

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

Sixth Interview 16 April 2008

This is the sixth interview of the Oral History of Judge Henry H. Kennedy, Jr. as part of the Oral History Project of The Historical Society of the District of Columbia Circuit. The Interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Wednesday, April 16, 2008.

Mr. Granof: We have talked a lot about the Superior Court, but the one topic that I reserved for last is a case I know that you think -- and from what I read, I think too -- was highly significant, which is the *Porter* case dealing with DNA evidence. It's a fascinating case because it really indicates the breadth of knowledge and experience judges have to have -- the analytical ability. Perhaps it says something about how judges go about their work and that they really are something more than just an umpire or somebody just applying the law to the facts. So I'd like you to talk about that case and describe how you came to decide it and what it's about.

Judge Kennedy: Well, for me the *Porter* case was a -- I'll use the word "defining," although that might not be the correct characterization -- but it was certainly one of the defining cases in my judicial career. Defining in the sense that I found it very challenging. The issues were very important, and it called upon me to really stretch when it came to determining what the law is and how to apply it. The *Porter* case was a criminal case in which the defendant, Mr. Porter, was charged with raping the sister of his girlfriend. Obviously, rape is a serious charge, and an important piece of evidence which the prosecution intended to present during its prosecution

of the case was a new type of evidence at the time. It was called DNA evidence. DNA stands for deoxyribonucleic acid. And this was a forensic technique that actually originated in England and was the subject of a book by -- I've forgotten the very famous writer who wrote this book -- but the name of the book was *The Blooding*. In any event, in the District of Columbia we apply the *Frye* rule when determining whether to accept into evidence a new scientific method or new scientific evidence. And the rule basically says that the court should admit into evidence this new forensic evidence if there is a consensus among the scientific community that such evidence is reliable.

Mr. Granof: And that's opposed to having the individual trier or decider, the judge, make a decision that it is or isn't reliable?

Judge Kennedy: That's correct. Now the *Frye* rule, by the way, has been since overturned or has been superseded by a Federal Rule of Evidence that has been the subject of much writing that requires the judge to be much more of a gatekeeper in determining whether such evidence is admissible. I've forgotten the name of the case.

Mr. Granof: Is that *Daubert*?

Judge Kennedy: *Daubert v. Merrell Dow*, which is the rule in federal courts. But even now in the Superior Court, as it was then, it is the *Frye* rule that provided the appropriate standard. The problem with applying that standard is that it was very, very broad. I mean "consensus." What does consensus mean? Clearly it doesn't mean every scientist has to agree. What is the relevant

scientific community, particularly when the rule is applied to DNA evidence that draws upon disciplines in several scientific communities -- population genetics, human genetics, biochemistry, biology. And also a very important part of the evidence has to do with mathematical probability theory. So I had the good fortune of having all of the cases that were in the Superior Court in which there was an attempt by the government to introduce this evidence. They were consolidated, and I made the decision.

Mr. Granof: And how did that come to be that you got to be chosen for this?

Judge Kennedy: I think what happened was that in the Superior Court judges are assigned to the various divisions for a period of time. And, as I recall, what happened was I took over a calendar that had been presided over by Judge Willie King. And his time in that division was just up. It had been on his calendar, and it just came to me. I inherited it. It was a natural inheritance of the case. But I recall that in order to make that decision as to whether or not there was a consensus in the scientific community, I first had to learn about the evidence. I remember I held a month-long hearing during which I heard experts called by both the defense and the government testifying about the different aspects of this evidence. I ended up writing a very lengthy opinion.

Mr. Granof: Of more than 100 pages?

Judge Kennedy: It was more than 100 pages. There were basically two questions. The first was whether the technique of comparing parts of the DNA from a

sample with the known DNA of the suspected perpetrator of the crime was a reliable way of determining whether there was, indeed, a match. And by the way, terminology became very, very important because match did not mean the same; it meant something else that right now I really can't even explain. But it had to do with the length of DNA fragments, and how much they varied. If the length didn't vary but so much -- and this was before the human genome had been actually sequenced -- then it was determined that there was a match. But if there was a variance of a certain amount, then there was no match. So one question was about the technique in determining whether there was a "match." I found that, in fact, there was a consensus in the scientific community that this was a proper way of making this determination.

