might previously have been state crimes?

JUDGE JACKSON: Yes, yes, that has. And is likely to do so to a much greater extent in the future. If the trend in Congress continues, and that's questionable now. But, of course, the drug epidemic has really skewed everything. And then there was the policy on the part of the Bush Administration – enthusiastically pursued by the U.S. Attorney, Jay Stevens, and complicated by the sentencing guidelines – to federalize every drug prosecution. And for several years we were inundated with what we regarded as trivial drug cases. Certainly none that, or most of them were not deserving of preempting the time and attention of the federal court with the limited number of judges that we have and the limited time that we have available. Beginning about 1987-88 we have – we were trying what we referred to disparagingly as "five gram crack cases." And these were street drug cases, street drug crime cases with, however, the quantity involved being in excess, however *de minimis* the excess might have been, of five grams. And that invoked federal jurisdiction that called down draconian penalties under the

sentencing guidelines, particularly if the guy had a record, and they were all being prosecuted here. Well that, fortunately, under Eric Holder has not continued. We still get a substantial number of cases, 50 grams now will generally call down a federal prosecution. And even lesser quantities if there's a firearm anywhere in the vicinity, whether it was used or not. That, however, has not been what I have been doing of late. I have been, beginning last spring, about 2 months, 13 or 14 months ago, I started with the Newton Street Crew. And there was never any doubt in my mind that that case was of a magnitude that deserved all the time and attention I could give it. It was, these were truly terrible people who had done inestimable damage to the community. And if that's, to the extent that the federal government is prosecuting drug cases at all, that was the sort of case that ought to be in this court.

MR. LYNK: I want a segue from the general problems that drug cases present to a specific drug case. You've mentioned one, the Newton Street Crew, let's mention another one which exercised a lot of your time and attention back in 1990, and that was the trial of Marion Barry, then and now the Mayor of the District of Columbia. Can you tell us a little bit about your reaction? And some of it is obviously on the record and in your sentencing statements. But what comes across from that record is your anger at his violation of trust in engaging in an activity which could lead others into criminal activity. Now I'd like to quote from your sentencing statement. You said the cocaine the defendant used in November of '89 was procured from some third person. It is not unlikely that that person was someone like the 35-year-old small-time drug dealer who was convicted in this court and sentenced in January 1990 to a mandatory minimum prison term of 35 years without parole. It might have also been a person like the 22-year-old Howard University student who began serving a mandatory minimum

sentence of 12 years, seven months in July of 1989, also without parole, for distributing drugs on and around the university campus.

JUDGE JACKSON: Those were two cases that I had. Two instances in which I felt that I had been obliged by the sentencing guidelines and the mandatory minimums to impose penalties that were cruelly severe and wildly disproportionate to the criminality, if you will, of the people involved. And I am sure my consciousness of these other defendants that I had had to sentence contributed to my frustration at having a defendant before me who instead of being a seller, was simply a buyer of a commodity that he bought in the same quantities as the people who were selling them. And yet they were the ones who were going to prison for these absolutely, I think, unconscionably long periods of time. In the case of the 35-year-old man, I wrote an opinion, and I departed from the guidelines in sentencing him and I found a way to, I thought, give him a less severe sentence. Although I still gave him something like 17 or 18 years, I don't remember for sure. Wrote an opinion on it, departing on the ground that if he had been prosecuted in any other jurisdiction in the country, without mandatory minimum sentences, or with a – or in circumstances in which his crime could have been prosecuted either by a state prosecutor or a federal prosecutor, but not a prosecutor who could exercise both state and federal prosecution authority, that he would have received a sentence which was proportionate to the extent that he was a criminal, which was that he was a confirmed street corner drug dealer. No big kingpin, and no firearms, no violence involved. He simply sold on a regular basis. We'd lock him up for five years and then he'd be back out and he'd be selling again. So I tried to find a way to depart and the court of appeals reversed it and told me that that represented an illegitimate ground on which to try to depart, so when he came back for resentencing I had to

give him what was called for by the guidelines. And it was, as I recall 35 years without parole.

