

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

Fourth Interview 23 October 2007

This is the fourth 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 Judge Kennedy at the Federal Courthouse in the District of Columbia on October 23, 2007.

Mr. Granof: Judge Kennedy, I think we left you at the last interview when you had just about finished your three years as an Assistant U.S. Attorney.

Judge Kennedy: Yes.

Mr. Granof: And I guess this was 1976?

Judge Kennedy: That sounds just about right. I was looking around for my certificate as to when I was appointed United States magistrate. I think I have it. It was 1976. The day after I left the U.S. Attorney's Office I began serving as a United States magistrate.

Mr. Granof: Going from Assistant U.S. Attorney to U.S. magistrate is not the usual career path after three years, and it's somewhat unusual. So how did it happen?

Judge Kennedy: The way it happened is as follows. I was very happy as an Assistant United States Attorney. Even when I answer the question now, and people ask me, "Well, what is it that you have done during your lifetime that you most enjoy?" When I really do some thinking about it I can say that my time as an Assistant U.S. Attorney was certainly one of the most enjoyable, if not the most enjoyable, periods of my work life. One day a man by the name of Frederick Abramson came up to me and asked me

whether I had ever given any consideration to being a United States magistrate. My response was “What is a United States magistrate?” Because I really didn’t know. While I had been an Assistant U.S. Attorney, I had never actually tried cases in the United States District Court where United States magistrates sat. So I didn’t have any experience. My experience in this federal courthouse was all before the U.S. Court of Appeals for the District of Columbia Circuit. Mr. Abramson explained that the United States magistrate was a judge. And, frankly, receiving that explanation I thought that it’s not likely that anyone would consider appointing a 28-year-old lawyer who simply didn’t have much experience as a United States magistrate. But he prevailed upon me to at least consider it, and I did.

Let me explain, though, something about Frederick Abramson. Well, Frederick Abramson was perhaps the second Black president of the District of Columbia Bar. The first being, I think, Charles Duncan. Between my second and third year in law school, as I described in one of our earlier interviews, I worked at the Jones Day law firm. It was a firm that had offices in several places in this country. Its main office actually was in Cleveland. But it had an office here, and between my second and third year in law school I was a summer associate at the firm. This was during a period of time when there were not many Blacks who worked in any capacity in, what I will call, silk-stocking law firms. And Fred Abramson, who was just a very, very fine man -- he was a Black man.

And a couple of other people. Vincent Cohen was one of them. Vincent Cohen was at one time a partner at Hogan & Hartson. A man by the name of J. Clay Smith was the Dean of the Howard University Law School for a period of time. At the time I believe he was working at Arent Fox. These men decided that it would be a good idea to have Black associates in these firms -- these six silk-stocking law firms -- and they just got together to talk about things of common concern or of interest. And that group was called the Lawyers Study Group, and that's how I met Frederick Abramson. As you can imagine, as what I've told you about him already suggests, he was a very community-minded person. He was a person who was interested in being a mentor. And what happened, I learned later, was that he was consulted by some of the U.S. district judges whose job it was to appoint the United States magistrate. There was a vacancy on the magistrate's bench created when Judge Arthur Burnett left. He was a magistrate judge. I think I might be the only person who was preceded by and succeeded by the same magistrate judge. As a United States magistrate I was preceded by Judge Burnett, and I was later succeeded by him. That's right, he came back.

In any event, one or perhaps several of the judges had talked with Fred Abramson and apparently had expressed the view that the persons who were under consideration to be a United States magistrate were not satisfactory. And Fred knew that I had been trying cases in the courts -- in Superior Court -- and arguing cases before the U.S. Court of Appeals. I

think it was the case that I had developed a pretty good reputation, a good reputation, and so that's why he asked me. Well, what happened was I decided to fill out an application and I was so sure that I would not get the job that I went skiing during the week that I understood that the appointments would be made. And I didn't even let anyone know where I was going. I'll never forget receiving a call when I was up in Vermont. I was at Smugglers' Notch in Vermont, and I received a call from Judge Oliver Gasch, who was the chair of the committee of judges who were going to recommend the person to be appointed to the now-vacant magistrate position. When I got the call, he congratulated me and said that I was going to be appointed, and I thanked him. And then I must tell you my vacation was ruined because I had some real second thoughts. I really did. I said, "What have I done? What have I done?" So much so that I actually considered, and talked to him as a matter of fact, and at least one other judge, Judge William Bryant, about whether I should decline the appointment. I talked to Judge Bryant, and I'll never forget that conversation because he didn't say that I should but he intimated that perhaps I should. I'll never forget it. Judge Bryant loved lawyers. He loved being a lawyer himself and he loved the lawyering process. And I remember him saying, he said, "Kennedy, I heard you're a pretty good lawyer." I said, "Yes." He said, "well, why do you want to be a judge now?"

I talked to Judge Gasch after that. But before talking to Judge Gasch I talked to Earl Silbert, who was the United States Attorney. I respected Earl Silbert, and still do. To me, he was just a giant. He was just a wonderful United States Attorney. And I remember going to him and asking him about this, and he said, "You know, I don't know. I really do wonder whether you have the experience that you should take it." And he didn't say that I shouldn't, but he understood my concern. And then I talked to Judge Gasch. And Judge Gasch said he understood the concern, but he said something like, "We don't make mistakes. And we know what we're doing, and we hope that you don't decline the appointment now." That's the long and the short of it, that's how I became a United States magistrate.

