THE HONORABLE
HENRY H. KENNEDY, JR.

Oral History Project
The Historical Society of the District of Columbia Circuit

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The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

THE HONORABLE HENRY H. KENNEDY, JR.

Interviews conducted by:
Gene Granof, Esquire

April 23, May 29, July 18, October 23, 2007;
February 12, April 16, May 21, June 19, August 5, 2008

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

The contents hereof and all literary rights pertaining hereto are governed by, and are subject to, the Oral History Agreements included herewith.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Interviews are conducted by volunteers, trained by the Society, who are members of the Bar of the District of Columbia.

Indexed transcripts of these interviews and related documents are available in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Library of Congress, and the library of the Historical Society of the District of Columbia. With the permission of the person being interviewed, oral histories are also available on the internet through the Society's web site, www.dcchs.org.

Such original audio tapes of the interviews as exist, as well as the original diskettes of the transcripts (in WordPerfect format) are in the custody of the Society.

INTERVIEWEE ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of Henry H. Kennedy, Jr.

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Henry H. Kennedy, Jr., do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and computer disk of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the tapes, transcripts and computer disk are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tapes, transcripts and computer disk and their content as a resource for any book, pamphlet, article, or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, transcripts and computer disk in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

Henry H. Kennedy, Jr.
Dated: 6/9/10

SWORN TO AND SUBSCRIBED before me this 9th day of JUNE, 2010.

Notary Public

My Commission expires

Jenna L. Gatski
Notary Public, District of Columbia
My Commission Expires 6/14/2013

District of Columbia : SS
Subscribed and Sworn to before me
this 9th day of JUNE, 2010

Jenna L. Gatski, Notary Public, D.C.
My commission expires June 14, 2013

ACCEPTED this 18th day of June, 2010, by Stephen J. Pollak, President of The Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Schedule A

Tape recordings and transcripts resulting from 9 interviews of Henry H. Kennedy, Jr. on the following dates:

Date & Title	Number of Tapes	Pages of Transcript
April 23, 2007, First Interview	2 (3 sides)	35
May 29, 2007, Second Interview	2 (4 sides)	42
July 18, 2007, Third Interview	2 (3 sides)	34
October 23, 2007, Fourth Interview	2 (4 sides)	36
February 12, 2008, Fifth Interview	2 (3 sides)	38
April 16, 2008, Sixth Interview	1 (2 sides)	29
May 21, 2008, Seventh Interview	1 (2 sides)	30
June 19, 2008, Eighth Interview	1 (2 sides)	33
August 5, 2008, Ninth Interview	1 (2 sides)	29

The transcripts of the 9 interviews are contained on one computer disk.

INTERVIEWER ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of Eugene B Granof

1. Having agreed to conduct an oral history interview with Henry H. Kennedy, Jr. for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Eugene B Granof, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and computer disk of interviews, as described in Schedule A hererto, including literary rights and copyrights.

2. I authorize the Society to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and computer disk in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society

Eugene B Granof
Dated:

SWORN TO AND SUBSCRIBED before me this
17th day of May, 2010.

Notary Public

My Commission expires

SHELLEY A. BAKER
NOTARY PUBLIC
MONTGOMERY COUNTY
MARYLAND
MY COMMISSION EXPIRES AUG. 8, 2012

ACCEPTED this 15th day of June, 2010, by Stephen J. Pollak, President of The Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Schedule A

Tape recordings and transcripts resulting from 9 interviews of Henry H. Kennedy, Jr. on the following dates:

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

First Interview
23 April 2007

This is the first 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 Monday, April 23, 2007, at 2:00 p.m.

Mr. Granof: Judge Kennedy, I think you've told me earlier that you were born in South Carolina.

Judge Kennedy: Yes, I was born in Columbia, South Carolina in 1948.

Mr. Granof: And how long did you live there?

Judge Kennedy: My family moved to the District of Columbia when I was nine years old. So I lived there from birth until that time.

Mr. Granof: So you obviously have some memories of South Carolina. What was it like growing up in South Carolina?