MR. LYNK: Do you know, and I should know this but, in fact, I don't – most of my practice is civil, too. But have the sentencing guidelines been challenged under the cruel and unusual punishment – has that gone up to the Supreme Court?

JUDGE JACKSON: Well, what has gone up to the Supreme Court has been the *Michigan* case, in which the Michigan legislature, copying the federal, its federal counterpart, provided that for a specific quantity of cocaine, possession, irrespective of any other factor, the sentence called for life in prison without parole. And the guy, the petitioner in that case was a guy who got caught, I think, with a half kilo of cocaine and that was the triggering quantity under the Michigan statute. I don't remember the specifics of it, but it was something like that. And got life without parole, and petitioned on the ground that he was being subject to cruel and unusual punishment and the Supreme Court held that that was not cruel and unusual punishment. Which took the wind out of any —

MR. LYNK: – subsequent suit on the federal —

JUDGE JACKSON: – anything else in the federal system. In effect, it's been held that it's a legislative judgment and imprisonment for any length of time being a legislative judgment, imprisonment itself, is not a cruel and unusual punishment.

MR. LYNK: What are your thoughts on how the trial was conducted? How the attorneys handled themselves and how the defendant handled himself?

JUDGE JACKSON: For any trial judge, particularly one who has done it himself, a well-tried case is a joy. It's a pleasure. And that was a well-tried case. Judy Retchin and Ricky Roberts were top-notch prosecutors, knew their case cold and knew how to present

their case. And of course, Ken Mundy is Ken Mundy. I've been an admirer of Ken Mundy for as long as he's been around. And Ken never, ever in any case that he'd ever tried before me or at any time when I encountered him in practice, crossed the line. He was a man of enormous integrity. He had a very difficult client and he handled his client as well as he could and represented him, I think, within the bounds of propriety and with dignity throughout the case. It was an extremely well-tried case. To the extent that there was a failure of justice in the case, I have to lay it at the feet of the jury who I do believe, have always believed, simply did not respond truthfully to questions on *voir dire*. I concluded that because it was so much in everyone's mind that the best way to address the problems of racial antipathy and political polarization would be to confront it directly in *voir dire*. And so I instructed the jury and inquired of each one of them whether they would be influenced by racial or political factors, telling them that this case was not, as far as we were concerned, as the judicial tribunal in which the issues were to be resolved, a political issue. It mattered not whether you were Democrat or Republican or whatever, D.C. Statehood, whatever, it's not a political case and it's not a racial case. And our function here, your function is to determine the facts and apply the law to those facts. Determine them truthfully and without bias or prejudice and deal with whatever other social strains there were in some other forum. That this was not a place where racial or political considerations ought to enter into the way in which I or they performed their functions. And the jurors who made it to the panel all assured me that they would do that. And I was, I thought somewhat skeptical, in some instances, some I concluded I simply would not believe. But the ones who I think did get on the jury who assured me that they would not do that were people who knew from the outset that they had their own agendas when they got on the jury and they were

the ones who prevented it from being brought to a conclusion. I was also very disappointed in the foreman of the jury, because I think that's what a strong conscientious foreman can do. Obviously in some cases you can't do it. But I didn't feel that the foreman of that jury tried very hard. I think he simply, acceded to the fact that people were not going to agree, and let it go at that. He didn't try as hard as I would have hoped that he would have tried to bring people back to the realization that their function had to be discharged without consideration of racial or political factors.

MR. LYNK: Did you sequester that jury?

JUDGE JACKSON: Yes. And that was an interesting experience. I'm not sure that I would do that again. Certainly I would – I'd think long and hard about it because it was quite a sacrifice to inflict on these people. They were awfully good about it. There were virtually no complaints about it. It wasn't as long as the O.J. case, but it was long enough that they felt the strains of being cooped up with one another and being inhibited from a lot of the activities that they'd like to pursue. The Marshals Service was awfully good, too. They went out of their way to make sure that these people were treated courteously and were made as comfortable as they possibly could be. Excursions were arranged for them to do things on weekends. And on one occasion, one young woman wrote me an impassioned note, stating that her best friend from early childhood was getting married and she had been asked to be the maid of honor and it was going to occur on a weekend. Was there any possible way that she could do this? So I took it up with the Marshals, I guess Marshal Rutherford was here then. In any event, we worked out a system, by which, at her own expense, she was allowed to fly out to Kentucky or Tennessee or wherever this wedding was taking place and we had three Marshals go out with

her. They kept her sequestered during the entire festivities, except for the service and the reception. And they all had to rent tuxedos to go to the reception. And made sure that they were the only ones to dance with her.