Mr. Granof: Has the appointment process changed? Who actually does the appointing now?

Judge Kennedy: Yes, the appointment process has changed. Now there is a panel that's appointed by the United States district judges. Before, what happened was a group of district judges, a committee, that recommended me for appointment. The committee was Judge Oliver Gasch, Judge Aubrey Robinson, and Judge John Lewis Smith, and they did the interviewing and the reading of the applications. And that committee would make a recommendation to all of the judges, who would then vote. Now there is a statutory procedure that is followed, and that calls for the judges on the court to appoint a panel of people. I don't know exactly how many it is. I

think it's about 8 to 10 people, maybe a little more, maybe a little less, including nonlawyers, who will review the application of persons who wish to be United States magistrate judges. Then it is the judges who act upon the recommendation.

Mr. Granof: So this is not a process that the executive branch -- the president -- is involved in, or Congress?

Judge Kennedy: No. The United States magistrate judges are appointed basically by the United States district judges.

Mr. Granof: Now, how many magistrate judges were there when you were appointed.

Judge Kennedy: Three, and there are three now. When I was appointed my colleagues on the magistrate's bench were Jean Dwyer and Lawrence Margolis. Jean Dwyer died about 15 years ago. Lawrence Margolis became a judge on the Court of Federal Claims and, if I'm not mistaken, he has now taken senior status on that court.

Mr. Granof: So, here you are 28 years old, three years of practicing law as an Assistant U.S. Attorney, and all of a sudden you're a magistrate judge. And you have to learn, I suppose, what a magistrate judge does because you haven't had experience. So how did you go about it? And what does a magistrate judge do?

Judge Kennedy: I think that the Administrative Office of the United States Courts does a good job in training people who are appointed United States magistrates, and that's what they did. I recall going to all kinds of training sessions and, frankly, leaning very heavily on my colleagues, Magistrate Margolis

and Magistrate Dwyer. And I must tell you, doing what I am very prideful about, which is doing the heavy lifting of learning. I mean just taking the time to learn by reading, going to conferences, perhaps taking a little longer to figure things out, particularly in the civil area than others might. So, that's what I did.

Mr. Granof: So you're appointed and I take it you're sworn in.

Judge Kennedy: Yes, by Judge Jones.

Mr. Granof: So, here you are. You're sworn in, and it's your first day on the job and you come to a new office a little bit nicer than an Assistant U.S. Attorney's office.

Judge Kennedy: Yes.

Mr. Granof: Do you have a law clerk?

Judge Kennedy: No. Back then we did not have any law clerks.

Mr. Granof: Did you have a secretary?

Judge Kennedy: I did have a secretary. Yes, and it was me and the secretary. And I had a courtroom clerk who was very knowledgeable about criminal matters. But with respect to the civil matters I was a one-person shop. It was very challenging. And I am very proud of the fact that I earned the respect of several of the United States district judges who came to refer all kinds of matters to me, and I handled them.

Mr. Granof: That's what I want to get to eventually, but what I'm curious about, first day on the job. You come in, you've got a courtroom clerk, what happens?

Judge Kennedy: In truth I cannot remember the first day. I can't remember the first week. When I think back about my first days as United States magistrate I just simply can't remember what I did. My suspicion is that my first assignments as a United States magistrate were criminal assignments. And with respect to the criminal assignments, I had been an Assistant United States attorney and so those kinds of things -- and I'm sure you know that the United States magistrate reviews warrants, conducts arraignments, preliminary hearings --

Mr. Granof: When you say "reviews warrants," search warrants?

Judge Kennedy: Search warrants, arrest warrants. Those kinds of matters I did have experience with. As an Assistant United States Attorney I would represent the government at arraignments and at the preliminary hearing. I would review search and arrest warrants. As a matter of fact, in the District of Columbia either by policy if not by statute -- and I just don't remember which it is -- but, in any event, before the police can go to a judicial officer to seek a warrant it must be reviewed by an Assistant U.S. Attorney either by law or as a matter of policy. And so I had done a good deal of that. So with respect to the criminal duties of the United States magistrate, my suspicion is that I felt pretty comfortable, and I think that's probably because that's what I started out doing. Again, it was the civil duties where my suspicion is that I was uncomfortable -- relatively so -- and it was simply a matter of doing what, actually, any kind of judge has to do when you're confronted with something or some kind of case that he

hasn't had any experience with. And virtually all judges encounter such things. You know, in this country, judges are real generalists. I mean at least certainly U.S. district judges and state court judges. We have some judges on special courts. But certainly judges in this courthouse are generalists, and so when you get a new thing, when you get a new case, or a new kind of case that you're not familiar with, you just worked hard.

Mr. Granof: Now I know you want to talk about civil matters, but I want to stick with criminal matters for a second. Who comes to you with the search warrant or with an arrest warrant? Is it the police officer?

Judge Kennedy: The police officer comes with the affidavit and the warrant itself. The warrant itself is important, but what the magistrate would do is review the affidavit that was crafted by the police officer to support the issuance of the warrant specifically. The affidavit must show that the law enforcement authority had probable cause to believe, in the case of an arrest warrant, that a crime had been committed, and that the person who is the subject of the warrant committed that crime. With respect to a search warrant for evidence, it is probable cause to believe that the place to be searched is the place where contraband is found, that which is illegal in and of itself to have, or there's evidence of a crime there.

Mr. Granof: Who, in fact, prepares these affidavits? Is it the Assistant U.S. Attorney?

