

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

Seventh Interview

21 May 2008

This is the seventh 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, May 21, 2008, at 2:00 p.m.

Mr. Granof: Well, Judge Kennedy I think the last time we talked you had been confirmed by the Senate and were sworn in as a federal district judge. According to your biographical sheet, you were confirmed by the Senate on September 4, 1997, and sworn in on September 18, 1997. But when you became a federal judge you had had something like almost 18 years of experience as a Superior Court judge. So, did the federal court immediately feel different?

Judge Kennedy: Yes it did, because judges who sit on the Superior Court -- which is where I served, as you indicated for about 18 years -- truly are trial judges in the most conventional and traditional sense of those words. Which is to say that the day-to-day existence of a Superior Court judge is spent on the bench trying cases. Indeed, on the Superior Court, the judges used to have competitions about who could actually try not only the most cases, but who could try the most cases at the same time. I recall at one time actually being in trial in three cases. One case I was, you know, selecting a jury; was also presiding over the deliberations of another sitting jury; and handling the pretrial motions in another trial. When I started work in federal court, it became immediately apparent to me that I would spend

far, far less time actually conducting jury trials, and that has been my experience since the time I have been here. That is, we actually have relatively few jury trials. So much of our work is done on paper -- deciding motions for summary judgment, motions to dismiss -- and doing far more writing of opinions than was the daily fare of the Superior Court judge.

Mr. Granof: And is that something that appeals to you more, or is it sort of a mixed bag?

Judge Kennedy: It really is a mixed bag. There are times when I have gone for long stretches of time -- I mean two, three, four months -- without trying a case, where I actually miss it because I liked trying cases. I enjoyed very much presiding over cases where there were advocates actually appearing before a jury. Certainly, in both civil and criminal cases that are in trial it required a really complete mastery of the rules of evidence, which I rather enjoyed doing -- not demonstrating the mastery, but getting the rulings on the various objections that might be raised during the course of a trial right. So, yes, there are times when I miss it, though I must tell you also that there were times when I was on the Superior Court when I was called upon to make rulings and I would have liked the opportunity to just do more thinking, more research, more thinking about the ruling. However, given the caseload over there, and the necessity of getting the job done, I did not take that time and would rule without doing as much research and thinking about the issue as I would have liked. You know, for the most

part, I can say there are things that I miss about the Superior Court, but I certainly enjoy my work here. I suppose the only other thing I would say is I guess I really do consider myself a real people person, and the Superior Court is really a people person court. Which is to say each and every day you would have litigants themselves, rather than their lawyers, appear before you and I rather like that.

Mr. Granof: I suppose from the trial judge's standpoint you look upon the appellate courts and you say, "Well, look at all the luxury of time that they have to think about the issue that I had two minutes to decide."

Judge Kennedy: Yes. Well, I don't know if I can speak for every trial judge, but I can certainly speak for some of them, and we kind of chuckle about just that. We appreciate, though, that that's exactly why we have a layered system of justice because that's exactly what the appellate judges are supposed to do. That is, with the benefit of having time to think about things and research these issues, they can tell us whether we are right or not. And I've never begrudged the court of appeals' judges their rightful place in our system, and that's fine.

Mr. Granof: I know that district judges, from time to time, are asked to sit by designation on the court of appeals. Have you had that opportunity?

Judge Kennedy: In this circuit I don't think that that is done very often. Certainly since the time that I have been here I don't know of any of us that have sat by designation on the U.S. Court of Appeals for the D.C. Circuit. I may be wrong, but I don't think that's the case. I do know that some of our senior

judges, Judge Oberdorfer in particular, has sat by designation, I suppose, on a circuit court other than the District of Columbia. So, since I have been a federal judge, I have not sat by designation on the court of appeals. When I was on the Superior Court I sat by designation on the D.C. Court of Appeals several times and enjoyed it.

Mr. Granof: It's a different experience?

Judge Kennedy: Yes. It's very much of a different experience. Of course, when judges sit on the appellate court their decision making is -- what should I say -- it's a collective decision making, collegial decision making I suppose is what you would call it. Very much different from a U.S. district judge who has to make the decision -- is expected to make the decision -- alone, without having to persuade someone else that your view is the correct view.

Mr. Granof: Since a lot of it is motion practice, summary judgments, do you have an opportunity to discuss the issues with your colleagues? And is that done?