MR. LYNK: (Laughter.) To what extent do you find – now I'm going to ask you to make a general observation from the specific. To the extent that racial animosity played a factor in some jurors, and let's say black jurors' unwillingness to convict a black mayor, if that's what it was, to what extent have you found that in criminal cases prosecuted in this district, that is a factor in all such cases where you have black defendants and black jurors, that there is an unwillingness to convict if there's any ambiguity at all in the evidence even if it doesn't rise to a reasonable doubt?

JUDGE JACKSON: It occurs. The vast majority of jurors are very conscientious and do their jobs and do them well. Every once in a while you run across one renegade who usually will produce a compromise verdict, will not actually hang the jury, although you do get hung juries. The cases in which I have seen it operate, are those cases in which there has been racial antipathy in the building of the case itself. When white police officers, for example, will deliberately mistreat a black defendant who has just been arrested. Will abuse him or will take advantage of him, or there is a convincing case, or there's reason to suspect that the drugs have been planted on a defendant. There was one case in which I am quite sure that the racial factor played into it. A young black defendant, who was, I'm sure, guilty of possessing cocaine with intent to distribute, was the subject of a traffic stop. And when the police found the cocaine in the car they handcuffed his hands behind his back and made him kneel down. Put his head up against his car and just kneel on the pavement until transport came

for him. And that did not sit well with the jury. It didn't sit well with me and they really had no justification for it other than official arrogance and the jury acquitted him. I could understand why they would do that. I have seen acquittals of obviously guilty defendants, usually in a black/white context where the police have been particularly brutal in the execution of a search warrant. They'll break into a house and they'll herd people down into the dining room and keep them all there at gunpoint lying on their stomachs in their nightclothes. And they'll be abrupt and angry and hostile. To a certain extent you can understand the police doing that. Executing a search warrant is a terribly dangerous thing and they don't know who's going to produce a weapon from wherever in the house. On the other hand, there's got to be a way to do it without antagonizing, without appearing to be brutes about the whole thing. I've seen acquittals in cases in which the police have torn up a house and they just leave it a shambles, whether they find something or not. Closets are smashed, drawers are overturned, furniture is piled up and broken, front doors are broken in. And the police, whether they find something or not, just leave it in that condition. And you can understand why jurors say, we don't care whether he's guilty or not, they're not going to get away with this. But there is, you do find instances in which jurors will express a sentiment which has been expressed more than once of late and that is that, "I simply will not be a party to sending one more young black man to jail."

MR. LYNK: In the Marion Barry trial, do you think that sentiment was expressed with the view that he was set up and that there had been such an effort by the U.S. Attorney's Office to get him that somehow that tainted the fact that they did get him?

JUDGE JACKSON: I think so. I think that of course the jury had been immersed in the publicity that went with it and that of course was part of all of the publicity with

the press, all of it. Gleefully, relishing the fact that a prominent politician had been caught in *flagrante delicto*. But then speculating whether or not this was a vendetta on the part of the U.S. Attorney's Office and the Justice Department to get a strong black leader and put him behind bars. I'm sure that – that was one of the reasons that I thought we ought to confront it directly in *voir dire* and acknowledge that this is, this philosophy pervades the community. Whether it's true or false, it's not part of our function. I'm sure that that was part of what had the effect.

MR. LYNK: After the trial was over, you were invited up to Harvard to give what have come to be called the "Harvard remarks." Can you talk with us a little bit about your statements at Harvard and the aftermath and whether you'd do it again?

