

## Oral History of William H. Jeffress, Jr.

### Fifth and Final Interview – June 5, 2013

*This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is William H. Jeffress, Jr. The interviewer is Professor Angela J. Campbell. The interview took place at the law offices of Baker Botts.*

PROF. CAMPBELL: So it's already June 5th, and this should hopefully be our last interview. So, Bill, when we first talked, you told me the story about the Billy Graham Day case. [*Sparrow v. Goodman*, 361 F.Supp. 566 (W.D.N.C. 1973)] We forgot to get that on tape, so I would like to get that on tape now.

MR. JEFFRESS: I think that would be a good one. That happened to be the first jury case I tried as lead counsel. I can give you a brief background which is very interesting. In 1970, Richard Nixon appeared in Charlotte at the Coliseum with Billy Graham. It was Billy Graham Day, and Nixon was there in honor of Billy Graham. In preparation for the event, the Charlotte police and the Secret Service learned that there were protesters planning to disrupt the event. They were distributing flyers and so forth. These were young, harmless people, who back in those days we called "hippies." They were not violent demonstrators or anything. But they did intend to disrupt the thing, blowing their horns and waving signs and so forth.

So the Charlotte police and the Secret Service and the White House advance staff that was advancing Nixon, put together a plan to try to control this. Part of it involved what they called a "demo chute." To get in the Charlotte Coliseum you had to have a ticket, but the tickets were free—you picked them up at banks and grocery stores. They had barrels with ropes to guide people toward the various doors of the Coliseum. On the end there was what they called a "demo chute," to which the VFW—who were the ushers—would guide anybody with long hair

or looked like they might be protesting or something, guide them into this chute. And as they went through the ropes and barrels, that chute didn't go into the Coliseum at all (chuckles) — it led out to the parking lot. So that was one way. If anyone didn't get caught and put into the demo chute, they would come up to the front, show their ticket. And the ushers would look at them and say, "I'm sorry that ticket is counterfeit, I can't let you in." (chuckles)

So anyway, they filed a law suit. The demonstrators—some 20 members of the Red Hornet May Day Tribe — filed a law suit against the police and Bob Haldeman, who at the time was in charge of the White House advance staff, and a number of other people, Secret Service. I represented one of the advance men from the White House.

PROF. CAMPBELL: This is when you were at Miller?

MR. JEFFRESS: Miller Cassidy. That case was tried in 1975. And it was a pretty wild case. It was before Judge James McMillan, who was a wonderful judge with a great reputation. He had done the Charlotte busing case, which was very famous back in those days. It was the first case ordering busing to the suburbs. But [he was] a very gentle man, gentlemanly man. So we're trying the case. I remember in closing argument, my argument was based on the Book of Revelations—there is a time for every purpose under heaven, a time to speak and a time to remain silent. I had one of those jurors nodding her head. (chuckles)

But George—I can't remember his last name—George was the plaintiff's lawyer [ed. note: George S. Daly, Jr., of the N.C. Civil Liberties Union] gave a very stirring closing argument I thought. We were there in 1975 — it was the 200<sup>th</sup> anniversary of the Boston Tea Party. And he said, "Those were protesters. Were they violent? Yeah, they were violent. They boarded the ship and threw tea into the bay. That's a tradition in America, and that's what the

First Amendment means, and this is a violation of the First Amendment.” Really it was much more stirring than what I just said.

I remember the lawyer for the Charlotte police stood up and said, “Objection, Your Honor. I ask for an instruction that the Boston Tea Party led to a violent revolution.” (chuckles) It was quite a trial. But we won that case, I think because the protesters tried to come across as people who simply wanted to express their views, but unfortunately, there were all kinds of flyers that they had put out calling for people to use tactics that would not be protected by the First Amendment. So we won the case. It was a very interesting trial, and like I say, it was my first jury case as lead counsel.

PROF. CAMPBELL: So who was your client, and what was his role?