Mr. Granof: Now, one of the interesting things about your opinion in *Porter* is that it reads like a biology textbook, but it's broader than that. There's an awful lot of pure science described at a fairly complicated and sophisticated level.

Judge Kennedy: Yes.

Mr. Granof: I think you once told me that you didn't have a scientific background. So how does a judge deal with these questions and come out with an opinion which could be put in as part of a college textbook?

Judge Kennedy: It required an extraordinary amount of work. It involved reading an extraordinary amount of material. As I indicated, I had this hearing that took a month, where day in and day out I actually heard scientists from the

witness stand, under oath, sitting right next to me, explain probability theory. Explain the theory of population genetics and human genetics that was applicable. So I heard these explanations. Frankly, we had excellent lawyers on both sides.

Mr. Granof: I was going to ask you about that. You must have had very competent counsel.

Judge Kennedy: We had excellent lawyers. The lawyers for the government were Pat Riley, an Assistant U.S. Attorney, and Wanda Bryant. And for the defense we had Ronald Goodbread and Frances D'Antuono. Ronald Goodbread has just retired as a magistrate judge in the Superior Court. After this case he was appointed a magistrate judge. Did a very fine job, and he just retired, and now works for the *Daily Washington Law Reporter* and actually summarizes the cases that appear there. But my methodology in the *Porter* case was to, every day, come in and listen just as intently and as focused as I could. By the way, it was just me. I had one law clerk, but frankly the law clerk was charged with doing other things. So I was there listening. And then at night going through, just reading, reading, reading the many, many articles that the experts were referring to -- the studies. And it was just, as I said, quite challenging. That's why I consider it one of my defining cases because I did not have to do that with other cases, and generally don't. But that one required it. So, I finally decided that, with respect to one element of this evidence, whether there was a reliable method of determining when two samples of

DNA, or a sample of DNA was compared with the DNA of the suspect, whether there was a match. And I hasten again to add -- and I'll explain why later -- why "match" did not mean the same. There was some significance to that. And I decided that with respect to the other aspect of this evidence, which was to describe to the jury the significance of this "match," that that was not the subject of consensus in the scientific community. Because what would happen would be, if there was a match, the forensic scientist would say, The chances of our making a mistake and that there was a coincidental match, which is to say that while it appears that there was a match but there really wasn't, was 1 in 1 billion. And you would have statistics like that. And I determined, after hearing all of these expert witnesses and after reading, that that did not find consensus in the scientific community. Well, I wrote this long opinion, it was over a hundred pages, that went up to the D.C. Court of Appeals.

Mr. Granof: After you wrote this opinion did anybody review it? I mean, other than the court of appeals. Did you submit it to the lawyers in advance?

Judge Kennedy: No. No I did not. I did not have it reviewed. Actually, I had a law clerk, Julie Adler is her name, and she wrote a very small part of it. Because part of the opinion was to review what other judges have found in cases involving DNA evidence. Again, this was a new technique, but there had been other cases. And her assignment was to summarize what other judges had found. The other parts of it I wrote. So, other than having her review her section -- and I think she did go over my section -- the only

other person that I asked to look at it was Judge Harriett Taylor. Harriett Taylor was my best friend on the court. A wonderful, wonderful, wonderful judge. She is now deceased. But her chambers were right across from mine, and we were fast friends and we both had a love of language that was very evident. And she read it over, and then I published it.

Mr. Granof: And it really is a remarkable piece of work because it is so detailed and it has so much science in it.

Judge Kennedy: Yes. Which is really very ironic because I may have mentioned that when I went to Princeton I initially thought about being a doctor. But I took some of the courses at Princeton and my performance on the science courses suggested to me that my talents lay elsewhere.

Mr. Granof: So the opinion does validate, I suppose, the value of a good liberal arts education?

Judge Kennedy: It really does. And I now will pay tribute to Professor Corngold at Princeton. I don't know if I've mentioned him, but Professor Corngold headed the precept for a course that I took at Princeton; it was Modern European Literature 141. And I'll never forget my very first paper that I turned in at Princeton. I did not do well. At the time Princeton had this grading scale of 1 to 7. One received a 7 if one did not come to class. Six was really failing. Five was failing as well, but not as bad as 6 and 7. I remember getting a 4-minus on that paper, a 4-minus. And I remember being absolutely distraught. Maybe that's an overstatement. I wasn't

distraught, but I was very disappointed. I had done well in my high school, and I was used to getting A's to tell you the truth. And I remember talking to Professor Corngold, and I'll never forget him looking me in the eye and saying, "Mr. Kennedy, your problem is that you don't know how to write." And I felt like saying, "You want to be more direct?" But he said something and did something which I will always be appreciative of; he said, "But you know, I think I can help you." And so for about six weeks after that, after the regular class, I would stop off at Professor Corngold's office and one-on-one he tutored me in the craft, the art of writing. And I must say I think I learned well, and right now to this day I take a lot of pride in my writing and don't back off from it at all. So that 103 page opinion, I think, reflects some of the tutoring of Professor Corngold.