Judge Kennedy: We certainly have the opportunity to do it. In my experience, it is rarely done. I mean sometimes the judges of our court will e-mail one another and ask about some issue that presents itself in a case that the judge is handling. But more often than not, the issue is not presented, particularly in a civil case, often. Much more often in a criminal case. And it might have to do with a sentencing issue, rather than an issue that arises in the context of deciding a motion to dismiss or a motion for summary judgment. That's been my experience.

Mr. Granof: Since each judge has his own chambers, how much opportunity is there -- I mean, not opportunity -- but, in fact, how much interchange is there? Do you see each other regularly? It would seem that the physical nature of it separates you, and so you really have to make an effort to get to see your colleagues.

Judge Kennedy: Yes. Well, first, we do see each other at least once a month because we have an administrative meeting that we call the Executive Session that is presided over by the Chief Judge. And the agenda at these executive sessions varies, but they take place once every month, except for sometimes in the summer. You know, the summer months we do not have them. But that is an opportunity for judges to get together, and we see each other and, of course, we address the things on the agenda. But frequently there is discussion about things that are not on the agenda. And so that's one opportunity that we have to get together. Also, many of us dine fairly often in the judges' dining room. There are some judges -- I'm not one of them -- but there are some judges who eat in the judges' dining room regularly, and that's a place where you will see your colleagues. But, as I indicated, I don't eat there regularly, and there are several other judges who do not go down regularly. And so, yes indeed, there are times when there will be weeks that will go by without your seeing any particular colleague.

Mr. Granof: It sounds in some ways like certainly a more lonely kind of a job. I know when I was in practice, you'd just walk into somebody's office and say, "I

have this problem,” you know, “let me bounce something off you.” But as a judge it’s much more difficult to do that.

Judge Kennedy: Well, I don’t know if its much more difficult to do it. I just don’t think that is what is often done, although I suspect that it has happened from time to time. It happens from time to time, but it just doesn’t happen, I would say, very often. We here on the United States District Court for the District of Columbia are often presented with extraordinarily difficult issues, issues that no one has ever considered before. But I think that when that comes about, we just do the hard work of what judges do, which is reading all the submissions of the parties. We all have law clerks. We rely on the law clerks to do some of the research -- actually most of the research -- on the issues. We talk with them. And then we arrive at our decision. That’s how I think most of us do it, though I suspect that there might be -- from time to time again -- one judge will stop in on another judge’s chamber and say, “Well listen, I do have this issue, you know, what do you think?”

Mr. Granof: So you have to essentially say, “It’s my job to reach a decision,” and you have to have a certain amount of, I guess, self-confidence to do that?

Judge Kennedy: Yes. You know, I think that you really hit it on the head. I must say that over the years, at least for me, I think that’s something that I developed. That is, regardless of how difficult the issue is, regardless of how momentous the decision will be, you take very seriously the proposition that it is your job, you have been invested with the power and the

authority to do that which needs to be done. And you simply do it. And that's that.

Mr. Granof: Well, when you reach a decision, do you have second thoughts or do you just move on?

Judge Kennedy: I generally don't have second thoughts, I generally move on. However, you know, in the law we have a mechanism for a litigant to ask the judge to reconsider. I get these motions from time to time, and for me, when I get these motions, I do take them seriously and don't out-of-hand assume that there's nothing to be reconsidered. I go about the business of taking a fresh look. Now, I think the record of what happens before me when there are motions for reconsideration, I suspect the vast majority of them are denied. However, I can tell you that there are times when I do reconsider. This question really triggers my memory of a case in which I reconsidered a matter last year. It was a criminal case. Fascinating case of a man who was charged with possessing a lot of drugs -- I won't be so specific or so detailed in describing the case -- but the man was seen outside of an apartment building engaging in what the police officer thought was a drug transaction. He was stopped and questioned by the police officer. The police officer had this suspicion that the man had engaged in a drug transaction, although nothing that was said by the man verified or confirmed this suspicion. So the police officer called for a dog, asked the man to come outside the door, outside the car. The man left the car door open. A police dog comes. The police dog circled the car and jumped

into the car and put his nose on the center console, behavior suggesting the presence of drugs. The police officer who was handling the police dog pulled the dog out and circled the car again. And the dog, again, jumped into the car, alerting to the presence of drugs that were, in fact, in the console. You have to understand that the law did not sanction the dog jumping into the car. The dog could sniff the outside of the car, and everything would have been just fine if the dog had alerted outside of the car that there were drugs inside of the car. The defendant made a motion to suppress the evidence. I ruled initially that the motion should be denied, basically saying that the dog's jumping into the car was kind of an instinctive act on the part of the dog, not police misconduct. I received a motion to reconsider. By the way, this motion really presented about five different issues. This was one of them. And the defense attorney asked me to reconsider on this one issue: did the police, having seen this initial jumping into the car, have a duty to restrain the dog from doing it again? I concluded that yes, indeed, the officer should have done so, and ended up suppressing the evidence. The U.S. Attorney's Office noted an appeal, but eventually decided not to appeal my ruling, I think because it was right. And by the way, each time I wrote an opinion. I wrote an opinion explaining why I initially denied the motion to suppress the evidence, and then I wrote an opinion explaining why I had reconsidered and had determined that the evidence should be suppressed.