Judge Kennedy: I have some very, very good memories of South Carolina. All of them, from my perspective, very, very pleasant. I think we all tend to look back through time through rose-colored glasses. I think that's probably a natural thing for all of us to do. But, I can just tell you that my time there was very -- very, very -- just good. I must tell you that part of my thinking about my time in South Carolina is influenced by my memory of the times that I spent during the summers there, after my family moved to Washington, D.C. I had an aunt -- my mother's sister -- my aunt Lillian, who lived there. She had four children, two of whom were close to my age. And for several summers after we moved here I would go down to

Columbia and spend, not the entire summer, but significant periods of time there. So when I think about my time in South Carolina, I include those times. And those times, in particular -- I mean these were during the summer months where the kids' time was spent, basically, just playing -- were very, very nice. To tell you the truth, my most vivid memories are the times when I would go to the local swimming pool. It was the Drew Pool, and I suppose it was there that I actually developed a love for the very first sport that I played. Sports have always been a very important element in my life, and the very first sport that I became impassioned about, if you will, was swimming. And that's where I learned to swim. And I remember the summers where each and every day we'd wake up very early in the morning, go to this pool, and stay there the entire day. Now that does raise or invoke a memory, and that is that we spent all of our time at the pool because some of the other recreational facilities near where my aunt lived were segregated, and I could not -- neither me nor my cousins -- could actually go to those places. I remember that there was just this beautiful, beautiful baseball field that we used to pass all the time on our way to the pool, but it just was not -- it was not something that we could do. But, my memories still are just very, very pleasant. It's something that now has significance, but again at the time, the memory, it didn't seem that -- frankly, that bad. For example, going to the movies. This was a time when the movie theaters, just like all the other places of public accommodation, were segregated. And so when me and my

cousins would go to a theater, we would naturally walk up to the section where -- at the time the preferred self-designation of African Americans or Blacks was Colored -- where the Coloreds would sit. And we would walk up to the balcony and look at the movie there. And I must tell you, at the time it was something you just did, and it didn't detract at all from the pleasant experience of going to the movies with my cousins.

Mr. Granof: It sounds like you had a large and extended family down there.

Judge Kennedy: We did, indeed, and I must tell you I'm just so proud of my family. My father was born in New Orleans, Louisiana. He met my mother when he was stationed in Fort Jackson, South Carolina.

Mr. Granof: I think that's a wonderful story. You told it to me before. I think you should tell it.

Judge Kennedy: My mother was sixteen years old and had been forbidden by her mother to go to the place where the soldiers hung out.

Mr. Granof: Now this was your grandmother?

Judge Kennedy: This is my grandmother. My grandmother, we called her Big Momma. The entire family. She was called Big Momma. She was kind of the leader of our family.

Mr. Granof: The matriarch?

Judge Kennedy: The matriarch, indeed. And she was all of five foot—no I don't think she was five feet. But, she was no taller than 5 foot one, but she had a persona that was just huge. But, in any event, my mother, when she was 16 years old did not follow her mother's instruction to never go to that USO down

at the corner of Oak and Gervais Street. But she did, and she met my father who was stationed at Fort Jackson. And fairly shortly after that they got married, secretly. My mother didn't tell her mother. My mother the next year went to South Carolina State College.

Mr. Granof: And how old was your mother at the time she got married?

Judge Kennedy: She was sixteen years old. And she went off to college. At the time she did not tell the truth on her application because married students could not go to South Carolina State College at the time. But, that's how it all kind of began. She had an older sister. She actually had two older sisters and two older brothers as well, one of whom had died very early on. But, in any event, the interesting story is that during a break in school my mother was on the street with my father, and this was after they were married. My father hailed a cab to take them to a hotel. The cab driver recognized my mother -- certainly didn't assume that she was married or she was too young to be married back then -- and refused to take this soldier and this young girl to the hotel, and also said that he was going to tell her mother -- my grandmother. Well, that prompted my mother to finally come clean and tell her mother that she was married. And one of the stories that we tell all the time at reunions is about the time when my father finally came to confront my grandmother. Not confront her, but to kind of face the music. And he did face the music that he had married her daughter secretly. And he fainted. He actually fainted when he came face-to-face with my grandmother.

Mr. Granof: She must have been a very imposing woman.

Judge Kennedy: She was.

Mr. Granof: Because I know that we'll get to your father's characteristics and he was not a weak man at all.