Mr. Granof: Since you mentioned the craft of writing, do you find that you can just sit down and write something, or do you find that it's when you start writing it really is the start of analysis and thought. That is, it makes you think through the problem and the solution and where you're going, and sometimes when you have something and you think it in your mind, then you set it down on paper and you say, "Well, this isn't working."

Judge Kennedy: What you have just said is absolutely true. I tell my law clerks all the time that writing -- you know, the work of writing -- can be very demanding because it does force you to write a topic sentence, and that's what good writing is all about. You first establish the context for what is to follow,

therefore you have to actually think about, Well, what is the big picture here? Because that is what is required. I don't know about you, but if you get a piece of writing and there's just a lot of detail, I mean there's just detail after detail after detail, without there being this topic sentence, you can't digest it. You can't understand it. Therefore, the writing requires you to first put things in context and then every sentence has to follow, relate to the context, and be the stepping-stone for what's to follow. And so you're absolutely right. And there is a real art, there's a real science, if you will, there's a real discipline that one must have in manipulating language on paper and put it to the task of expressing what's in your head. And that is not so easy. I'm always asked, "Do you like to write?" Now I don't always answer every question that's asked of me, but when I forthrightly answer these questions -- and I don't ever lie, but sometimes I don't choose to answer -- I say, "No, I don't like to write." I mean I like to do a lot of things. I like to play tennis. I like good food. I like spending time with my wife. I don't like to write, but I love to have written. And I'm going to tell you what that signifies is that the actual getting what's up here -- and I'm pointing to my head -- down there in a way that is calculated, at best, for the reader to understand what was up here in my head and now is on paper is an arduous task. Now, my brother loves to write. Mark Twain, I suppose, loved to write. But for me I don't love to do something so arduous, but I love to have done it well.

Mr. Granof:

It's reading it at the end?

Judge Kennedy: It's reading it at the end.

Mr. Granof: After you've got it down?

Judge Kennedy: Yes.

Mr. Granof: And say, "I finally got what I want."

Judge Kennedy: Yes, that's exactly right.

Mr. Granof: I think you indicated they were a series of consolidated cases. These cases were before other judges?

Judge Kennedy: That's right.

Mr. Granof: And they basically assigned them all to you?

Judge Kennedy: That's correct.

Mr. Granof: So the case ultimately got up to the D.C. Court of Appeals?

Judge Kennedy: It did get up to the D.C. Court of Appeals and something very interesting happened. I have never been affirmed with respect to every factual finding and legal finding, but nevertheless been reversed. Although that's not really what happened.

Mr. Granof: Well no, because there was an intervening event that you had, in fact, anticipated.

Judge Kennedy: That's correct. That's right. What happened was that the introduction of DNA evidence became so controversial, and I mean it was really very powerful evidence. In some states, you know, people had been sentenced to death basically on the basis of DNA evidence. The National Academy of Sciences was asked to take a look at this. Actually, when I was writing my opinion I knew that this was going on. And I did, as you point out,

refer in my opinion to the fact that the National Academy of Sciences was looking at this issue, and I did allude to it. And there was this intervening study that was done, and the court of appeals said that there is reason to believe that given the findings of the National Academy of Sciences -- how the National Academy of Sciences expresses the significance of the match and determining how it is to be done -- perhaps it can be said that there is now a meeting of the *Frye* test. And it was remanded to me to make this determination. And that remand continued my odyssey in this area, because what happened is that I held additional hearings. The first time I held a hearing, the hearing was about a week long in which I heard from scientists and mathematicians. I ended up writing an opinion, but the defendants reminded me that I had suggested that I would have even more hearings before finally coming to a conclusion. And I ended up basically withdrawing that first opinion. I was just very dissatisfied with the testimony from all of these experts. These experts -- on both sides -- were absolutely well credentialed, had excellent reputations in the field, and I was hearing different things from different people. And even when something was said that was a slight -- how to say -- spin on the information, that left me really uncomfortable as to what the decision should be. And in order to kind of resolve this thing to my satisfaction, I decided that I would call upon a man by the name of Dr. Eric Lander, who is the head of the Whitehead Institute in Cambridge, Massachusetts. He was a biochemist, I believe. His name came to my attention because I