Judge Kennedy: No, it's the police officer who then brings it to the U.S. Attorney for review. And the United States Attorney will review it and ask questions of the officer. If the Assistant U.S. Attorney reviews the affidavit and

there's a question as to whether or not it is sufficient or it will be found to be sufficient, then the U.S. Attorney can ask questions of the officer, perhaps have the officer change something in the affidavit, and eventually will either sign off on it or not.

Mr. Granof: Police officers may be good at testifying, but not many people are good at writing. So how good were these affidavits, and how much attention did you have to pay?

Judge Kennedy: I don't know, but I'm sure that it's a part of the training of a Metropolitan Police officer, and certainly the training of other law enforcement personnel such as FBI agents. They get training. They're not scribes, but they know what the requirements are and they were expected to, and generally did, present warrants that were not difficult to read. They were always for the most part typed out. So it was not burdensome because of a lack of clarity in the writing. Now sometimes it was burdensome because the United States magistrate was on call 24/7. And sometimes you'd get called at all times of the day and all times of the night in which you had to review a warrant.

One of the most interesting experiences I've ever had as a judicial officer was when, one night, on the Fourth of July, I was called upon in the early morning hours to review a warrant that would authorize law enforcement agents in the District of Columbia -- the FBI -- to search the premises of the Church of Scientology. It was on the fourth of July that I actually signed the warrant. I received a phone call on July 3rd of

whatever year that was, it probably was 1977, '78. I was called because the Assistant U.S. Attorney wanted to alert me that this very, very extensive affidavit was going to be submitted to me, and it was very important that the warrant be signed at a particular time because law enforcement authorities hoped to execute warrants for facilities operated by the Church of Scientology all over the world. And so, let's see, police authorities in various countries, including Interpol, were going to go into these facilities. Obviously it was of some -- I won't say concern -- but it was not lost on anyone that what was being sought was a warrant to enter into a religious facility or a facility that was associated with a religion. And so there I was early in the morning, about 1:30 in the morning, going over this affidavit. It was a very lengthy affidavit and I ended up signing the warrant. And yes, indeed, the FBI did search a facility here in the District of Columbia, and the authorities worldwide searched certain facilities of the Church of Scientology. The upshot of it is really interesting that that action on my part triggered one of the most interesting experiences that I've had as a judicial officer. There came a point in time when there were people who were prosecuted for some crimes. I don't even remember what kind of crimes they were. And evidence that was seized pursuant to these warrants was going to be part of the prosecution's case. The defense filed a motion to suppress the evidence. And at least one of the bases for suppressing the evidence was that the warrant was insufficient. And there was the suggestion that there had been a

substitution of a page for a page that the government indicates was given to me and reviewed by me. And the case was assigned to Judge Bryant, who really is just a giant of a man. And he ended up granting the motion to suppress evidence. Leading up to his suppression of the evidence I was put on the witness stand to testify about my review of the warrant. I don't remember everything about what happened, but I recall that I gave testimony concerning precisely what I did in reviewing the warrant. And it was my practice to actually initial every page of the affidavit which I read. However, it was not my practice to initial the warrant itself. Remember, I said, that actually what is presented to the magistrate judge is the affidavit in support of the warrant and the warrant itself, which describes the place to be searched, so on and so forth. The defendant's assertion was that the warrant itself did not describe with sufficient particularity the place to be searched. And because I did not initial the warrant itself, there was again this question as to whether or not the particular document that was before the judge was what I had reviewed. And we had this hearing and Judge Bryant ended up suppressing the evidence. And I'll never forget the day when we were both on the elevator and he looked at me, he says, "That was a bad warrant Kennedy. That was a bad warrant. You know that was a bad warrant Kennedy." And really he criticized me. He says, "Why did you let those people wake you up and require you to do this in the middle of the night? They should not have done that, and you shouldn't have let them do it." As it turns out,

Judge Bryant was then reversed, but I never said to him, "See Judge Bryant, I was right all along." No, I would never say anything like that to Judge Bryant.

Mr. Granof: Did you turn many of these warrants down?

Judge Kennedy: No. Thinking back, I remember sometimes I did, but relatively few. And I can say this, too. Sometimes, if I'm a magistrate judge, I'm reviewing the warrant and something is just not quite right, the magistrate judge is authorized to ask questions of the police officer. And the police officer -- who, by the way swears to tell the truth -- then can say, "I saw such and such from this distance," and you know you're reading the warrant and you say, "Wasn't there a truck maybe in the way, how could that be?" And he says, "Well, no. What happened is that no, the truck wasn't in the way." Well you say, "Well, if that's the case then you will have to change this affidavit to include that, to clarify information in the affidavit that perhaps is troubling." So that is what happened from time to time. In reviewing the affidavit you see something that is not quite clear. Gives you some pause. I would ask the law enforcement officer questions under oath, and depending upon what the officer's response would be I would require a change.

Mr. Granof: How did you do it? Under oath?

Judge Kennedy: Yes.

Mr. Granof: But it's not recorded, is it?

Judge Kennedy: No. This is not recorded, but you have the officer raise his right hand, “Do you solemnly swear?” And on the affidavit itself there is a printed oath.

Mr. Granof: And so reviewing affidavits and arrest warrants was part of it, but also conducting preliminary hearings?

Judge Kennedy: That’s correct

Mr. Granof: And that’s in open court?

Judge Kennedy: Yes.