Judge Kennedy: Absolutely not. My dad -- and that is what makes the incident so kind of ironic -- was a very -- what should I say? -- strong-willed individual. Not ever one to back down from a fight. As a matter of fact, as you perhaps can tell just from the few conversations that we've had, I'm a rather competitive person. And I just get that from my father. All my father's heroes were people who were fighters and competitors. One of his heroes was Vince Lombardi.

Mr. Granof: And yet you grew up in essentially the Jim Crow South for the first nine years, and you came out with this sense of optimism, self-confidence, stability.

Judge Kennedy: I attribute all of that to my parents. I happen to have been just absolutely blessed. Just absolutely blessed with wonderful, wonderful parents. People who certainly were looking for a better life. As a matter of fact, the main reason that my parents moved to the District of Columbia was because they -- my father and my mother, particularly my father -- were tired of the oppression, the mistreatment which he encountered in the South. You've asked me about my memories of my growing up and it just so happens that I'll never forget this. But this memory, and I'll tell you about it, doesn't color my, again, pleasant memories of what happened.

My mother and father after a while actually built a house in the suburbs of Columbia -- actually it's probably a park where they built the house. It's probably a park in Columbia, but it was not close to where my grandmother lived, and was a distance from the downtown area. Not that Columbia, South Carolina, at the time had a large downtown area, but, there was a part of the city that was more built up than other parts. But there was a fateful Saturday morning when I went to a little corner grocery store, and I couldn't have been more than six or seven years old. Perhaps as old as eight, but I don't think so. But I had a run-in with the man who owned the store. It was a white man. And what happened pure and simple was that I ordered something. I think at the time we used to love to eat pickles. There'd be these pickles in pickle jars and I purchased a pickle and gave the women -- and I don't know whether it was his wife or daughter -- some money but I touched her, touched her hand. And the man became very angry with me. And he, basically, called me some very nasty names and kicked me out the store. And when I say kicked me out of the store he did not physically throw me out, but he told me to get out of the store and not to come back. But it was a troubling incident. I remember going home telling my mother about it. My father at the time worked for the United States Post Office, and he actually drove postal trucks to different communities, and he would sometimes stay overnight. So he wasn't home at the time. But I remember he came back and my mother told him about what happened. And my father, I'll never forget

my father getting his gun. Actually taking a gun in his hand, and my mother pleading with him not to go down and confront this storeowner who had been so mean to me. So no, my father was not a shrinking violet by any stretch of the imagination.

Mr. Granof: But one thing that is interesting is that experience stands out probably because it was somewhat unique.

Judge Kennedy: Yes.

Mr. Granof: And that it does seem, at least in Columbia, South Carolina, in your particular part and maybe your experiences, it wasn't quite as oppressive as maybe certain parts of the South, say rural Mississippi. I mean you don't come out sounding angry, and you're much more optimistic.

Judge Kennedy: I don't know what accounts for that. All I know is that I am. I know that the Black people of accomplishment whom I really respect so much -- one of them being William Bryant for whom this annex is named -- were Black folk who withstood some very bad things happening to them. Segregation, you know, Jim Crow was not good. But they managed not to carry it with them. To go on. Do the work. Do what they could do to make things better, but not to be bitter. And I certainly respect those people. And if that is said about me, I'm glad.

Mr. Granof: Your grandfather. Did you know him at all?

Judge Kennedy: Didn't know my grandfather. My grandfather was a chauffeur. His name was Sellerspan. He was a chauffeur and he died before I was born. I think he actually died when my mother was a young girl.

Mr. Granof: Now, was your father from Columbia or just happened to be stationed in Fort Jackson?

Judge Kennedy: He was stationed in Fort Jackson. My father was born in Chamberlain, South Carolina, and he had a very interesting life. You know, all of our life experiences go into making us the people who we are. I've already told you what a wonderful man he was; what a wonderful father he was. I suspect that is because -- I don't know why it was because or why this was -- but he had a rather unsettled family life. His mother died within a year of his birth. His father permitted his mother's sisters -- two of them, Aunt Edna and Aunt Beanie -- to basically raise him for a period of time. These are two sisters who lived in two different places. One lived in Baton Rouge, Louisiana; the other lived in Port Allen, Louisiana. And he would stay with one for a period of time, stay with the other for a period time. Then my grandfather -- his father -- got remarried, and then came back for his son. And that caused quite a bit of -- what should I say? -- well I won't say quite a bit, but caused acrimony within the family. And dad, I think, was affected by it. And so my own inexpert psychological reading of him and what drove him is that that had some part of it. That he wanted, for himself, to have a family, and I was the beneficiary of that. And my sister and brother.