read in a periodical some words by Dr. James Watson. Dr. James Watson and Francis Crick won the Nobel Prize for discovering the helical structure of the DNA molecule. And Dr. James Watson said that Dr. Eric Lander was a person who knew more about this than anybody else in the world. Oh, I've just remembered where I read this. It wasn't in any periodical, it was in *Parade Magazine*.

Mr. Granof: I think you refer to it in your opinion.

Judge Kennedy: It was in *Parade Magazine*. And, yes, the topic of the magazine was "Who Are the Smartest People In the World?" One of the people who was asked about that was Dr. James Watson, who had won the Nobel Prize. And he had said, "Well, in my view, Eric Lander is the smartest person in the world because he knows more about this very complicated science of DNA than anybody else in the world." I noticed in the article that Dr. Eric Lander was a graduate of Princeton University. I also noticed that he was a Rhodes Scholar. By the way, Princeton University's informal motto is "Princeton in the Nation's service and in the service of all Nations." I was talking to my brother -- I think I mentioned that I'm very close to my brother -- about this. And my brother says, "Oh, I know Eric Lander." My brother was a Rhodes Scholar and he says that he really is as bright as Dr. James Watson says. He's a wonderful guy. So I got the idea to have Eric Lander be the court's witness to help me basically understand the nuances of the differences between the scientists called by the government and the scientists called by the defense.

Mr. Granof: I guess I'm a little puzzled because you had this report from the National Academy of Sciences. Could you have rested on that and just said, "Well, there's a consensus. The National Academy says that."

Judge Kennedy: I could have.

Mr. Granof: But you elected instead to really go ahead and make your own investigation?

Judge Kennedy: Yes. I don't really remember why it was, what my thinking was back then, but I concluded that I had to do more. And so I called up Eric Lander and he tried mightily to not have to do this. Obviously I couldn't pay him. We didn't have any money to pay him. This man goes around the world giving speeches at scientific conferences all the time. He's a very busy scientist. And he told me, "Judge Kennedy, I'm sorry. I would love to help you, but I just can't do it." And then I just mentioned how I too went to Princeton and started calling on school ties. And I said, "You know, if it's a matter of time, what I'm asking of you for this very important matter, is two hours." I said, "Can you give me two hours?" And he says, "Well, you know, just to get down to Washington." I said, "What if we came to you?" He said, "What?" I said, "What if we came to you." Well, to make a long story short, I convened court in the Suffolk County courthouse in Boston, Massachusetts, and we all went up to Massachusetts, except the defendant, and I established some ground rules about how much time Dr. Lander would be questioned. I decided that I had complete discretion about how to do this, and so I did the initial

questioning, and asked the questions in the manner in which I thought was best calculated to get the answers that I needed. You know you can ask a question all kinds of ways, and frankly I was tired of hearing the lawyers framing questions in a way that was calculated to get an answer that is supportive of their view with respect to this nuanced issue.

Mr. Granof: Which is, of course, what lawyers do.

Judge Kennedy: What lawyers do. I mean, absolutely. I don't blame them for it, but I decided that I had to do it, and so that's what we did. And sure enough I asked the questions. Then the lawyers asked the questions. I ended up writing the second -- I guess this would be the third -- opinion in which I ended up admitting the evidence and, very importantly, indicated exactly how the evidence could be presented to the jury in terms of the probability theories. There are some other interesting things. A fellow by the name of Bruce Budowle -- perhaps I'm mispronouncing his last name -- was head of the FBI's laboratory, which was the premier crime laboratory in the country if not the world, that was in favor of the introduction of this evidence. Dr. Budowle had established the protocol for deciding matches and probability theories, and what not. Budowle, himself, came up for this hearing to listen in while Dr. Lander testified. After the hearing they had lunch together, and it was from that lunch that Dr. Budowle and Eric Lander ended up co-writing an article that appeared in *Nature* magazine. It was either *Nature* or *Science* magazine. These were two of the preeminent peer reviewed scientific journals in the world. There are

probably more, but *Nature* and *Science* are two. I know I read about 40 articles in these two journals in coming to my decision that put this whole issue to rest. So that was one of the outcomes.