Mr. Granof: And I guess the requirement is that you have to bring a defendant before a magistrate within twenty-four hours?

Judge Kennedy: I’ve forgotten what it is now, but Judge Bryant argued the case in the Supreme Court, *Mallory v. United States*, which established the principle that it violated a person’s constitutional rights not to be brought before a judicial law officer within a certain amount of time. It has some significance now, right?

Mr. Granof: Yes. And that was done in open court, and you had the ability to determine whether there’s probable cause to uphold the arrest?

Judge Kennedy: Well, the first step in the process when a person is arrested then, yes indeed, he or she must be brought before a judicial officer, and in the federal system that is the magistrate judge. At that point, it’s not an arraignment, it’s called a presentment. And really the only thing that happens at a presentment is to make a determination as to whether the person will be released pending further proceedings or not. If a person is

arrested and charged with certain kinds of crimes, he can be held without bond. Most crimes, though, the vast majority of crimes, are not ones where the person can be held without bond. The magistrate judge has to make a determination as to whether to release the person on personal recognizance or require some type of bond. So that's what happens at the first proceeding before a judicial officer, the presentment. Then the next proceeding is called the preliminary hearing. And that proceeding is for the purpose of determining whether there is probable cause to believe that a person has committed the crime. The magistrate judge does the same thing that a grand jury does, but the magistrate judge does it for the purpose of determining whether the case should be bound over for grand jury consideration. That's the term of art that we use. Though I can tell you that if even if the magistrate judge makes a determination that there wasn't probable cause at that point, the prosecution can still seek a grand jury indictment. But if the person is being held, the person can't be held on a charge for which the magistrate judge determines that there is no probable cause.

Mr. Granof: Were these hearings extensive?

Judge Kennedy: Some of them were, but typically not. Typically not. On a day when the magistrate judge's assignment was to handle preliminary hearings, as I recall -- and again, I don't have a great memory of these things -- but one could handle, say, five, six in an afternoon.

Mr. Granof: And witnesses were presented?

Judge Kennedy: Generally speaking, yes, witnesses would be presented. Generally, only one witness, however, because at preliminary hearings the rules of evidence do not apply, so hearsay evidence is admissible. So typically, typically now, there's only a police officer who will testify. Now, of course, the defendant has a right to testify, but oftentimes the defendant chooses not to testify at the preliminary hearing.

Mr. Granof: Are they represented by counsel at some point?

Judge Kennedy: Yes. Under our system of criminal justice a person accused of anything other than a petty offense has a right to counsel at all critical stages of the criminal proceedings. The presentment and the preliminary hearing are two such critical stages.

Mr. Granof: As a magistrate did you have any role in appointing counsel?

Judge Kennedy: Yes, that's what I would do. I would appoint counsel.

Mr. Granof: And how did you do that?

Judge Kennedy: Well, back then we had a panel of attorneys who would pick up these cases. And there would be a list every day we would choose from. How the attorneys got on the list for that particular day I don't remember. But I do remember when I was conducting presentments looking at a list that my secretary would give me of the people who were available to be appointed, and I would say, "Well, appoint this person to that case, appoint another person to this case," so on and so forth.

Mr. Granof: How did you determine how to set bond? Was that a hard thing to do?

Judge Kennedy: This is all governed by statute, and there is a statute that sets forth the criteria that a judicial officer should use in determining what conditions of release should be imposed. The United States Code indicates for which crimes a person may be held without bond. The United States Code states the standard to be used, what can be considered, and so on and so forth.

Mr. Granof: Did you have to set the amount, or is that pretty routine?

Judge Kennedy: Oh no. No, it was not routine at all. And one of the decisions I would have to make is to determine whether to set bond. Some people, of course, should be released on their personal recognizance; that is, on no bond at all, just their personal promise to reappear in court. But if the magistrate decided that a bond was appropriate then one would have to make a judgment as to how much. That is not specifically set forth in the law, and the magistrate has to use his or her judgment.

Mr. Granof: Did you find that difficult to do, and did you develop any principles that you would apply?

Judge Kennedy: The statute says that a person should be released on the least restrictive -- I've forgotten the language now -- least restrictive conditions that are consistent with making sure that the person will return to court. So, armed with that you do your job. It seems to me every time I say something to you it just reminds me of some incident.

Mr. Granof: Does this remind you of an incident?

Judge Kennedy: It does remind me of an incident. When I was a United States magistrate I was called upon to handle the preliminary proceedings -- the setting of

bond, conducting the preliminary hearing -- in a case in which some men were charged with operating a huge drug distribution conspiracy. And the head of the conspiracy, allegedly, was a man by the name of Linwood Gray, never forget it. His nickname was Big Boy. And Linwood Gray came before me charged with -- Do you remember the movie, "The French Connection"?

Mr. Granof: Yes.