MR. JEFFRESS: He was a White House advance man named Mike Duval. Every time the president goes on a trip, they go and work with the local police and the local community, the mayor and so forth, and try to anticipate any threats to the president. Try to organize, to make sure the right people are there and that the transportation is taken care of. So that is how he got involved. He was not really a major actor, but clearly did work with the Charlotte police and security for the Coliseum.

PROF. CAMPBELL: How long did the trial last?

MR. JEFFRESS: A week, it lasted a week. But it was one of those funny cases where I remember, one of the plaintiffs came to his deposition in a Superman uniform, with a blue cape and everything else and had bright red hair. So one of the counsel got a Polaroid camera, and took a photograph of him there at the deposition, and then showed it to him and said, “Is that the way you appeared today at this deposition?” And the guy looked at it and said, “Doesn’t look a thing like me.” (chuckles)

PROF. CAMPBELL: I did read the judge's opinion and it was actually quite fun to read because he describes each plaintiff, what they look like, how long their hair was, what they were wearing and all of that.

MR. JEFFRESS: I had forgotten about that opinion. This was a jury trial, so the verdict was the jury's, but I guess did he write an opinion on the motion for a new trial or write an opinion on the motion to dismiss? Must have been the motion to dismiss.

PROF. CAMPBELL: I think so. [ed. note: it was on motions of the federal defendants for summary judgment and for dismissal].

MR. JEFFRESS: He was a very fine judge. It was a privilege to appear in front of him. But it was a funny trial, it was a funny trial.

PROF. CAMPBELL: How did the jury respond to all these shenanigans during the trial?

MR. JEFFRESS: Well, I think the jury thought, as everybody thought, that these were not dangerous people. I mean they are not terrorists, they are not the kind of people we are really afraid of today. But I do think they believed—and Charlotte was a good place for defendants to try that case — that Billy Graham was owed respect, that the President of the United States was owed respect, and that these people didn't intend to show respect. So the First Amendment [issue] was on which side does their conduct fall. And they concluded that it was beyond any First Amendment rights.

PROF. CAMPBELL: And the other thing that is mysterious in that decision, was the role of the guy named Helms. He was like a bouncer type. He is described as a very large person who refused to testify because he took the Fifth. Do you remember him at all?

MR. JEFFRESS: Vaguely, but I can't remember. Was he from the Veterans of Foreign Wars?

PROF. CAMPBELL: Yeah.

MR. JEFFRESS: Yes, that is what I thought. They were the ushers, volunteer ushers, that had been used. And he undoubtedly was the guy—this is coming back—yeah he was the guy that bounced protesters, tore up tickets, wouldn't let them into the Coliseum. But until you said that, I had forgotten there was somebody who took the Fifth.

PROF. CAMPBELL: Okay, so anything else you want to add from that period?

MR. JEFFRESS: No, that's the *Sparrow v. Goodman* case.

PROF. CAMPBELL: All right, do you now want to talk about Judge McBryde?

MR. JEFFRESS: Judge McBryde is a federal judge, still is, in Fort Worth, Texas. The reason that case is really interesting [is] I don't think there's ever been a case remotely like it. In the Northern District of Texas, Judge McBryde is pretty well known for being a very stern judge. Probably threatens or issues more findings of sanctions and contempt than all the rest of the judges in that district put together. And I think it would be fair to say, and Judge McBryde wouldn't disagree, that he and the chief judge, Jerry Buchmeyer, I believe was his name, did not get along.

There came a time when there were two cases sort of simultaneously. One was a sentencing of a defendant who had been convicted in his court, where the U.S. Attorney in Arizona, happened to be Janet Napolitano, didn't want Judge McBryde to proceed with sentencing. They wanted to have the sentencing first in Arizona and then Judge McBryde go second. Well that not only infringed on his prerogative, but he sensed that they were trying to do that because of some law in the Ninth Circuit that would have given the defendant a double jeopardy claim if Judge McBryde had gone first. And so he asked a lot of questions and demanded that the government back up some of their statements to him. And he just got more

and more suspicious. Ultimately held the Assistant U.S. Attorney in contempt, created something of a ruckus, and caused at least the U.S. Attorney, and perhaps the judge in Arizona, to complain to Chief Judge Buchmeyer about the way her people were being treated.