Mr. Granof: They must have been married for more than fifty years.

Judge Kennedy: Oh yes. Yes. My father died in September of 2002, and -- I'm terrible on dates like this -- but they were married for over 60 years.

Mr. Granof: I guess there's a lesson there that you can get married at sixteen to an itinerant soldier and sometimes things work out really nice.

Judge Kennedy: Sometimes serendipity works that way. But I can tell you that in talking to my daughters -- I have two daughters -- and they know about this story. I told them, "Nope, this is not something that they should try to duplicate."

Mr. Granof: Don't get married at sixteen?

Judge Kennedy: No, no, no, no, no. Don't get married at sixteen.

Mr. Granof: Well I'm sure it's more than serendipity. There was clearly a degree of character there that permitted this wonderful, stable relationship.

Judge Kennedy: Yes.

Mr. Granof: Loving relationship.

Judge Kennedy: Yes.

Mr. Granof: Now your dad came out of the army -- I guess a segregated army at that point -- and at some point he went to college?

Judge Kennedy: Well, yes.

Mr. Granof: Went to three colleges?

Judge Kennedy: He went to three colleges. Back in those days, the governing board or the governing institutions of college athletics were nowhere near as vigilant as they are today regarding things like paying students to play sports. My father was a relatively small man. Well I'm five foot six. I'm not even five foot six, I'm a little shorter than five foot six. He was about five foot nine, but a slightly built man. But he was a fabulous, fabulous football player. And he ended up going to three colleges. He went to Xavier

University in New Orleans, Dillard University, and Southern University. And he played quarterback for all three. And basically whichever school -- I don't want to defame the school -- but back then, and this was a long time ago, whatever school made it more financially rewarding for him to play, that's where he went. And so that's what he did.

Mr. Granof: Was this after his army service?

Judge Kennedy: No, this was before. This was before the service. And then he went into the service.

Mr. Granof: And he got a job with the Post Office, which then was a place where African Americans could be employed?

Judge Kennedy: Actually he didn't get a job at the Post Office directly out of the service. For a period of time he owned a little nightclub. The Dew Drop -- I've forgotten the name of the nightclub -- the Dew Drop Inn, or something. Or the Moon Drop nightclub. And dad always wanted to be an entrepreneur. I mean he really did. And this was this club that he had down in South Carolina. It didn't last long. He ended up getting arrested by the state authorities for selling liquor without a proper license. And there are all kinds of stories about his -- you know, what he did with the local authorities being in terms of giving some of the local authorities, police officers, money so they wouldn't bust him. But he ended up not doing that for very long. And, yes, there was a period of time after that that he was, from what I could tell, basically a maintenance person at the army base. He wasn't in the army at the time, but he came back as a

civilian and worked as a custodial person, janitor. But then he did get a job in the U.S. Post Office which was a very -- you know -- which was a very, very good job for probably anybody, but particularly for a Black man at that time.

Mr. Granof: Your mother went to South Carolina State.

Judge Kennedy: Yes she did.

Mr. Granof: And ultimately she went on to get her masters at NYU?

Judge Kennedy: That's right. She went to South Carolina State. She graduated from South Carolina State. She wanted to be a teacher, but she could not attend a graduate program in South Carolina because of Jim Crow. And the State of South Carolina paid for her to go to NYU. That's why she ended up there.

Mr. Granof: And so she's got a master's in teaching or education?

Judge Kennedy: She has a master's in education.

Mr. Granof: What did your father do during that time?

Judge Kennedy: For most of that time he was in the Post Office.

Mr. Granof: I mean, were they separated when she was in New York?

Judge Kennedy: Yes. He lived in South Carolina. That aunt that I told you about or that I mentioned, my Aunt Lillian, whom I visited during the summers, she kept me for a period of time so her younger sister could go off to college. She was a teacher herself, by the way. So they were for a period of time separated by distance, at least, while my mother pursued her education.