Mr. Granof: I think you should send that up to Harvard Law School for an exam question.

Judge Kennedy: It was a very interesting issue. Again, and I have not explained, really, the nuances of the law with respect to dogs alerting, what they can and cannot do. So that was just a summary.

Mr. Granof: What percentage of your time would you say you spend on criminal matters and what percentage civil matters?

Judge Kennedy: Far, far, far more time spent on civil matters than criminal matters. I would say for me, and I think that I am pretty typical, certainly no more than 15 percent, maybe as generous as 20 percent. But certainly no more than 20 percent of my time is spent on criminal matters.

Mr. Granof: And I guess it's a little hard to compare with the Superior Court because the Superior Court depended on which division you were in?

Judge Kennedy: Exactly. You see we have a random assignment system here, so we all get our cases right off the wheel randomly. And our case is our case until it's been resolved. In Superior Court the judges are assigned to different divisions of the court for periods of six months to a year. Sometimes I think the assignments are for a year and a half.

Mr. Granof: Which brings up an interesting question. I know in some courts -- and I think in some federal district courts -- there's a motions judge that you go before, and then the case may ultimately be heard by an entirely different judge. What do you think of that practice?

Judge Kennedy: Which is what happens, by the way, in Superior Court. You might rule on a motion and the case is then tried by some other judge. I really am very firmly of the view that the more effective, more efficient -- the system that is better calculated to get it right -- is one where the judge has the case from beginning to end. That's my view. For example, with respect to discovery matters. And I must say many discovery matters I do send down to the magistrate judges. But magistrate judges, by the way, are just like the district judges. They tend to write a lot. So even with respect to discovery matters, I will get reports and recommendations from the magistrate judges, or their determination with respect to a discovery matter, and everything is set forth in writing. But that gives you a chance to really get to know the case. Really know the case. When you are on a motion for summary judgment, for example. Even if you deny it, oftentimes we will explain what the material facts are that are in dispute, so when time comes for the trial you really are very, very familiar with the real issues. Often it's the case that your evidentiary rulings are just better because you know what's really at issue versus what's not. So, I think that the system where the judge kind of handles the case from beginning to end is the better one.

Mr. Granof: As an attorney, I was always much more comfortable with that. I don't know whether other lawyers have expressed the same view to you or you've gotten any feedback on that from lawyers.

Judge Kennedy: No, I haven't. No.

Mr. Granof: Although you have far fewer jury trials than you did in Superior Court, how much time do you spend on the bench hearing arguments on motions?

Judge Kennedy: It just depends. I find it very difficult to give you even an average per week. And let me just say this, by the way. You know our criminal cases, we have very few criminal cases, but sometimes when we do have a criminal case it can be extraordinarily complex and take a very long time to try. I have tried two cases, while I've been a judge on this court, that took six months to try. Six months. So, for six months I was in court every day from basically 9:45, 10 o'clock until 5 o'clock.

Mr. Granof: Jury trials?

Judge Kennedy: It was a jury trial. Very, very challenging. Very, very challenging nationwide drug distribution case. Challenging in any number of respects, including choosing a jury. Now just think about that, trying to find people who will conscientiously listen and watch over some six months, and then do what jurors are expected to do. It was very challenging selecting that jury.

Mr. Granof: How do you get people to give up six months? I know you get letter carriers or postal workers that often can do that because they just get a substitute.