Another interesting thing is that I held a hearing in Boston shortly before the O.J. Simpson trial, and I remember getting a couple of calls from Lance Ito, who was the presiding judge of the O.J. Simpson trial, who wanted to know when I was going to issue my opinion because O.J. Simpson had filed a motion to exclude the DNA evidence that the government was going to introduce in its prosecution against him. You know, of course, he was charged with murdering his ex-wife, perhaps his wife, and Ron Goldman. And, indeed, that motion was based, I understand, on my first opinion. Lance Ito got wind that I was about to issue this follow-up opinion, and he wanted to know what was going to happen. So I got a couple of calls from Judge Ito, and I ended up issuing my opinion. And, if you recall, O.J. Simpson, after I issued my opinion, withdrew his motion to suppress the identification and the forensic evidence and attacked it from a different point of view.

Mr. Granof: That the collection was improper?

Judge Kennedy: The collection was improper and all of that. So, yes indeed, the *Porter* case was a most interesting case.

Mr. Granof: And it went up on appeal.

Judge Kennedy: Yes. On appeal it was affirmed in every respect.

Mr. Granof: So that really is just a fascinating case of the kind of work judges do, and the fair amount of judicial creativity involved in getting expert advice -- the best, probably, that was available.

Judge Kennedy: Yes. Well, as I said, it was a most challenging case. I'm frankly very pleased with the way I handled it.

Mr. Granof: Now, at some point, I guess around 1997 or 1996, there was a Democratic president and Republican Congress, and you're being considered for the federal bench. How did that come about?

Judge Kennedy: I guess that the best way to explain this, you know traditionally when there were vacancies on the United States District Courts the senior senator from the state in which the vacancy occurred would make a recommendation to the president of the United States and that was very, very influential in determining how vacancies would be filled. As you know, the District of Columbia does not have voting representation in Congress, doesn't have a senator. However, I think Jimmy Carter was the first president to accord the District's nonvoting delegate what is called senatorial courtesy. Our nonvoting delegate was then, and still is, Eleanor Holmes Norton. President Clinton also followed that practice. Eleanor Holmes Norton did something which actually other senators were starting to do, and that is instead of treating this like a personal perk to make a recommendation to the president for judicial office, she established what is called a Judicial Nominating Commission comprised of lawyers and some lay people who would basically interview and consider people to

recommend to her. She would receive three recommendations, and from that number she would recommend some person to President Clinton.

Well, that's what happened.

Mr. Granof: Do you have to apply?

Judge Kennedy: You have to apply. There were very specific requirements for the application, and I applied. The process also involved my being interviewed by this Commission. The Commission recommended me for consideration by her. I understand there were two other people who were also recommended. I don't know who they were. I was then interviewed by Eleanor Holmes Norton. I'll never forget, by the way, that Eleanor Holmes Norton's chief of staff was Donna Brazile. I remember going up to her office, being met by Donna Brazile, and told to have a seat. Then I had a conversation with Delegate Eleanor Holmes Norton. I don't know how long afterwards that I learned that I had been recommended to the president.

Mr. Granof: What made you decide that you wanted to be a federal judge? I mean, I can think of a lot of reasons, but I'm just curious what was in your mind.

Judge Kennedy: I had been a judge on the Superior Court for 17 years. I certainly had enjoyed it; I really did. But this offered an opportunity to do something else, something different in the same field in which I was very comfortable. I think that I appreciated that some of the decisions that are made in this court have wider effect than the decisions that are made in the

Superior Court. Frankly, I knew that the work here was very challenging, and I wanted to undertake that challenging work. I think that's the reason.

Mr. Granof: Do you recall anything about the interview with Representative Norton? I mean, what was she interested in? What's the sort of questions that you recall?

Judge Kennedy: I don't recall specifically any question that anyone asked me except one, and I don't remember the context in which this question came up. But my wife and I, at one time, had hired a person to care for our child whose immigration status was not such that she should have been able to work for us. I don't think she had a green card. She had applied for a green card, but she didn't have a green card when she worked for us. You might remember back then there were people being considered for judicial office who had hired improperly documented or nondocumented workers, and who for that reason were not selected for judicial office. Zoey Baird, for instance.