JUDGE JACKSON: The answer to your last question is no, I will not do it again. I was invited up there by somebody I regarded as a friend to talk to what I understood would be a seminar in the criminal justice system. I did not know until 45 seconds into what I had to say that I was talking to a crowd that consisted of at least 50 percent members of the media. And by that time I had bespoken myself. There was no way to take back what I had said. So I felt a little – I had never been told expressly that this was simply an academic gathering in which we were – I was dealing only with law students and talking in the semi-confidence that you would expect under those circumstances. On the other hand I think I should have been told in advance that this was —

MR. LYNK: On the record?

JUDGE JACKSON: – was on the record and that the media had all been alerted to the fact that I was going to be there. Insofar as what I said I still believe it. I still – I am convinced that the evidence of guilt was as strong as I've seen it in any case. An interesting

irony about it is that the most celebrated, the most publicized of the instances in which Barry was supposed to have used crack cocaine, the sting at the Vista Hotel, was one in which I think the jury could very properly have acquitted him. There was enough evidence of entrapment generated about that so that I would have understood an acquittal on that count very easily. There was no question that he used it. But there's also no question – and Ken Mundy was awfully astute at bringing this out, there was no question in anybody's mind that he had not gone–the commodity that he was looking for when he went up there was not crack cocaine. But other counts I thought the evidence was just overwhelming and that it was really – and the perjury counts to. You'd listen to the audio tapes of the man's testimony and look at those transcripts and you know he's lying. You just know he's lying. And how the jury could have found —

MR. LYNK: Do you think the jury system failed in that case?

JUDGE JACKSON: Oh yeah, yeah.

MR. LYNK: In your experience does that happen often?

JUDGE JACKSON: No. No, I think the juries, my experience with juries here has been awfully good. I think that by and large they are extremely conscientious people and try, they believe fervently in the importance of their function. Maybe more so than they do elsewhere in the country. And I think the people try awfully hard to be conscientious jurors here. And 90 percent of the cases they get right and in 99 percent of the cases, whether they get it right or wrong, they've done their job.

MR. LYNK: So it's a small one percent where you —

JUDGE JACKSON: Let's make it five percent.

MR. LYNK: Okay. What observations, stepping back again, do you draw from

that trial and what, how did it inform your style and substance in subsequent proceedings? For example, one of the things you said you would not so easily be drawn into a university context to discuss, post-trial, some of these issues. What other lessons or experiences do you take from that trial?

JUDGE JACKSON: Well, I'm not sure that I learned so much more from that case. I learned to be a lot more cynical about responses on *voir dire*. I learned that I would be very reluctant to sequester a jury, for any length of time, again. And frankly, I think that it was unnecessary in that case because whatever publicity was likely to infect them had already infected them. Although I'm not sure that I would not want to insulate them from the day-to-day coverage of the trial. But it's a problem, it's a problem for everybody. It's very costly, it's an enormous imposition on the jurors and I'm not sure I would do that again. Other than that, I'm not sure that I would try it a great deal differently. The case from which I think I learned more than anything else in terms of a high profile trial was the *Michael Deaver* case, which was the first one that I tried that really got nationwide publicity.

MR. LYNK: Yes. I'd like to start, if we can, talking about that case, we may not get a chance to finish it today, but if you – my thought would be, it's about 5:15 now we might go to 5:30.

JUDGE JACKSON: Whatever you want to do.

MR. LYNK: Let's talk about the *Michael Deaver* case, unless there's any other observation you want to make about the *Barry* case.

JUDGE JACKSON: No, I think from the *Michael Deaver* case, I learned for the first time just how difficult the press can be. I think we handled the press from the *Barry* case a

lot more felicitously than we did with the *Deaver* case. But the press are, they are a driven force. And it is really – they have to my observation, very little interest in the proper functioning of the judicial system. They want news. They want access to the news. They want to be the first with access to the news. And if it ends up destroying the trial, so be it. That's just more news.

MR. LYNK: To the extent you were more felicitous in handling the press in the Barry trial. What was the difference? What did you do different that was better?