As you can tell, I mean education in my family from the very beginning was a very, very big deal. There was never any question -- I mean there was no question but that I would be an educated person. It was expected, and the only question was, you know, what kind of education.

Mr. Granof: Was that unusual? I mean, were your friends like that? I mean, maybe your cousins, but --

Judge Kennedy: No, I wouldn't say that it was unusual among the --

Mr. Granof: Your peer group?

Judge Kennedy: My peer group down in Columbia, South Carolina. I mean, my peer group were people who, yes, they all became educated people. You know it all depends on how you define peers, but among the people with whom I was, you know, close to, the people that I played with as a youngster, they all became educated people. My first cousins: I have a doctor, physician, family practice. Very, very distinguished man. Also has done some teaching at The Medical College of South Carolina in Charleston. He's taught there. He has a practice there. I have a cousin who is a certified public accountant. I have a cousin who's a principal. I have two cousins, in fact, who have been principals. My girl cousin and a male cousin. I have a cousin who's a professor at Rutgers University.

Mr. Granof: So it was not just your family. I know we'll talk about your brother and your much younger sister.

Judge Kennedy: Yes.

Mr. Granof: And both of them went on to get law degrees?

Judge Kennedy: Sure.

Mr. Granof: And distinguished careers?

Judge Kennedy: Yes.

Mr. Granof: So I can see where your mother certainly was very education minded, but it's interesting your father was too.

Judge Kennedy: You know my father was not very educated. Again, he went to three colleges, but I don't think he really spent a whole lot of time studying. But while he wasn't educated, he's one of the smartest people I have ever met in terms of just good common sense, and able to discern how it is that one is able to navigate this society well. And so I think it's just because he appreciated that in this society education is a must. And he could foresee it, and did see it, and so he stressed it.

Mr. Granof: I think when we were talking informally last time, if I quote you correctly on this, you said your father was one of your real heroes.

Judge Kennedy: Yes.

Mr. Granof: Now why is that? He must have had an enormous influence on you.

Judge Kennedy: Well, he did. And I suppose when I said one of my real heroes, I suppose a better thing to say is that I just love him so much. And attribute to him my ability to achieve what I have achieved. And that is because my father very early on just impressed upon me that I did have the ability to achieve. And frankly there was a period time when I thought he was out of his head. I mean I thought that he was like any other, you know, fathers who just -- you know you want to think the best -- you know fathers generally

like their kids. You know, parents like their kids. So, isn't that why he is saying these things and acting like there is simply nothing that would prevent me from just achieving? And he said it so many times, and demonstrated it as well, that I started to believe it. I actually started to believe it. And you know it's like anything else, when you start to believe, you start to act on those beliefs, and sometimes you start to gain some success. And then success breeds success, and things start rolling. And so that's what I mean when I say he was my real hero. I mean there are specific things as well that he did that just demonstrated such love for all of us. My parents were not wealthy people. We were not poor by any stretch of the imagination. I mean my father was a postal clerk for many, many years, and my mother was an elementary school teacher. So I think that probably, with standard government salaries, we were in the middle class.

Mr. Granof: What grade did she teach?

Judge Kennedy: Third grade. Second and third grade. But that being said, you know, we lived here in the District of Columbia. It's an expensive place to live, and they had three children. And I'll just give you an example. My brother, after a while, demonstrated to everyone that he really had a superior mind. He was just a very, very bright boy. And when he graduated from St. Albans School, he won something called the Morehead Scholarship from the University of North Carolina. And the Morehead Scholarship would have paid every cent of his education as an undergraduate and, were he to

decide to go to a professional school, either a law school or a medical school, they would pay that too. I'll never forget Randy, for some reason, simply wanted to go to Princeton. I think it was actually because of a teacher at St. Albans.

Mr. Granof: And it couldn't have anything to do with the fact that you went there as well?

Judge Kennedy: Yes. My father, without blinking an eye, said okay. And, by the way, Princeton doesn't give athletic scholarships or scholarships other than based on need. But Randy wanted to go. And my father went, "Okay. Okay." You know that's the kind of thing that just reveals to me a real, just appreciation -- I mean, you know, North Carolina is a great school, but Randy wanted to go someplace else. And my father, as long as we were doing something constructive, he would support us. He would support us.