Judge Kennedy: Okay. This drug conspiracy was larger than "The French Connection," which was based upon a true story. In "The French Connection" the heroin was imported into New York from France. In my case, the heroin came from some place in the Middle East, or perhaps Afghanistan, to the West Coast and into the District of Columbia. Well, Mr. Gray was charged with being the mastermind of this. And he was a huge, big guy who came before me for the purpose of setting bond. And I set a very high bond. I think it was at the time a million dollars, very, very high. But what was more significant as it turns out was that I set a very, very high bond on his wife because his wife was charged with being a part of this conspiracy. And the United States had seized all of their property. I'll never forget the time when his lawyer, whose name was Kenneth Robinson -- he's a well known lawyer, and as a matter of fact I saw him day before yesterday just on the street -- filed a motion to reconsider Mr. Gray's bond and to reconsider the bond that I had placed on his wife. I denied them both. This upset Mr. Gray mightily, and in that small

magistrate's court there were several marshals. It was a big case. They were all around. But Linwood Gray jumped from the table, he slammed his hands down on the table, and he says -- he looked at me and he says -- "You know, your name is Kennedy." He said this, "Your name is Kennedy, and you look like Martin Luther King, but you're just a rebel. You're just a George Wallace." Then he was ushered out of the courtroom. And I got to thinking about these words, and I called the United States marshals in. You know, the United States Marshals Service has experts on what constitutes a threat or not. And the marshals came up and listened to the tape, and they said, "Yes, this is definitely a threat." All three people that were mentioned -- your name is Kennedy, John Kennedy; Martin Luther King; but you're just a rebel, George Wallace -- had been shot. So that was the first time, actually I think it's the only time, that I was put under round-the-clock marshal protection, and for good reason because within a week or two of that threat the prosecutor in the case, in fact, was shot. Yes. He was shot in the parking lot of the this courthouse. As a matter of fact, this annex was built over that parking lot. You remember when it was a parking lot, of course.

Mr. Granof: Yes. Yes I do.

Judge Kennedy: Well, the prosecutor was shot coming to work. It wasn't fatal by the way -- Barry Edwards -- and it was a very, very scary thing.

Mr. Granof: Did they pin it on Linwood Gray?

Judge Kennedy: He couldn't have actually done it, but the suspicion was that he had commissioned someone to do it.

Mr. Granof: Because he was incarcerated?

Judge Kennedy: Because he was incarcerated. As it turns out, remember I mentioned Kenny Robinson.

Mr. Granof: Yes.

Judge Kennedy: Years later Kenny Robinson was the subject of an assassination plot. That's right.

Mr. Granof: Because he didn't adequately represent somebody?

Judge Kennedy: No, what I understand, and I can't now remember where my understanding comes from, but I think what happened was that Linwood Gray -- remember I told you the government had seized a lot of his property, well one thing it didn't seize was his home in which his wife lived after she was released. By the way, Linwood Gray was not convicted of drug distribution. The case was tried before Judge Bryant and he was, I think, acquitted of most of the drug charges, but he was convicted of, I think, tax evasion. And I don't know whether his wife was convicted of anything at all, but, in any event, at some point she gets out. She starts living in the house in which she lived with Mr. Gray. I understand that the house was used to pay the legal fees of Mr. Gray, and the defense attorney wanted to evict the wife. And he was told that he should not do that by Mr. Gray, I understand. But when this expressed

desire was not complied with, well, there was an attempt on Kenny Robinson's life.

Mr. Granof: That's the kind of incident that a person would remember.

Judge Kennedy: Yes. So, yes, that was one of the times that I'll never forget when I was called upon to set bond, and it was very contentious as to what bond would be set, and the consequences became very, very significant. Another time was when I was called upon to set bond in a case -- I've forgotten which of the Hanafi Muslim cases it was -- but you might remember a long time ago when there was a takeover of a house. Some people were killed in a house on 16th Street. The people who lived in this house were Hanafi Muslims, and the people who were charged with the murder were Black Muslims from Philadelphia. It was not that case that came before me. But what happened was that after that murder the Khalifa -- the head of that house -- then took over the Islamic Center and actually held some City Council people hostage in the D.C. City Council including, at the time, Councilman Marion Barry.

Mr. Granof: That I remember.

Judge Kennedy: Right. Well the people who were involved with that were brought before me and charged before me and I had to set bond. And I remember setting bond on those people, and it was a big, big case. And I had to decide whether to set bond and what bond to set.

Mr. Granof: Which brings me to another question about setting bond and releasing people. To what extent could you consider whether, if released, they

would be a danger to the community even though you thought, “Yes, they’ll show up alright, but they’ll knock off three other drug stores in between.” Now are you supposed to consider that, and how did you approach that?

Judge Kennedy: The bail laws, I think, have changed since when I was a United States magistrate. And, perhaps, even then there was the opportunity to take that into account. The United States Code empowers the judicial officer to take that into consideration with respect to certain types of crimes, but not other crimes. And I can tell you that that scenario that you just laid before me was one where, yes, it was a matter of concern. And I could tell you that I did take it into consideration, and I would sometimes impose a bond that reflected my concern that if this person were to be released into the community he would be a danger. And then, you know, the question becomes, Well, is that something that should have been done, or not? I leave that to whomever it is that makes these kinds of judgments.

Mr. Granof: I assume that, for instance, one of the reasons you could either set a high bond or deny bond is if you’re concerned that the individual would intimidate or threaten witnesses.