Judge Kennedy: Well, the jury selection for that trial took almost a month for the reasons that you indicate. You talk to each and every one of the jurors. Many, many of them say, "Well, listen, I just can't do it. I can't do it." And so

you actually explore whether they can't do it, or that they very much do not want to do it. And you express that desire in the formulation "can't." And that's exactly what I was required to do. And that's the challenge. Now there are certain people who have certain jobs, for example, a person who works in the government -- people who work for the government are paid while they are on jury duty. Frankly, I think that there are some people who work in government who like the idea of doing something different from what they are doing. Then there are citizens who work for large corporations. And I always want to know whether the corporation is a good corporate citizen and will pay an employee his or her salary while serving on jury duty. There are many corporations that will. Some as a matter of policy, some when I actually ask, "Well, ma'am you say that you can't serve on jury duty because you are the only source of income in your family. I understand that. Well, will your employer pay you?" "Well, I don't know." "Well, I tell you what. Why don't you go and ask? And I would ask you to explain that you have been summoned to jury service, that we need your service. And ask your employer." I was surprised. Sometimes the employer said, "Well, yes." A couple times I wrote letters, "Dear Mr. so and so. Ms. so and so here has been called off to jury service. I understand that she does such and such. She has explained to me what her situation is. I'm sure that you can appreciate that in this city, in this country, for the criminal justice system to work we need jurors who are willing to do this job properly."

Mr. Granof: And some of them paid?

Judge Kennedy: That's right. Exactly. But believe me it took a lot of time.

Mr. Granof: You had indicated that aside from jury selection there were other complicated issues. I don't know if you wanted to talk about the case in more detail because it sounds very interesting and the sort of things a federal judge gets to do on occasion.

Judge Kennedy: Well, this is a case in which there were a number of men and women charged with being involved in a conspiracy to transport cocaine that had originated in Columbia, South America, brought to Mexico, and then to Los Angeles. And the scheme involved using trucks that had been specially built to carry cocaine in the underbelly of the trucks. And these trucks had the logo of a business; it was a men's cosmetic business. And this group of people shipped the cocaine to Columbus, Ohio; Detroit, Michigan; Buffalo, New York; New York City; Washington, D.C.; Nashville, Tennessee. This conspiracy was uncovered when the FBI was actually wiretapping some local drug dealers and they learned about it.

Mr. Granof: In the District?

Judge Kennedy: In the District of Columbia. And that led to the investigation of this nationwide drug conspiracy. And the government decided -- and I think unfortunately they made the wrong decision -- to try the entire case here in the District of Columbia rather than breaking it up.

Mr. Granof: So you had a lot of defendants?

Judge Kennedy: It started off with about 20 defendants. Eventually, all but five pled guilty. First of all, the number of issues. I mean, all kinds of things.

Mr. Granof: Would it have been manageable to try the case with 20 defendants?

Judge Kennedy: No. As a matter of fact, pretty early on I indicated that I would not try a case with 20 defendants. Actually, I had said four at a time, but then after we got down to five I said, "Okay, I will do five."

Mr. Granof: Even five, it's tough to manage. You have five sets of attorneys.

Judge Kennedy: Five sets of attorneys. In this case, there were hours and hours and hours of tapes of conversations. There were all kinds of issues. First of all, the tapes, while they were pretty good, sometimes the taping wasn't quite what it should be and it was difficult to hear. And so there was a lot of discussion about whether or not the tapes could actually be played. The number of evidentiary issues having to do with, well, if one co-conspirator said one thing to somebody else could that statement be introduced at the trial? What hearsay objection applies? Again, because this is a conspiracy, because there were so many people, there were so many issues like that to have to decide.

Mr. Granof: Did you have to confront, "Well, you can introduce it for defendants A and B, but the jury cannot consider this to C, D, and E?"

Judge Kennedy: Yes, indeed. Those kinds of issues. Absolutely.

Mr. Granof: It must have been tough for the jury to keep that straight in a six-month trial.

Judge Kennedy: Oh, absolutely. You know, we had FBI agents in I don't know how many different jurisdictions. When could they come to testify? I mean these were working FBI agents, and having to try to coordinate their appearance before the jury.

Mr. Granof: So this is an interesting aspect of a federal district judge's job, which is management?

Judge Kennedy: That's right. That's one of the things that we do. We make the calls, but also a large part of what we do is just managing a system. Managing a system.

Mr. Granof: And managing cases?

Judge Kennedy: And managing cases.

Mr. Granof: Which is, I suppose, one reason for having a single judge hear a case starting with pretrial clear to the end?

Judge Kennedy: Yes. See, if you are in charge of the case from beginning to end you have a vested interest, of course, in getting it done. If you're dealing with just this aspect of it, "I'm going to make my decision here and, you know, somebody else can handle something else." There's something about the ownership of the case that, I think, is better for -- if it's the interest to be served -- just getting the case done. And, more and more, I have come to appreciate the truth of that adage, you know, "Justice delayed is justice denied." And I must say I'm not the best at this, that is, so far as efficiency is concerned, but I must say I'm always cognizant and sensitive to the desirability of getting a case decided. Getting a case decided,

because if a case hangs around so long, you know justice is not being done.