Mr. Granof: Yes, she was the Attorney General nominee, and she got in trouble because she not only hired an undocumented person, but also didn't pay social security. That really did her in.

Judge Kennedy: My wife and I, by the way, always paid the social security taxes. Chuck Ruff -- Charles F.C. Ruff -- who was the United States Attorney and a very fine lawyer was being considered for a position, and I remember he had a household worker whose papers were not as they should have been.

Mr. Granof: I don't believe that at that time there was any obligation to check on the immigration status of the people you hired for domestic work.

Judge Kennedy: That's right. And there was another woman judge in New York who also had a problem.

Mr. Granof: I know who you mean. Kimba Wood?

Judge Kennedy: Judge Kimba Wood. And then, during my interview, in some way this issue came up. I recall explaining what happened. And I recall that one of the nonlawyer members of the Commission could not understand why this was an issue, why the Commission was asking me about this, or why I was explaining about this. They couldn't understand why it was that I had someone working for me -- for me and my wife -- who had not received her green card, what that had to do with my qualifications and integrity to fill judicial office. But I remember trying to explain what the issue was. And I must tell you at the every end of this explanation, that Commission member looked at me and evidenced that she still didn't get it. But that was the only specific thing that I remember. I presume that I was asked questions about why it is that I wanted to do what I was doing, and so on.

Mr. Granof: Judicial philosophy?

Judge Kennedy: Judicial philosophy and subjects like that.

Mr. Granof: Of course, you had a pretty good track record.

Judge Kennedy: I did have a track record. I just recall having a very pleasant conversation with Eleanor Holmes Norton, but I don't recall anything that she said. I will tell you something that happened that was absolutely heartwarming to

me. And, of course, I was very, very pleased to finally be recommended by her to the president and to finally be appointed. But the day after the interview, I received a call from Donna Brazile. I don't think that she would mind my revealing this. She said, "I hope you get the recommendation. I just want to let you know that I really very much enjoyed the very short time that we talked."

Mr. Granof: That was nice of her.

Judge Kennedy: It was very nice of her. When I had arrived for my interview with Delegate Norton, she couldn't see me right away so there was this 10 minute period when I just talked with Donna Brazile, who, as I said, was Ms. Norton's chief of staff. And the conversation went, "How are you doing?" and then, "Where do you come from?" And I said, "I come from D.C., but I was born in South Carolina." And I said, "Where do you come from?" And she said, "Oh, I was born in Louisiana." And I said, "I love Louisiana. My father was born in Louisiana." She then asked, "Where was your father born?" I responded that, "He was born in Chamberlain, but he actually was reared by some aunts in two places, Baton Rouge and Port Allen. And then his father basically took him away from his mother's sisters and raised him in New Orleans." And then she just started talking about her life in Louisiana. We just had a very warm conversation. I don't know if you've ever met Donna Brazile, but she is just very, very charming and smart. So I was very gratified when the next day she said, "I don't know what's going to happen, but I just want to let

you know that I enjoyed our conversation and, I'll tell you, I'm certainly pulling for you." And since Delegate Norton did recommend me, and I was finally nominated and confirmed, of course everything turned out beautifully.

Mr. Granof: What was the confirmation process like? You had to get through the Senate Judiciary Committee, and was that headed by Senator Hatch at that point?

Judge Kennedy: It was. Senator Hatch was the chair of the committee, and I'm trying to now remember who was the ranking member of the committee. I believe it may have been Senator Kennedy. But, before we get to that, there were some interesting things that happened because I was recommended by Delegate Norton to President Clinton, and back then that was pretty much seen as tantamount to the nomination. As it turns out, the president didn't nominate me immediately. I never talked to the president, but I am told by people on his staff it was because he was about to run for reelection for his second term. This was just before the '96 election. I was recommended by Delegate Norton long before that, I think sometime in 1994 or 1995. Senator Dole ran against Bill Clinton in 1996. And Senator Dole, when he announced on the floor of the Senate that he would be running for president, indicated that his campaign would raise the issue of the appointment of judges who were soft on crime. Well, sometime before then I had been the subject of a complaint stemming from my sentencing of a young man who had killed a baby.

Mr. Granof: I think you had mentioned that in some detail in our last interview and what a difficult case it was.