There was a second case in which the clerk of court had made a mistake. They had not invested some monies that were due to a minor beneficiary of a settlement in interest-bearing accounts as they should have been. The clerk told the plaintiff that, "Look, we can't do anything. It was our mistake but we can't do anything. You've got to go through the Federal Tort Claims Act or something like that to get reimbursed." Judge McBryde didn't like that. He issued an order to the clerk. She wrote a letter back that at least he viewed as somewhat insulting, provocative. He didn't hold her in contempt, but he issued an order which was very critical, and she was afraid she was going to be held in contempt. So she complained to Judge Buchmeyer.

So Judge Buchmeyer, as Chief Judge, reassigned those two cases to himself and vacated Judge McBryde's orders. Judge McBryde challenged that, and before I got into the case, it was denied by the Fifth Circuit Judicial Council. They refused to overturn Judge Buchmeyer's rulings. At that point, he hired me to challenge that in court. That was 1995 or 1996, something like that.

PROF. CAMPBELL: How did he find out about you?

MR. JEFFRESS: Well, that's a good question. He had a relationship with, I believe it was Chuck Ruff. He knew Chuck Ruff here in D.C., who I knew pretty well. He didn't want to hire anybody from Texas, he didn't want to hire anybody that appears in front of him or would be likely to appear in front of him. And I believe it was Chuck Ruff that recommended me. And I was delighted to do it. It seemed a pretty interesting issue of judicial independence. We filed

in the Fifth Circuit a mandamus petition against the Fifth District Judicial Council and against Judge Buchmeyer. It was a fascinating case with fascinating issues about judicial independence and the powers of the chief judge and so forth. There is a long and very well done opinion by Judge [Patrick E.] Higginbotham which is—

PROF. CAMPBELL: I actually have the case right here. [*In re The Honorable John H. McBryde*, 117 F.3d 208 (5<sup>th</sup> Cir. 1997)]

MR. JEFFRESS: When I argued that case, the Fifth Circuit Judicial Council had hired Bob Fiske of Davis, Polk to represent them. I think the world of Bob. I think he's a superb lawyer and a good man, known him a long time. When we appeared at the oral argument, the first thing that happened—Judge Higginbotham and Judge Garza and Judge Dennis were our panel—they asked counsel to come back into the robbing room, out of the public. I wondered what was up. But he said, “Look, we realize that this is a very delicate case with strong opinions on either side by different judges.” Chief Judge Politz, for example, was adamant (chuckles) against my position. And he just thanked us for being willing to do this and complimented us on the briefs and everything. I thought that was a very nice thing. So we argued the case and we won it.

PROF. CAMPBELL: What was the legal claim for mandamus?

MR. JEFFRESS: The legal claim was that the chief judge does not have the power to assign a case based on disagreement with the merits of a district judge's decision. That's the essential claim; there were lots of issues. The central claim was when a chief judge reassigns a case based on disagreement with the merits of a trial judge's actions [phone rings, pause]. So where was I?

PROF. CAMPBELL: You were talking about the legal arguments.

MR. JEFFRESS: Yeah, the legal arguments. When a chief judge reassigns a case based on disagreement with the merits of a decision, that's a violation of judicial independence. There is Supreme Court case law going back—

PROF. CAMPBELL: So is that Article III?

MR. JEFFRESS: It's all Article III, going back to the *Chandler* case from Oklahoma, where Justice Douglas had written a really very strong opinion about judicial independence. [*Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970)] And so we won. What happened then, was that the Fifth Circuit Judicial Council, Judge Politz at the head, decided they would start a proceeding under the judicial misconduct statute, which they did.

PROF. CAMPBELL: Against Judge McBryde?