Mr. Granof: And I guess the Administrative Office of the U.S. Courts gets you on their bad list?

Judge Kennedy: That's right. Yes. I can tell you there's something called the CJRA list. CJRA are the acronyms for Civil Justice Reform Act. And the act requires federal judges, twice a year, to report those motions that have been pending for more than six months and cases that have been pending for more than three years. And every year, in the *Legal Times* or in some publication -- and, of course, this is all public -- the judges who are slowest are subject to some story. I tell my law clerks, "I don't want to be the subject of that story." Because I do not want to be the judge who is, you know, got more cases on that list than any other. And I haven't been, and I don't intend to be. And that said, by the same token, I would want the public to appreciate that to get this stuff done right takes time sometimes. And, again, we have cases that are just extraordinarily complex, and, you know, there are only so many hours in a day. We do have more than one case. Every litigant, I think, kind of believes that his case, or her case, is the only one that this judge should be concerned about. Well, we do take one case at a time, but the fact is we have many cases. And some of them present issues that are very, very complicated. And when they do, we have to take the time to try and get it right.

Mr. Granof: And in your docket now, how many cases are there?

Judge Kennedy: On my civil docket, I have about 222 cases. On the criminal docket, I have about 20.

Mr. Granof: So, it seems to me, managing 220 civil cases, even if some of them are in all different stages, that requires, again, getting back to what you said, that district judges have to have management skills.

Judge Kennedy: Oh, absolutely have to have management skills. And just consider this: this jurisdiction handles more FOIA cases -- Freedom of Information Act cases -- than any other U.S. District Court in the country by far. I have a case right now where the Electronic Privacy Information Center and the American Civil Liberties Union have sought records concerning the president's terrorist surveillance program. Well, I think any lawyer might appreciate how much paper is involved. How much paper is involved, and how the government says, "We should not be required to disclose these materials under these civil exemptions." You know, "To do so would jeopardize national security." "This paper should not be disclosed because it is protected by deliberative process privilege." "This one because of the attorney-client privilege." I have to decide this case. But I can't spend all my time on just this case as important as it might be.

Mr. Granof: You have 200-and-something other cases, and 20 criminal cases.

Judge Kennedy: Exactly.

Mr. Granof: I don't think the public has any conception of the workload involved. You know, being a judge, that's really nice. You know, sit on the bench, hear cases, hear lawyers, and make decisions.

Judge Kennedy: Yes, I think you're absolutely right. To me, an indication of that is the number of cases that are filed *pro se*, that is the citizens believing that they can represent themselves in a court of law and decide to proceed without even trying to hire a lawyer. And some people proceed *pro se* when they can hire a lawyer. But they really do think that they know what to do and know what is involved in litigating a case. And they don't.

Mr. Granof: Well, this seems to me to be every lawyer's nightmare is you have a case from a *pro se* litigant which seems to have some merit, and you're on the other side and you say, "Well, now I've got this judge -- the federal judge -- trying to figure out and be an advocate for the *pro se* litigant."

Judge Kennedy: Well, that's a challenge. Dealing with *pro se* litigants poses some real challenges for judges because every judge wants to do justice or have justice done and, therefore, have a matter resolved on its merits. But by the same token, there are rules that must be followed -- are supposed to be followed -- procedural rules that if they're not followed will result in a case being resolved not on the merits. But what do you do? I mean if we're anything, we're a system of laws. And that's what a rule is -- a rule of law -- so you can't excuse one's litigant not following the rules. Also, while it is a principle of law in this judicial district and this circuit that *pro se* litigants' pleadings should be viewed leniently, we can't be their lawyers. I mean, we're not supposed to be their lawyers. That's not right either. So it does pose a real challenge.

Mr. Granof: Sort of a balancing act?

Judge Kennedy: A real balancing act.

Mr. Granof: In Superior Court, even sitting in the civil side, you still handled domestic relations and landlord and tenant. But in terms of the complexity and the breadth of federal legislation that judges deal with -- and I guess state legislation too because you have pendent jurisdiction -- how does that --

Judge Kennedy: How does it compare?

Mr. Granof: Well, I'm sure that the federal court is just enormously broader, but I guess my question is, how do you deal with that tremendous breadth of very complex areas of the law, ranging from securities, labor legislation, etcetera?

Judge Kennedy: Well, you know, frankly that's one of the things that make this job worthy of trying to get.

Mr. Granof: The challenge?