Judge Kennedy: Yes. It was a very difficult case. But, in any event, I was the subject of a complaint by the Washington Legal Foundation and others, and I will never forget the call that I received from the president's office telling me that the president was not going to immediately nominate me for this position given the political climate. I was told that the president certainly had every expectation of winning the 1996 election, and that when he did so he would then appoint me. But he simply did not want to have this controversy from nominating me, a judge who was the subject of a complaint for being soft on a baby killer. And so that recommendation languished for a substantial period of time before I was nominated. Now as it turns out -- it's really interesting how things work out -- after I was nominated, and after I got a hearing, everything went very, very smoothly. But I felt the need to get the support of at least one senator who would kind of break the logjam. Back then, as there is now, there was a lot of politics being played regarding who would get a hearing and who would not. And after I was nominated by the president, no hearings were being scheduled. So, rather than gnashing my teeth about it, I thought about what I might do. And what I did was I had my family members from South Carolina, where I was born, contact none other than Senator Strom Thurmond. I don't know if you know anything about Senator Strom Thurmond, but one thing you might know is that he was a master

politician. And constituent services is something that he prided himself on. So I had family members, living in South Carolina, and they wrote a letter to Senator Thurmond saying, essentially, "Dear Senator Thurmond. We certainly hope that you will use your good offices in seeing to it that our dear cousin, Judge Henry Kennedy, a very experienced judge who has distinguished himself on the Superior Court, we hope that you will assist him in finally being confirmed for the position of United States district judge." One of my cousins had been determined that year to be the South Carolina physician of the year. Another of the cousins had been the South Carolina educator of the year two years before that. Well, Senator Thurmond got that letter, and I don't know what happened. I can't say that he was responsible for my getting the hearing, but I'll tell you this. There was always a question as to who would actually be my out-front backer. Certainly, Delegate Norton was going to make an appearance. And there was discussion about, perhaps, Senator Leahy making an appearance and saying some things on my behalf because he was a Democrat. And, of course, there was Senator Kennedy. Well, as it ended up, it was Senator Strom Thurmond who actually introduced me to the Senate Judiciary Committee that at one time he had chaired. He introduced me and said some very nice things about me. And I will never forget Senator Hatch saying after Senator Thurmond introduced me, "You know, Judge Kennedy, with an introduction like that from our

esteemed former chair of this committee, Senator Thurmond, one would say that you are virtually assured of being confirmed.”

Mr. Granof: That’s a fascinating story. Were you working with White House political operatives?

Judge Kennedy: Yes. And to this day, by the way, the White House political operatives at the time still marvel at what I did.

Mr. Granof: That’s what it took. You had your nomination because of what you did and because you just happened to have family members who were well known in South Carolina.

Judge Kennedy: Absolutely. It was, and is, in my view, crazy. Absolutely. That is not the way things should be. Absolutely not. And I would hope that we find some way to reform the system of confirming nominees for federal judicial office.

Mr. Granof: I’m sure that you had to fill out a lot of disclosure forms. Probably endless forms.

Judge Kennedy: Yes.

Mr. Granof: And submit every opinion you’ve ever written?

Judge Kennedy: Absolutely.

Mr. Granof: In addition, did you personally have to call on the members of the Judiciary Committee?

Judge Kennedy: No, that’s not something that I did, and it was not suggested that I do it. There is a division of the Department of Justice -- at least there was at the time -- that was headed by Eleanor Acheson. One of the responsibilities

of her office was to prepare the president's nominees to judicial office for their hearing and for the confirmation process. I understand that for nominees to the Supreme Court it is standard that the nominees actually meet with the senators at least on the Senate Judiciary Committee. But for me, at least, that was not recommended.

Mr. Granof: Did you meet with Senator Thurmond?

Judge Kennedy: I did meet with Senator Thurmond just before the hearing.

Mr. Granof: Now he must have been in his 90's.

Judge Kennedy: He was in his 90's. I'll never forget it. But we arranged to meet just before the hearing. And we did outside in the hallway. I didn't go to his office. We just decided to meet outside in the hallway. And it was a very brief conversation. It consisted of, "Well, good to meet you Judge Kennedy. I've now read about you, and I've heard a lot about you." You know he had a real deep southern drawl. And he said, "Very glad to support you." I must say I especially remember one thing he said: "Judge Kennedy, you have made an excellent name for yourself. I certainly hope that you never do anything to taint that name."