Judge Kennedy: Oh yes. But I’m going to tell you that that didn’t happen very often. I think that before the bail laws were changed -- and I don’t remember exactly when that was but I’m fairly sure it was after 1976 -- as I recall the main if not the only reason for setting bond, given the presumption of innocence that we all enjoy and given that a legal charge is nothing really

until there has been adjudication of guilt, is that the person should be released unless there is reason to believe that he won't come back to court. So that was the philosophy that imbued the law regarding whether or not a person should be released. And that is something, as I recall, having to deal with when that might be so. But just suppose you think somebody is going to do something really bad, but that there is real evidence that the person would be dutiful in coming back to court. For example, suppose there is a person accused of a crime who is brought before the magistrate, let's say charged with a federal offense of forgery, an offense which ordinarily would not warrant a high bond being set because there is no reason to believe that the person will not come back to court to face the criminal process. But suppose this person has been convicted in the past of two armed robberies, and each time was released but came back and went to trial and was convicted. And there's no indication of bail jumping in connection with those other cases. That kind of thing presented itself. As a good prosecutor, I remember arguing before Superior Court judges that, listen, this federal case now raises the stakes, particularly since the defendant was convicted in the past of these very serious offenses. And he has every reason to think that if he is convicted of this charge that the penalty is going to be heightened. He faces a stiffer penalty because of this other past conduct, and that realization provides a motivation for him to not come back to court. And so you listen to those kinds of arguments and you have to assess them. And now, with the benefit of some

hindsight, I can just tell you that in some way I think that the likelihood or the possibility that a person would commit a violent crime if released did play some part in my decision-making.

Mr. Granof: Other than preliminary hearings and arrest warrants and search warrants, what other duties did you have in the criminal area?

Judge Kennedy: The United States magistrate could try what are called petty offenses and minor offenses. Petty offenses are offenses that carry a penalty of no more than six months in prison, and minor offenses no more than a year in prison. With respect to minor offenses, as I recall, however, the defendant would have to agree to a trial before a United States magistrate.

Mr. Granof: And these were bench trials?

Judge Kennedy: These were bench trials. As a practical matter, I don't recall trying very many of these petty offenses. If you commit a crime on federal property of what most people consider to be very minor, perhaps littering on government property, that would be a petty offense and you would come before a United States magistrate judge.

Mr. Granof: Or if I get a parking ticket from the Park Police on Clara Barton Parkway?

Judge Kennedy: Absolutely. Those types of matters generally just didn't result in trials. A couple did, but not many.

Mr. Granof: So that didn't take up much of your time?

Judge Kennedy: No.

Mr. Granof: Did you get reversed at all?

Judge Kennedy: I don't recall getting reversed very many times. I remember getting reversed one time with respect to, I think, a contempt matter.

Mr. Granof: A contempt matter? You held somebody in contempt?

Judge Kennedy: Yes. I remember holding a lawyer in contempt who failed to appear on more than one occasion to represent a defendant, and it was held by Judge Gesell, as I recall, that under the statute I did not have the authority to hold the person in contempt. I believe that the statute would require me to make a recommendation that a United States district judge find him in contempt. I must say, thinking back on my record -- now I hope that I'm not looking back through time through rose-colored glasses, which is what we tend to do -- I don't recall being reversed many times at all.

Mr. Granof: Now this was on the criminal side. How much of your time as a magistrate judge did the criminal side take up?

Judge Kennedy: The way we did it back then is that one of us would be assigned to, say, warrants and the presentments, and the other would be assigned to do preliminary hearings. And this would be done on a monthly basis. And during the month when the magistrate judge was on a criminal assignment, almost all day was taken up handling criminal cases. Other than that assignment, however, that came about once every three months, most all of the time was spent handling civil cases. I would say much more time was devoted to civil cases.

Mr. Granof: Now on the criminal side, that's not something that district judges referred matters to you?

Judge Kennedy: Oh no.

Mr. Granof: And did the criminal side raise issues of law? I mean I'm sure the civil case side did, but did the criminal side?

Judge Kennedy: No, not often.

Mr. Granof: So, lets move to the civil side, which did take up the majority of your time.

Judge Kennedy: Yes.

Mr. Granof: And I know that magistrates deal with discovery disputes.

Judge Kennedy: Yes.

Mr. Granof: And at that time, could they try cases if the parties agreed?

Judge Kennedy: Yes, if the parties consented, the magistrate judge could try a case back then, and I did. Not a huge number, but some civil cases. I would say the vast majority of my time, though, was spent on discovery and settlements. Trying to effect settlements. Now there were a couple of judges who -- and I smile because I just remembered them so fondly -- wanted to refer something to me and I would say, "Judge, you know, I would love to handle that but you know in order for me to handle it both sides would have to consent. And I don't think these lawyers will consent." And the judge would say, "Okay Kennedy, okay, they won't consent. I'll refer it to you as a Special Master, and you just make all findings of fact and conclusions of law and submit a report and recommendation." So I actually tried a lot of cases, non-jury, as a Special Master. And it was very, very challenging to have to write down every finding of fact and

conclusion of law. You know, when you try a case with a jury you don't do that. The jury comes back with a verdict. When a magistrate acts as Special Master, then you have to display your reasoning in black and white in written text.

Mr. Granof: And these were cases in which the parties were not entitled to a jury trial?

Judge Kennedy: That's right. Back then, for example, Title VII plaintiffs -- that is plaintiffs alleging discrimination -- were not entitled to a jury trial. And so I tried a fair number of Title VII cases as "Special Master." Now, unlike then, a person alleging race, gender, or national origin, discrimination has a right to a jury trial. But not back then.

Mr. Granof: There were three magistrates, but a lot more federal judges.

Judge Kennedy: Right.

Mr. Granof: You weren't assigned to particular judges, were you?