Judge Kennedy: Yes, it really is. It's a wonderful, wonderful challenge. I think most of us like to be challenged, so that's just a part of the job. And I think that every one of us knew of this before we came on the bench and that complexity -- being called upon and required to become very knowledgeable about a huge number of things -- is attractive. As you know, I was an avid tennis player until I was sidelined by this wrist injury. Some people would kind of look at me like I was crazy when I talked about how much I loved tennis, competitive tennis. That I actually loved going on the tennis court, the hotter the better. I loved it when it was 94 degrees and at 80 percent humidity in the middle of the day, and I was

playing a worthy opponent. And after playing -- even having lost -- coming back and just feeling just tired, just tired, just whipped, and I would say to my wife and I would say to anyone who would care to ask, "Boy, that was great." And I meant that. It was absolutely great. Now I don't want to draw comparisons that really don't stand up, but to a certain extent there is a comparison to that. Yes, you get this case. It's a patent case for me. A patent case, wow, what are they talking about? Where you have to just figure it out. Well, that's what I'm supposed to do and, frankly, I like what I do, and so I do it.

Mr. Granof: I think I can understand because it's when you're confronted with a problem, and you first attack it and you really have no idea where to even look. But then at some point you go through the decisions and you really get a sense of what the law is.

Judge Kennedy: Right. Absolutely. It's really interesting that we should be having this conversation now. My daughter just finished her first year in law school, and she is now in the midst of the law review competition. She wrote me an e-mail telling me that, with respect to a certain issue, she had nothing to say, and she was just kind of discouraged. And I wrote her back and I said, "Just remember this, one of my favorite verses from a poem by T.S. Eliot." This verse comes to mind whenever I have one of these really hard, hard cases where it does not readily appear to me what the correct ruling is or how even to approach it. Well, the verse is from one of T.S. Eliot's poems, and it's this idea of one day at a time: "For us there is only

the trying. The rest is not our business.” One day at a time, one case at a time, one issue at a time. For me, there’s only the trying, doing the best that I can to understand, and then making the decision. The rest is not my business. And that’s a kind of guiding principle that I’ve had now for many years. It has served me well, and that’s what I do. I don’t care what kind of case it is, I don’t care how important a decision it is, whether it’s having something to do with the Freedom of Information Act or a request to the court to conduct a judicial inquiry stemming from a revelation that the CIA had destroyed the tapes of an interrogation of a terrorist. Do the best you can, and go on.

Mr. Granof: My sense is that the District of Columbia, the federal courts, have the reputation of handling or getting some of the most complicated and unusual cases because it’s the seat of government. I mean as opposed to, say, New York which handles commercial cases, financial, and that sort of thing. Do you think that’s true?

Judge Kennedy: Yes. I do. One of the things that we do is from time to time we go to judicial conferences and seminars, and we have an opportunity to talk with other judges about their concerns. From those conversations -- and also just getting the statistics -- I am able to discern that, yes indeed, this judicial district is a unique one in the sense that we do get very, very complex cases, often involving the federal government, that are brought here rather than in some of the other judicial districts.

Mr. Granof: For instance? The terrorist cases?

Judge Kennedy: The terrorist cases. Early on it was determined that it's the United States District Court for the District of Columbia that would handle the petitions for writs of habeas corpus filed by the prisoners who are detained in Guantanamo Bay, Cuba, and have been designated as enemy combatants by the Department of Defense. So, we have all of those cases. All of them.

Mr. Granof: Have you had any?

Judge Kennedy: Oh yes. I have about 14. Fourteen separate petitions, and some of those are petitions filed by more than one detainee. So, yes.

Mr. Granof: And other judges similarly have these petitions?

Judge Kennedy: Yes. Yes, they do.

Mr. Granof: And at what stage are they at now?

Judge Kennedy: It's really interesting that you should ask the question, "Well, what stage are they?" Depends upon who you talk to. The United States Court of Appeals for the District of Columbia Circuit has ruled in a case called *Boumediene* that the United States District Court does not have jurisdiction over the petitions as a consequence of the Congress passing the Military Commissions Act about a year and a half ago. That act was passed after the Supreme Court had made a ruling that the detainees did have access to the courts. That decision by the United States Court of Appeals, which said that this new congressional act wrested jurisdiction from the U.S. District Court, is now on appeal to the Supreme Court. So, as a matter of fact, I think that case has already been argued and we are all

waiting to see how the Supreme Court rules because if the decision of the U.S. Court of Appeals for the D.C. Circuit is affirmed, then we don't have jurisdiction and all these cases will go away. However, if that decision is reversed, then we will have jurisdiction.

