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.