Judge Kennedy: No. About eleven years ago -- at the time I wasn't a judge on this court -- I understand that there was some thought given to pairing a United States magistrate with a certain number of judges, the way it is done in some jurisdictions around the country. In some jurisdictions, it is the United States magistrate judge that handles everything except the trial. That was not the case when I was a United States magistrate judge, and never has been the case in this jurisdiction. Although, as I started to say, there was some thought given to seeing whether that might be a good thing to do in this judicial district, but that was not adopted. Now, and back then, the referrals simply came from the United States district judge. Whichever

magistrate the district judge wished to refer a matter to would be the magistrate judge who handled the matter.

Mr. Granof: And I think you said that you got a lot of referrals?

Judge Kennedy: Yes I did.

Mr. Granof: And from particular judges, more than, say, from Judge Bryant for example?

Judge Kennedy: I don't recall that many referrals from Judge Bryant. And there were some district judges, frankly, who didn't refer anything to any of the United States magistrates.

Mr. Granof: And who were they? Who do you recall?

Judge Kennedy: Judge Gesell, as I recall, didn't refer anything to me, and I don't think he referred anything to any of the other magistrate judges as well.

Mr. Granof: Judge Gesell was a tough guy.

Judge Kennedy: He was a very, very tough guy. A very, very bright guy. Judge Barrington Parker, though, I must say, I was his magistrate judge. He referred many, many things to me. Some very, very interesting things. Judge Parker was a wonderful man. I didn't get to know him very well, really, but I got to know something about him, and my impression is that he was just a wonderful judge.

Mr. Granof: He was the one noted for footnotes?

Judge Kennedy: No, that's Judge Spottswood Robinson. Really interesting that you should mention Spottswood Robinson. My daughter was home -- she's home right now as a matter of fact -- and she was telling me about some case in

which she was questioned during a law school class. And she mentioned the decision had been penned by Judge Spottswood Robinson. And so I had occasion to tell her about my experience with Judge Spottswood Robinson and what it said about Spottswood Robinson. I think Spottswood Robinson, for a very short period of time, was a district judge although I'm not sure. He had certain characteristics which would not have made being a district judge very easy for him, because you have to work very quickly as a district judge. In the U.S. Attorney's Office we always said, If you can get a Spottswood Robinson opinion, it probably touches upon each and every thing that had any relation to the issue at hand at all. He was so thorough and wrote so many opinions with extensive footnotes. But what a wonderful man and what a gentleman.

Mr. Granof: So you got a fair number of referrals and you did trials. How about discovery? Now today, at least the conventional wisdom is that discovery disputes drive judges crazy.

Judge Kennedy: Yes. Maybe I should speak only for myself, but actually I think that I can speak for others as well. They drive this particular judge crazy. I don't like to see them. And when I was United States magistrate judge, that was my impression as to the reason why so many discovery disputes were referred to me. And I handled a huge number of discovery disputes. By the way, when I say that they drive judges crazy, I don't want to convey nor do I mean, that this judge – and I don't think any judges – fail to appreciate just how important discovery is. It really is a very, very

important part of the process. It's just having to get into the trenches and dealing with those issues.

Mr. Granof: Back then in the '70s, I don't know whether litigation was more civilized than it is now. I suspect it was.

Judge Kennedy: It was.

Mr. Granof: I suspect that discovery disputes were more limited in the sense that with electronic discovery disputes have multiplied.

Judge Kennedy: I really don't know if I can make a judgment about that. I do recall that I did not have a day when I was not on a criminal assignment that I didn't handle a discovery dispute.

Mr. Granof: And what kind of disputes? Can you characterize them or were they just all over the lot?

Judge Kennedy: Oh, they were really all over the lot. Everything from whether a person has sufficiently answered an interrogatory. Whether the request for discovery is too broad, too burdensome. Whether a party was entitled not to reveal certain information because the information is shielded by the attorney-client privilege or the work-product privilege, or some other privilege. A huge number of issues can crop up in discovery. Where should a deposition take place? How long it should last?

Mr. Granof: Did you ever have occasion to say, "Okay, I'm going to preside over the deposition"?

Judge Kennedy: Yes. Not often, but I did it maybe three or four times when I was a magistrate judge, at the request of the district judge. You know, the

district judge would say, "I'm just tired of ruling on these discovery disputes. I'm going to ask you just to preside over the deposition." And so I would.

Mr. Granof: You must have gotten pretty good at resolving these discovery disputes.

Judge Kennedy: Yes, I think I did. After a period of time you develop some confidence about how you can cut the wheat from the chaff and get to the point. And, yes, it became easier over time.

Mr. Granof: Did you form an impression of the lawyers involved? Were there some that were more difficult than others?

Judge Kennedy: Oh yes. There were some more difficult than others. I must say, though, that my impression -- and that impression is based upon my talking with judges in other judicial districts -- is that for the most part the Bar of the District of Columbia, in particular the Bar of this court, really is quite good. Quite, quite good, as you would expect. I mean, after all, this is the capital of the nation, and so my impression was that the lawyers are very, very good. But you know, with being very, very good they, were very -- what should I say -- enthusiastic advocates for their clients. Now that doesn't mean that one has to be a jerk, but it does mean that a good lawyer will, you know, argue each and everything that might advance the interests of the client. And so that's what I was faced with.

Mr. Granof: You know that's an interesting point. Is it really a good idea for an advocate to argue each and every point? My own view -- and some very

good lawyers I know don't agree -- is go to the best points you have and try to make those.

Judge Kennedy: I think that's right. I agree with you, but I can tell you there are respected members of the Bar who do believe that the scorched-earth policy is the best policy. I'm not so concerned about that type of lawyer who puts into play that type of strategy. What I was most perturbed about -- and I saw more of it then than I do now actually -- was lawyers simply not being very civil to each other.