Now, what many people don't appreciate is that while this legal wrangling is going on before the Supreme Court, there are these people down in Cuba -- many of them with lawyers -- who petition us for various things. For example, to actually see their clients. Now there is a protective order which kind of regulates this, but there are all these little disputes that crop up. One dispute that cropped up just recently was that the lawyers don't speak Arabic, they go down with interpreters. And the interpreters have to be given a background check. Well, what happens when a lawyer who doesn't speak Arabic goes down with an interpreter and for some reason that interpreter's authority to interpret is yanked by the Defense Department? Well, what happens is the lawyer calls the judge. So, the point is, yes, very interesting issues come before the judges here.

Mr. Granof: Well, what can the judge do in that scenario? I mean, he can't hire an interpreter.

Judge Kennedy: Exactly. Well, not much frankly. Not much, though you want to try to get a good sense as to whether or not everyone is being fair, and that there is a real good reason other than simply to harass the other side for the withdrawing of the credentials. So, that's about as much as you can do.

Mr. Granof: Let me ask a question about argument -- oral argument. I'm talking about, I guess, motions like summary judgment. I know that there are a lot of motions that you're not going to have argument on.

Judge Kennedy: Right.

Mr. Granof: Because they're?

Judge Kennedy: They're matters of law.

Mr. Granof: Or they are the kinds of procedural motions for extensions of time, or minor stuff?

Judge Kennedy: Exactly.

Mr. Granof: First, do you find oral argument helpful, and when do you decide to have it?

Judge Kennedy: I rarely have oral arguments on most motions. We're talking about civil cases here, because in criminal cases when there are motions to suppress evidence and various other motions, you almost always have oral argument. You have to. I mean, there's no question. There's oral argument that is coupled with the taking of evidence. In civil cases, on the other hand, the vast majority of motions that are filed are not ones where I will hold oral argument on. And I don't do it because, frankly, the lawyers' papers are clear enough. And there's really nothing that they can say that contributes to any kind of illumination of the issues. So on most motions to dismiss, most motions for summary judgment, I don't have oral argument. Now I must say that particularly, of late, on motions for summary judgment in Title VII cases, cases in which a person is claiming

discrimination, I am tending to hold oral arguments on those motions for summary judgment. Employment discrimination cases are kind of an interesting breed of case because the plaintiff, in order to get to court, has to jump through several procedural hoops. One hoop says that a person who believes that he has been discriminated against must complain within a certain amount of time. And then a person has to file a case in court within a certain amount of time of having the EEOC resolve the matter or not. Now, if the motion for summary judgment is grounded on the proposition that the procedural hoop has not been jumped through, there's no reason to hold oral argument on that. However, often the issue comes down to this. "I was not promoted. I've been a GS-12 for however many years. I always received satisfactory performance evaluations. This position came up, and I -- let's say I'm a woman -- I applied for it. A male person was hired who had much less experience than me." The defendant says, "Well, listen, we didn't discriminate. We didn't hire her because --" and there are any number of benign explanations that are given. Well, it is the plaintiff's burden to show that this benign explanation that's given is a pretext for the real reason, which is, you know, considerations of gender in the scenario that I have just described. I am finding that to have the lawyers come in and to argue the case, and sometimes really point to matters of record that I otherwise might not have read quite the way the lawyers want me to view it, I find that that's helpful. So, to answer your question, for many, many civil motions I

don't have hearings. I'm finding that I'm having hearings on motions for summary judgment in discrimination cases now more and more.

Mr. Granof: Because you find it helpful?

Judge Kennedy: Absolutely. Because I find it helpful.

Mr. Granof: I know some judges have had a practice of writing, what they call, a tentative decision. And they call the parties in and sometimes they actually post the decision, and other times they say, "Well, this is the way I'm going to rule. Do you have anything to persuade me to the contrary?" Have you considered that?

Judge Kennedy: You know, actually I have heard of that. But, no, I haven't considered it to this point. So the answer is no. But what an interesting way of doing things. I'd be very interested to know if any of my other colleagues do it. One of the things that I have learned over the years is that from district to district, state to state, the legal culture is very much different. But I don't think that writing the tentative decision and giving the lawyers a chance to persuade you to a different decision is one that is done here. I suppose one thing that my colleagues might say, or I might say, is that's one of the reasons why you have motions for reconsideration. And so anybody who felt that the judge was really fundamentally wrong can do so by filing a motion for reconsideration.

Mr. Granof: In terms of management, now you have two law clerks or one?

Judge Kennedy: I have three law clerks.

Mr. Granof: Three law clerks?