MR. JEFFRESS: Against Judge McBryde. Seeking to take away some of his cases or some other remedy. Again Bob Fiske represented them; I represented Judge McBryde; it was a fascinating thing. It was, I think, a two-week, essentially trial before a special committee of the Judicial Council. Took testimony from 40-some witnesses, theirs and ours. I argued that matter before the Fifth Circuit Judicial Council, which is made up of the 15 judges of the Circuit, nine district judges, and a couple of more judges who were members of the committee but not members of the Council. Almost 30 judges.

PROF. CAMPBELL: That you argued before?

MR. JEFFRESS: Yes. We're in a huge conference room in Judge Politz's conference room in the Fifth Circuit in New Orleans. I'm arguing to 30 judges, almost 30 judges.

(chuckles)

PROF. CAMPBELL: Oh my goodness, I can't even imagine.

MR. JEFFRESS: It was fascinating.



PROF. CAMPBELL: Did they let you talk at all?

MR. JEFFRESS: Oh yes, yes. But you know, you'd get questions from all sides.

Ultimately they did find a violation of the misconduct statute; they issued some relief. This is public. To me, it seemed clear from the argument that it was not unanimous, that there were pretty strong feelings on either side. But in any event, it was a decision by them which was then challenged by Judge McBryde in the D.C. Circuit, and actually, the District Court here in D.C. [*McBryde v. Committee to Review Circuit Council Conduct*, 83 F.Supp.2d 135 (D.D.C. 1999), *aff'd in part, vacated in part*, 264 F.2d 52 (D.C. Cir. 2001), *rehearing den.*, 278 F.3d 202 (D.C. Cir. 2002), *cert. den.*, 537 U.S. 821 (2002)]

PROF. CAMPBELL: Now how would the District Court have jurisdiction over what happened in the Fifth Circuit Judicial Council?

MR. JEFFRESS: Well, the Judicial Council had essentially taken away some of Judge McBryde's suspended assignments of new cases, I think that basically was what it was. And that's a violation of the Constitution. I forget what the jurisdiction was that we used, but certainly we survived the jurisdictional issue.

But I wound up getting out of that case. It was a mutual agreement between me and the client. And the case proceeded. Anyway, the District Judge sat on the case for long enough where the main relief they had granted, which was suspension of case assignments, expired. It was only for a year I think, and a year passed, and she would not expedite the case or make any rulings. By the time she ruled on it, I think she ruled on the merits against the judge, but when it went to the Court of Appeals, they said this is moot. We don't have to face this issue because it's expired and it's moot.

PROF. CAMPBELL: Who took over the case?

MR. JEFFRESS: David Broiles. He had been my co-counsel. He's from Fort Worth, and he continued handling the case in the D.C. District Court and then the Circuit. This won't show up on the transcript, but up on the wall up here, I have a cartoon in color from some magazine. And it's signed by Judge McBryde. The story behind that cartoon is: one of the witnesses in the proceeding said the judge has got in his chambers this painting of sharks approaching the bench, and that just proves how paranoid he is. (chuckles) Well, I found on line several copies of this and ordered it, had them printed, and Judge McBryde inscribed each of them to me and the other lawyers working on the case. Sharks approaching the bench.

PROF. CAMPBELL: That is cute.

MR. JEFFRESS: But anyway, I thought that was a highly unusual case, representing one federal judge against essentially the chief judge of the Circuit and a lot of other federal judges. It doesn't come along many times in a career that you have a case like that. And the issues were fascinating, so I was delighted to do it and had a good time.

PROF. CAMPBELL: Any other cases that you wanted to talk about?

MR. JEFFRESS: Those were the two cases beyond the ones that we discussed in the earlier interviews that I ought to mention.

PROF. CAMPBELL: I had a question about the mandamus part. So was that a 15-minute argument, or was it a much longer, sort of back and forth?