Mr. Granof: And you saw more of it then than now?

Judge Kennedy: Yes. And I think that's because maybe lawyers are more on their better behavior before the United States district judge than they are before the United States magistrate judge. Actually, it wasn't when I was a magistrate judge, it was when I was on the Superior Court that I actually took the time to write an opinion calling a lawyer who was just not being civil to task for it. And so every once in a while you would have that type of lawyer. But, as I said, it wasn't very often. And I must say that the very best lawyers in this jurisdiction who I've seen and who have come before me are unfailingly polite. Unfailingly. And, as I've said, I've seen some of the just very best lawyers. I mean, Edward Bennett Williams. I happen to have seen him practice several times. People like J. Kenneth Mundy, whom you might remember. He represented Marion Barry.

Mr. Granof: Did Williams appear before you?

Judge Kennedy: Williams never did appear before me. I remember I was an Assistant U.S. Attorney and I would go to Judge Hart's courtroom, and Edward Bennett Williams was representing Defense Secretary Connolly in the Milk Producers, some scandal --

Mr. Granof: Which he was acquitted of?

Judge Kennedy: Yes. And I remember thinking that this man had such a presence, command of the courtroom. And was unfailingly civil to his opponent, to the judge, and I think that the judge found him to be just a real pleasure to be in front of. And he was very, very aggressive, but civil. The same thing with Kenneth Mundy. One of the best lawyers that's ever appeared before me, and I've had many who are always just so polite, civil. Never throwing a low blow. And there are others too. Leroy Nesbitt was another one.

Mr. Granof: Having been a magistrate judge and now a federal judge, do you refer a lot of disputes to magistrate judges?

Judge Kennedy: Yes. I handle very few discovery disputes myself. I refer almost all of them to the United States magistrate judge.

Mr. Granof: Settlements?

Judge Kennedy: Yes. I refer all of those to the United States magistrate as well.

Mr. Granof: Now, when you were a magistrate you were probably good at effecting settlements.

Judge Kennedy: I was. I don't know what the statistics were, but I appreciated that effectively mediating cases was something that was expected of me to do,

and so I put a lot of energy and time into doing it. So, you know, I would not hesitate to spend extra time in a settlement conference. One that, perhaps, would last into the evening. I do also think that I had a -- I hope this doesn't sound completely vain -- but I think that I do have a kind of a sense of what motivates people. And if you have that sense or if you can develop that sense, it really does help to bring about settlements because you can speak to it. And so I developed certain techniques which I think proved to be pretty successful. I can tell you there was more than one time -- as a matter of fact many times -- when lawyers would say, you know, "Judge, I think that if I would consent to you talking to my client alone, your perspective would be very helpful." And I did. Sometimes I actually did that. I would actually talk to a client alone, without the lawyer being there, trying to get some sense of, again, what it is that the person really, really wanted and could accept.

Mr. Granof: And you could also, I think, give him some assessment of his prospects?

Judge Kennedy: Yes.

Mr. Granof: Of what was realistic?

Judge Kennedy: What was realistic. I think I also was able to project that I was a person who was interested in actually effecting some measure of justice, and at the end I always let them know that it was up to them. I think I was able to make the point very, very clearly -- and I think this point did result in settlements -- that is, a good settlement is when you walk out not feeling great. You know, if you expect to settle a case and also feel great, your

expectation probably is going to stand in the way of effecting a settlement. Almost by definition a settlement is where you kind of walk out thinking, I surely am deserving of more, or, I'm conceding a little bit too much. Because, you know, if you walk out thinking, Ah, I've won it all, then something is probably not right. The value of a settlement is that you get to control it. Now I think we would all agree -- I mean it just makes good common sense -- that you cannot know what twelve people, twelve fair-minded people, are going to do in this case. If the case is now before me for settlement, generally that means that there has already been a resolution of all legal issues. So there was something to fight about. Now can you, in your heart of hearts, tell me that you are sure of what these twelve people are going to do? I think you would agree that you cannot. I know I can't.

Mr. Granof: I found that when I was involved as one of the attorneys in a settlement conference, the mediator or would say, "Do you know how the judge is going to come out on this?" And I would say most of the time, "No, I couldn't be sure."

Judge Kennedy: No, you can't be sure. And, therefore, with respect to an important matter isn't it better for you to have control over your destiny? Within reason, obviously. I mean nobody is asking you to not get something or to give all. And so I think that I was able to project that. I was willing to take the time to do it. Also, to actually get a good settlement you really have to do some work. You really have to get down into the nitty-gritty, really

understand what the issues are, what the facts are. Because just to try to persuade the parties to settle without a context, they're not going to take it seriously. So that's what I did. I took some pride in it.

Mr. Granof: Were there any other techniques you used? I mean aside from really getting down and knowing the case?

Judge Kennedy: I always promised, and stuck to the promise, that these conversations would be confidential. Would not be disclosed to the other side. And so with that I was really able to find out each party's position, and then kind of work toward the middle.

Mr. Granof: Did you tell the parties that you wouldn't discuss this with the judge?

Judge Kennedy: Oh absolutely. That was an absolute promise that was always made and kept. If you were before me, the judge knows nothing about it.

Mr. Granof: Well, I've taken up a lot of your time. You're most generous.

[This concludes Interview No. 4]