Judge Kennedy: I have two what are called term clerks. They are clerks who work for me for a year, and I have the lady out there, Nicole Pittman, who is my career law clerk, who replaced my secretary, Faith Lyles, who retired in December. And so rather than replacing her with a secretary, I decided that I would do what many judges in this district have done now, which is hiring a third clerk who will also do some administrative things, but who does the work of a law clerk. You know, with new technology -- computers -- so much of what secretaries did, frankly I do. I mean I can put something in my calendar, hit a button, and the computer will remind me. My law clerks type their own papers. The secretary doesn't do that any more.

Mr. Granof: Do you type your long decisions?

Judge Kennedy: Oh yes. Actually, what happens more often than not in my chambers is that the law clerk will draft an opinion and will send it to me. And I'll see it, and if I have questions I'll talk with the law clerk about it and say, "Well, you know, some issue needs to be researched more. Go and do it. Tell me what you find. Send it back to me. I'll make corrections, and send it back." And, that's how we do it. It's a very easy thing to do with cutting, pasting, and making changes. It's just a very, very easy thing to do. But my secretary, who is now my career law clerk, doesn't get involved.

Mr. Granof: So, now, are there two law clerks who are termed sort of for a year?

Judge Kennedy: Right. And we'll have to see how long Nicole can take it.

Mr. Granof: I'm sure it's a wonderful experience for her.

Judge Kennedy: I think she's a very, very bright young lawyer. Very conscientious. She worked for a law firm for a little over a year, I think. A very fine law firm, Kirkland & Ellis. And before working for me, she was the career law clerk for Chief Judge Hogan.

Mr. Granof: So, in terms of the pool of people you get, I would assume that clerking for a federal district judge draws more applicants, more qualified applicants, than, say, a Superior Court judge. Not that the Superior Court clerks would not be good, but it's very prestigious to clerk for a federal district court judge.

Judge Kennedy: Well, that's true.

Mr. Granof: How do you use your law clerks? Do you discuss the case with them beforehand?

Judge Kennedy: Sometimes I do. Most times I don't. What I do is every case that comes in the chambers, every case that's docketed, I read the complaint to get an idea of what the case is about. I follow the case. Oftentimes, there are discovery disputes. If there are really complicated discovery disputes sometimes I will refer them to the United States magistrate judge. Other times I handle them myself. I mean handle everything. Reading, researching, writing a court opinion if I need to, and docketing the order. Other cases the law clerk -- say there is a motion for summary judgment -- the law clerk will read it and will submit to me a draft opinion. A good draft opinion explains exactly what the case is about, explains what the

lawyers' arguments are. That's what I require of my law clerks: tell me what the arguments are, and then propose how it should be resolved and the rationale for it. I sometimes agree, sometimes I don't. Sometimes I'll say, "Well, you know, that rationale perhaps will carry the day, but I don't understand it. It hasn't been expressed in a way I can understand. There's this logical jump here. Maybe you can fill that gap, but you need to do that. So, come back." Sometimes we'll talk about it. In the end, after some back and forth, we get it done.

Mr. Granof: You said before that you read the complaint to get some idea of what the case is about. The Federal Rules seem to require only notice pleading, so I've always thought that the complaint should be a bare minimum. But I've seen people draft these very lengthy complaints which sort of set out and tell the whole story, and I'm beginning to think that maybe in light of what you told me, I was wrong.

Judge Kennedy: No, no, we have notice pleading. And there have been some cases, as a matter of fact, where I have *sua sponte* said, "Listen, Rule 8a requires that the complaint be a short and plain statement of the grievance. You have given me 55 pages, complete with 55 paragraphs referring to all kinds of extraneous, irrelevant stuff. This is not in compliance. Redo it." I've done that more than one time. Again, *sua sponte*, without being asked by the other side. So, you know, the rules are the rules. And just fairly recently a lawyer proceeding *pro se* did just that. I think I dismissed the

complaint without prejudice, and it didn't come back because I think that the lawyer appreciated that I wasn't going to have any of his shenanigans.

Mr. Granof: It sounds like perhaps it's a good idea to have something more in the complaint than the bare minimum sufficient to resist a motion to dismiss, but not too much, as long as it's enough to tell you what the case is about.

Judge Kennedy: Sure. The whole point of a complaint is to put everybody on notice of what the grievance is. And, you know, a defendant should be able to get a complaint that sets forth a cause of action, but no more. Because, of course, the defendant is expected to respond to the complaint. And a defendant shouldn't be required to respond to some reference to some case decided in some other jurisdiction that had some tangential relevance to this case.

[This concludes Interview No. 7]