JUDGE JACKSON: Well, we started early on making plans for the trial. Worked with LeeAnn Flynn Hall from the word go in allocating space for the press. From the beginning of that trial I'd indicated that I would be available off the record to talk to a representative group of the press, a pool if you will, who would come in and be representative of their number, and as often as not what they wanted to complain about was the fact that it was too hot in the courtroom, or the seats were too hard. I learned to accept – in these off-the-record encounters with them I learned to stay away from them completely, not say anything. Actually, I didn't open my mouth once, until the Harvard remarks, and then I thought that I was in a relatively safe environment and the case was over. Which it turns out, it's not over until it comes back from the court of appeals, but I didn't do any legal research on it and I didn't realize that. I learned in the *Deaver* case, the hard way, not to let the press get involved in the proceedings at all. I allowed representatives of the press to, in the *Deaver* case, to make representations, presentations to the court as if they had any interest or standing in the case at all. And that obviously became part of the record in the case, which they utilized in one very difficult situation to go immediately to the court of appeals when they didn't like the way in which I ruled. That had to do with the process of jury selection. They wanted jury selection to be absolutely and

completely open, without any inhibitions whatsoever. And truth be told, I hadn't done any research on it, enough to realize that the general principle of a public trial obtains and to the extent that it can be open, it should be. But, Michael Deaver, had intimated that he intended to raise a defense of alcoholism. And so, obviously, that became a subject that had to be addressed with the jury on *voir dire*. And I told the jury that their answers to the questionnaire would be kept confidential and would not be disclosed to the public. There were other personal things, too, marital situations and whatnot. And the press objected to that and I let the press get heard. I forgot who it was who came down, but somebody representing *The New York Times*, somebody representing the networks, and let them make a record. And then adhered to my earlier ruling that these questionnaires would remain confidential. And to the – oh, and the other part was that if the jurors were to be interrogated about their answers on the questionnaire they would be interrogated *in camera*, to these personal questions. Well, the next thing you know they're up in the court of appeals on a petition for a writ of mandamus to direct me to open the jury proceedings, all jury proceedings to the public, i.e., the press. And three of my colleagues on the court of appeals, in what I thought was one of the most sanctimonious, pious, self-righteous opinions, in effect excoriated me for closing these and didn't I know that the Supreme Court had said back in 1902 that – they had one citation, to one case in which the Supreme Court had sort of offhandedly dealt with the business of closing *voir dire*, the gist of which was that *voir dire* is open unless the juror takes the initiative and affirmatively asks, at which time the judge has to make findings that the juror has legitimate reason for not answering these questions on the public record. Well, I get this order back from the court of appeals and this screwed up everything. Here I had a jury panel of 150 people, all of whom had filled out the questionnaires on the

premise, as I promised them, that their questionnaires would not be made public. And now I've got an order from the court of appeals directing me to make these questionnaires public. So, I discharged the whole panel and we had to start all over again, impanel a new jury, and it took us three, four months to go ahead with that. Now if I had not let the press get heard in that case, if I had just treated them without standing, as they are, in the case, and had not heard them, we would have gone ahead with the trial, would have picked the jury in that case. It may be that I was in error, but it would not have affected the trial and I would have gotten a slap on the wrist after the fact for having kept the press away from these confidential questionnaires. But that would not have affected the fairness of the trial and the case would have been concluded with the first jury. I try to accommodate them, and you have to try to accommodate them. Indeed, most of them are conscientious people. They're only trying to do their jobs. They really are not truly sympathetic with, or they do not comprehend the problems that we have in trying to conduct a trial. They are only concerned with their deadlines, their ability to get their information. And that is their job. I try to accommodate them, but it sometimes becomes awfully difficult. In the *Barry* case, we had this system set up whereby half the courtroom was allocated to the press and half was allocated to the public, to the general public, which would be inclusive of any member of the press who didn't get in under the press credentials. And of course, we had requests from media all over the world to come in and sit in on this one. And it was sort of a first-come, first-served. We would allocate a seat for a particular publication and it got to the point where we – and for local publications we would allocate two seats. Then we had to decide whether or not a seat for a television reporter should also – should prevent the use of a sketch artist. Was that seat no longer available for a sketch artist, or did they count as press? And LeeAnn Flynn probably