Mr. Granof: That's interesting.

Judge Kennedy: Let me make one more statement about this. I do remember that confirmation hearing, and I do remember a couple of things. One, I remember that Orrin Hatch was most gracious. He was a Republican chair and, frankly, during those times, particularly at that time, nothing that President Clinton was doing found immediate favor with many

Republicans. With me, Orrin Hatch was most gracious. I'll never forget his introducing himself to my wife and to my children. His questioning, I thought, was fair. Each one of those senators, except one, I thought were fair. They asked some tough questions about all the hot-button issues: affirmative action, the death penalty.

Mr. Granof: It was not a pro forma hearing by any means?

Judge Kennedy: Oh no. It was not a pro forma hearing. There were three other nominees who were sitting at the counsel table -- we had our hearing together -- but the questioning of us was very tough. Oh yes, indeed. They were asking some tough, tough questions.

Mr. Granof: For instance. What do you recall?

Judge Kennedy: What did I think about the death penalty for juveniles.

Mr. Granof: What did you say?

Judge Kennedy: I must tell you I don't remember what I said. I suspect that I thought about it and said, That's a really interesting question. I don't know how I would rule on such an issue. It really would depend upon the challenge and what was said. I would bring to that question the discipline that a judge brings to every hard question. Some of the questions, frankly, were not questions at all.

Mr. Granof: So, in essence, you evaded the question.

Judge Kennedy: Yes. But I had the sense that, again, all of the senators who were there -- I remember Torricelli, former senator from New Jersey was there; Jeff Sessions, senator from Alabama; Orrin Hatch; Diane Feinstein was there;

and I'm sure there were a couple other senators there as well. John Ashcroft was there, and I got the sense that he really didn't like me. But this is only an impression because eventually he voted for me both out of committee, and also on the floor of the Senate. Still, I got the sense that he would have voted against me if he could have. But I was certainly glad that there was really nothing that he could hang his hat on. He asked questions of me in a way that I did not perceive to be very polite. All the other senators asked questions by looking me in the eye and using a tone of voice that I consider to be respectful. I can't be specific in describing what it was about his questioning, but again my perception, my sense, was that it was not respectful. The way he sat.

Mr. Granof: Body language?

Judge Kennedy: Body language. And I'll always remember that. I always remember as well that he was the only senator that made me fill out a questionnaire after the hearing. And, in my view, the questions that were asked were not befitting. They were not questions that one would think a United States senator would ask.

Mr. Granof: Really? Why?

Judge Kennedy: He asked me things that in my view are just silly. Such as, "Who is your favorite Supreme Court judge?" That was one. Another was, "What one book or article you have read that most influences your judicial outlook?" I don't know how to characterize these questions other than I just don't think they were very apt. Who is my favorite Supreme Court

justice? Well, frankly, I don't have a favorite Supreme Court justice. Why, if I did, what would it matter if I had a favorite? I haven't met many Supreme Court justices, so I don't know who I think would be the friendliest. Favorite? Are you asking the question, "Which Supreme Court justice has articulated a jurisprudence that you most agreed with?" That's a question that I might think was appropriate. But, "Who is your favorite Supreme Court justice?" "What book or periodical have you read that has most influenced your judicial thinking?"

Mr. Granof: Did anybody vote against you?

Judge Kennedy: No. I was voted out unanimously from the committee, and a good friend of mine gave me the *Congressional Record* of the roll call vote in the Senate, and I got all votes of approval, except for several senators who were not there. I got yeas from everybody, including Ashcroft.

Mr. Granof: That must have made you feel pretty good, and made your family feel great.

Judge Kennedy: It did indeed. And it's so interesting that I did not know when the roll call vote would take place. I knew that I had been voted out unanimously by the committee, but I did not know when the full Senate vote would take place. One day I'm at the house -- it was one evening -- and I get a call from Jim Feeley, with whom I play tennis. "Hello, Henry." "Who is this?" "Jim Feeley." He says, "You're being voted on right now." I ran to the television so I could see them vote. So that's how I learned about this.

Mr. Granof: What did your brother think of all of this?

Judge Kennedy: Well my brother, you know, we are very, very close. And so he was very pleased at the outcome because he knew that I would be pleased at the outcome.

Mr. Granof: This is probably a good place to stop.

[This concludes Interview No. 6]