MR. JEFFRESS: No, it was much longer than that. The courtroom was packed and this was a special case. I don't remember how long we argued, but it was a long time. And they kept us going. I've got to say, you talk about judicial independence, that was important. When Judge Higginbotham ruled as he did, he had to know that Judge Politz was not going to like this at all, or Judge Buchmeyer. And Judge Higginbotham, I don't know how much you know about him,

but he's a very fine judge, one of the stars of the Fifth Circuit. I guess he's senior now but, certainly a great judge.

PROF. CAMPBELL: So you started private practice in the early 70s?

MR. JEFFRESS: '72.

PROF. CAMPBELL: And you're still at it, in 2013, that's a long period of time. What would you say has changed over time?

MR. JEFFRESS: Of course, a lot of things have changed in the profession. We know a lot more about law firm economics and organization and who is changing firms and all that sort of thing. When I started, we didn't have the *American Lawyer*, we didn't have the *Legal Times*. I didn't know anything about practicing in a law firm. I remember based on talking to my dad, who was not a lawyer but knew some lawyers, thinking that when I went to a law firm I would be expected to buy into the practice. So I talked to John Cassidy when I was interviewing at Miller Cassidy and asked him, if I become a partner, how much is that going to cost me? John paused a minute and he said, I like your attitude. (chuckles) So I didn't know much about law firms. Now you know there is all this — *American Lawyer* and *Legal Times* and *Above the Law*, blogs and all kinds of other information that tend to emphasize the economics of the practice, and who is doing big deals. So it's different. I don't know if it's better or worse, but it's certainly different today. There is much more emphasis on the business of law.

In the area where I practice, which is litigation, there are many fewer trials. They've gotten so expensive that for a small case, you can't go to court now. You've got to do some alternative dispute resolution procedure. It just doesn't make any sense. I mean, I was in a case where the plaintiff had a fair claim for about \$150,000. The client was going to have to pay me a

million dollars to defend it. So you might end up settling it for \$300,000. That is what happens in those cases, and it happens more and more.

In criminal cases, the advent of the sentencing guidelines made it harder to go to trial. Before the guidelines, in many cases I believed that my client would do better, even if convicted, at sentencing if the judge heard the actual evidence instead of the prosecutor's description of the evidence, as she would in a plea bargain. But that no longer was possible under the guidelines. They have been ameliorated a little bit since *Booker* [*United States v. Booker*, 543 U.S. 220 (2005)], but I still think the guidelines drive people to where they can't risk a trial or it's harder to risk a trial.

So that's been one effect. But also I think the Justice Department has been successful in causing more compliance, more attention by private companies to obeying the law. There was a time in the 80s I guess, maybe late 70s, where there were an awful lot of procurement fraud cases against very major companies that violated the Truth in Negotiation Act or done something to overcharge the government. There were lots and lots of cases, and I had probably, I don't know, a dozen of them. You don't see those anymore, at least by the major actors. There was an initiative at the Department of Defense for companies to self-police and self-report and that's been very successful. I think they are trying to do that in FCPA area now, without a lot of success so far, but maybe they'll have success in the end and those cases will go down.

PROF. CAMPBELL: FCPA is?

MR. JEFFRESS: Foreign Corrupt Practices Act [ , .

PROF. CAMPBELL: Okay.

MR. JEFFRESS: But then third, companies just can't risk going to trial anymore. It's not just the guidelines. I see a public company—let's take one in the pharmaceutical industry.

The government has been incredibly successful in obtaining three hundred, six hundred million dollars, in two cases over a billion dollars, from pharmaceutical companies based on marketing of their products for off-label uses not approved by the FDA. Doctors are free to prescribe these drugs for these uses, because Congress doesn't want to regulate doctors. But they say the pharmaceutical companies can't promote those uses. Well that's kind of difficult when you are talking to doctors who you know are prescribing for unapproved uses. And yet, the government is getting hundreds of millions of dollars from the drug companies in these investigations because they can't afford to do anything else. They've got to make an agreement where they don't get debarred from Medicare, where they can still sell their drugs. I'm sure it drives up the price of health care. But it's a public company. And they're not the only ones. Financial services companies are heavily regulated. The Bank of America, they can't defend a case, a criminal case. So, it's very weird.