went bananas dealing with these people. Well, she gets the whole thing parceled out and we get a letter from *Time Magazine.* *Time Magazine* was late getting the word that they had to apply for a seat and by this time all of the seats had been allocated. The letter is from a vice president of *Time Magazine* and its tenor is, "Don't you realize who we are? How could you possibly exclude *Time Magazine* from this trial?" And we decided to stick to our guns and say you didn't get in queue. Who do we throw out because you're as important as you are? And we told them, what you'll have to do is simply take your chances and come in with the general public. Well, they did that and they covered it. They didn't cover it very extensively. Actually they gave it the back of their hand. But the interesting fact of the whole thing is that in the course of the nine weeks the case was in trial, whatever it was, they never once mentioned the name of the trial judge. "We'll fix you," you know. *Washington Post* insisted that they should not get just one or two seats, but because they were who they were they ought to get four seats. And I said no. And I didn't hear any more about it. The next thing you know I have an invitation to the White House correspondents dinner. I thought, wow, this is from *The Washington Post*, from the city editor of *The Washington Post*. Wow, boy, I really am honored they're going to invite me to the dinner. I get to the dinner and I discover the whole reason that they've invited me to the dinner is to lobby me for two more seats at the trial. I tell them, "No, you can't have two more seats. But thank you for the invitation and I've enjoyed the dinner." I've never heard a thing from *The Washington Post* since that time. Now, that city editor who extended this personal invitation to me has never called me since. I've never had any contact with her at all. Deal with these little things, with the press.

MR. LYNK: Judge, I think we're going to stop now.

JUDGE JACKSON: Okay.

Oral History of Judge Thomas Penfield Jackson
by Eva Petko Esber, Equire
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 Judy Retchin, who is now an Associate Judge of the Superior Court. I asked Judy 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, Judy 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-tried 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

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 possible 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 the 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.

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1982 to 2004: United States District Judge, U.S. District Court for the District of Columbia (Appointed June 25, 1982, by President Ronald Reagan). (Assumed Senior Status February 1, 2002. Retired August 31, 2004.)

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Member of the Committee on the Administrative Office,
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Member of the Lawyers' Club of Washington (Board of Governors, 1989-92; President 1993-94).

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COMMENTARY

Don't Gag the Judges

By Thomas Penfield Jackson

Legal Times, September 30, 2002

The Supreme Court has recently confirmed the constitutional right of elective judges to speak forthrightly to the electors about legal issues they may be obliged to decide, in *Republican Party of Minnesota v. White (2002)*. So now is the time for the federal judiciary to re-examine its own attitude toward public speaking by federal judges. Our life tenure is all the more reason for us to be able to communicate informally on occasion with a public that must live with our decisions, yet can never vote us out of office.

One convention of federal judicial life to which I have never been fully reconciled is the notion that judges shouldn't ever comment publicly about their cases-period. As the branch of government that prides itself on being the principal guardian of the right of free speech for all, the federal judiciary can still be remarkably intolerant when it comes to its own.

CANON OF SILENCE

The Canon of the Code of Judicial Conduct on the subject of unofficial public statements by federal judges generally provides merely that a judge should "avoid public comment on the merits of a pending or impending action." The canon then expressly admits of exceptions for explanations of the legal process and for purposes of legal education. I have considered the canon to be simply a rule of prudence, i.e., don't say anything for public consumption, on or off the bench, that might sound prematurely judgmental or cast doubt upon the essential fairness of the proceedings.

Although some judges will on occasion speak "off the record to members of the press, many judges -- perhaps most -- believe that the canon imposes a virtual code of *omerta* forbidding any public commentary while a case remains unfinished in any respect, quite possibly forever. They regard the canon as a commandment to withdraw from all public discourse about the case, even if their thoughtful and timely observations might be a significant contribution to public understanding of it. The ostensible reason is that anything said informally, but publicly, about a case must perforce detract from the court's "appearance of impartiality." Whether what the judge might say is legally and factually accurate is essentially irrelevant.

So interpreted, the canon represents a variant of that dubious maxim of leadership: Never apologize; never explain. It also suggests that the judiciary is more concerned with appearances than with actuality.

Ironically, the unwritten corollary to the same rule countenances almost anything a judge chooses to say about a case when spoken from the bench or in a written opinion, even if what he says does little to promote the appearance of a neutral and detached

jurist. No one ever talks back, and there are no follow-up questions.

The distinction between sanctioned "judicial" speech and proscribed "extrajudicial" speech is unrealistic. It conflates the concept of unofficial commentary and personal prejudice, which do not always equate, and draws the line between the permissible and the impermissible on the basis of whether the judge speaks ***ex cathedra*** or simply as a knowledgeable participant in the adjudicative process.

A judge's silence, on or off the bench, does not guarantee his impartiality. Any "appearance of impartiality" conveyed by a judge's silence may be an illusion. It may also reflect ignorance or indifference. The only genuine determinant of judicial impartiality is the integrity of the judge himself, not appearances, and a reputation for candor is a better gauge of integrity than a reputation for silence.

MOST SECRETIVE BRANCH

The judiciary is in many ways the most secretive of the three branches of the federal government. It is not subject to the Freedom of Information Act or any other so-called "sunshine" statute. Judicial disciplinary proceedings are conducted in private. Although the judicial system professes to display its decisional processes "on the public record," its most important decisions are made behind closed doors, whether by judges or juries. Law clerks and supporting staff are sworn to secrecy. There are remarkably few "leaks," and no whistleblowers. **A** veteran journalist once told me that "we know more about how the CIA operates than we do about you."

That secrecy has consequences. In his remarks to the D.C. Chapter of the Fellows of the American Bar Foundation last spring, my colleague Judge Paul Friedman expressed alarm at the increasing intensity of public attacks upon judges and their decisions, and the loss of public confidence in the judiciary as an impartial and nonpolitical branch of government. Because it would be "unseemly" for judges to respond, however, as well as contrary to the Code of Judicial Conduct, Judge Friedman called upon the bar to assume the responsibility to defend them.

I cannot agree. Judges are responsible for their decisions, not the bar. And so judges should expect to bear a large part of the responsibility for dispelling the caustic effects of any criticism they provoke. One way of doing so would be to become more communicative.

The Supreme Court may be an exception, but if there ever was an era in which lower court judges could rely upon the majesty of the office and the aura of omniscience to inspire confidence in their decisions, that age is long past. People expect other public officials to earn their respect in part by displaying a willingness to answer good-faith questions about actions taken and decisions reached. Judges should be no exception.

I know of no good reason why a judge who has made a decision, in a case of obvious interest and concern to many people, should not at least be willing, if not expected, to respond to legitimate inquiries about it from responsible interlocutors, whether they are lawyers, academics, students, journalists, historians, or the local garden club.

I am certainly not advocating that judges should issue press releases or hold regular press conferences, or even be readily available for public comment. There are, of course,

eminently good reasons for judges to be circumspect as a rule. Judges should generally not offer post hoc defenses of decisions they have made if they truly believe they have sufficiently explained them on the official record. The record may, indeed, "speak for itself." For another thing, a garrulous judge is likely to be seen as self-promotional. For yet another, there are those in the media all too willing to exploit judicial loquacity to their own ends, which may be anything but the public's interest in understanding a controversial case.

MORE-SENSIBLE RULES

Moreover, judges should never speak publicly in or out of court until the timing is appropriate. In jury cases judges should obviously not speak out when, or in such a fashion, as may unduly influence a jury in its work. In nonjury cases, a judge's premature expression of an opinion on the merits may signify a mind closed before all of the evidence is in. Appellate judges should not disclose their thinking about a pending appeal until the collegial process of writing majority and minority opinions is completed.

And I add another proscription: as a rule, judges should not speak ill of other judges personally, whether on or off the bench. Personal attacks on judges by other judges also undermine respect for and confidence in the judiciary.

Thomas Penfield Jackson is a senior judge on the U.S. District Court for the District of Columbia. He presided over the trial in United States v. Microsoft in *1999 and 2000. On appeal, the D.C. Circuit removed him from the case because he had commented on the dispute outside the courtroom.*