I did have a case for Reliant Energy Company arising out of the California energy crisis. Reliant decided we're going to defend, we're going to go to trial. It was one of the only companies that took that position. The reason they were able to do it, is we'd settled all the civil cases, so no matter what happened in the criminal case, it wouldn't have any effect. I calculated the guidelines were about \$36 million, even if they were convicted. And we had a good defense. This was the first prosecution under a statute that was 69 years old; first prosecution under this part of the statute. There was a big article in the *American Lawyer* about this. We hung in there. We were there to pick a jury one day, and the government said we can't go forward because we are going to take an appeal to the Ninth Circuit of one of your rulings. They lost in the Ninth Circuit, came back, and we were about to start trial again, and the prosecutor finally called and said, "Can't we settle this case?" I said we're not going to plead guilty. He said, "Well, I'm not

sure that will be required.” (chuckles) So he worked out a deal for a deferred prosecution for everybody, and that was the end of that case. But that’s one of the few companies. For a company that is heavily regulated, a company that faces huge civil consequences, debarment consequences, they just don’t feel that they can go to trial anymore.

PROF. CAMPBELL: So do you find that you spend a lot of your time then in negotiations?

MR. JEFFRESS: Sure, negotiations with the government in an investigation. But that’s always been true; that hasn’t changed. You negotiate a deal. The deals are not entirely cookie-cutter, but you can take this piece and that piece of former deals. Once they decide that they’ll do it, it’s not that hard to get it done. So there really are many fewer trials, and people have fewer opportunities in private practice at least to get trial experience. I think that’s kind of sad. As for alternative dispute resolution, there was a handful of people doing that when I started practicing law, and now it’s a huge industry. I’ve done a lot of it myself. But that’s always leading to a settlement, not to a trial.

The other thing I wanted to talk about—for trial lawyers, it really is hard on your family. My wife kept track, I think I was out of town one-third of the time. The kids were small, and of course, very hard on her, undoubtedly hard on the kids. There are certain sacrifices you make to do it. You said you had seen the article in the *Washington Post*. [Carol D. Leonnig, *Courthouse Is a Home Away From Home*, *Washington Post*, Dec. 6, 2006.] There was a time my daughter was Assistant U.S. Attorney, my son a federal public defender, and I was a defense lawyer all trying cases in the same courthouse, and it was fun. We would run into each other in the hall and have lunch together and that sort of thing.

PROF. CAMPBELL: You obviously didn’t scare them away from the practice of law.

MR. JEFFRESS: No, it was interesting, it was interesting. I never really thought my daughter would want to be a lawyer, but she did. She's been hugely successful at it, now at the U.S. Embassy in London as the Justice Department attaché. And Jonathan is still trying cases in court. My youngest son decided I'm not going to follow my brother and sister into the grave; I'm not going to be a lawyer; I'm going to go to business school; which he did. He has a great job now. All of them are in Washington. It wound up being a very close family but partly because my wife was long-suffering and very good at what she did. (chuckles)

PROF. CAMPBELL: So was it mostly the travel or did you have to spend a lot of weekends and evenings preparing?

MR. JEFFRESS: I did when we were in trial. But I made a decision which wound up being a terrific decision. When we moved to Washington, I decided I am not going to be a commuter. Since 1970, I have never lived more than 15 minutes from my office. So, when I had to work late, I went home, I had dinner with the kids, we did their homework, whatever, and then I would go back in and finish work. Even today, I live 13 minutes from my house to my office. I knew people who lived in Reston and Herndon, places like that, you can't do that. And if you are really busy, you're home after dinner, kids are in bed. So that was important. I'm sorry I've got to cut this short, but I appreciate your doing all this and I think we've covered an awful lot of territory.

PROF. CAMPBELL: I think we have too. I've enjoyed going through the transcripts.

**[END RECORDING]**