There are other little things I'll never forget. I told you that I was a swimmer. Well, when we moved up here I joined a swim team. It was the YMCA swim team. As a matter of fact, it was the YMCA that was close to the White House. Well, I used to get up early, early in the morning. Five o'clock in the morning to take the bus from upper -- we lived in Takoma Park, DC -- to go down to practice at the YMCA to swim. There came a point in time when there was a big swimming meet that was to take place up in Delaware. The members of the team were supposed to go up in a van, accompanied by our coach, of course, and I'll never forget the

day that, for some reason, the van broke down and the coach couldn't go, and it was my father, who by the way was a very good football player but he didn't know anything about swimming. My father got the team together and drove us all up to this meet. And I'll never forget when the meet organizer said, "Well, where's the coach?" Because my dad didn't look like a coach. My dad raised up to his full five-foot-eight frame and says, "I'm the coach." And that's the way he is. I mean if at all challenged by anybody he was one that felt that the best defense was a good offense. He was very, very aggressive in tone and manner. But I'll never forget being just so proud of him that he would just take, you know, take it upon himself to get us up there, to be the coach, and permit us, and me, to swim in that meet because it was important.

Mr. Granof: Now your brother Randy was born when you were still in South Carolina.

Judge Kennedy: Yes. He was born in South Carolina. My sister, sixteen years younger than me, was born here in Washington, D.C. He was born in South Carolina.

Mr. Granof: You said your father, primarily, was the driver, at least, to move the family --

Judge Kennedy: Yes.

Mr. Granof: -- to Washington because he was tired of Jim Crow.

Judge Kennedy: Yes.

Mr. Granof: Not that Washington was any great bastion of complete desegregation at the time.

Judge Kennedy: Yes.

Mr. Granof: I guess this is what, ’57, ’58?

Judge Kennedy: That’s right. But I understood from him that he was actually thinking about one other place, Atlanta, Georgia, to move us to. But he saw it was the Jim Crow regime that affected his ability to advance in terms of his, not life style, but his standard of living, I think, that was most troublesome for him. And he saw that there were other places, such as Atlanta, Georgia, and Washington, D.C., where there were sizable numbers of Black folk who seemed to be just advancing in the workplace in a way that he felt that he would not be able to advance in the workplace down in South Carolina.

Mr. Granof: How did he happen to pick Washington?

Judge Kennedy: I don’t know. I think probably by reputation. Well, we did have a relative up here, but he wasn’t very close to this particular relative.

Mr. Granof: But this was a big decision to move from a very stable environment with a large extended family to a city where you really didn’t know anybody.

Judge Kennedy: That’s right.

Mr. Granof: And he clearly had the self-confidence to do it.

Judge Kennedy: That’s exactly right.

Mr. Granof: And apparently your mother did too.

Judge Kennedy: That’s right. To this day, there are sometimes comparisons made between African Americans and people from the Caribbean and Africa who have

come here, and sometimes, you know, the studies show that there has been more advancement by --

Mr. Granof: The more driven?

Judge Kennedy: Yes. My thinking about that is that people who do that kind of thing, who have the wherewithal, the whatever it takes, the spunk, the whatever, courage, are people who are kind of different. They're different. That reflects a --

Mr. Granof: Motivation, drive, ability?

Judge Kennedy: Exactly. And my father and mother had it. And they did. And they brought us up here. And I just don't know why Washington, D.C., versus another place, but it was clear that he was going to go to a place that he thought offered the best possibilities, or best possibility, for his family to thrive.

Mr. Granof: And was he able to get a job with the Post Office here, or just transfer?

Judge Kennedy: He transferred. He worked here for many years in the Post Office. First at the main Post Office at North Capitol Street and -- is that New Jersey Avenue?

Mr. Granof: Yes.

Judge Kennedy: Yes. Near Union Station. And then he became a postal clerk at the local branch of the Post Office that was not very far from where we lived in Takoma Park.

Mr. Granof: And your mother was able to teach in the District?

Judge Kennedy: No. You know, it's really interesting. I don't know that my mother ever taught in the District. For some reason, she taught in Montgomery County. She taught in Montgomery County for years and years.

Mr. Granof: Do you know what school she taught at?

Judge Kennedy: Chevy Chase Elementary School. One of the interesting facts is that I have come into a huge number of people whose sons and daughters she taught, such as David Tatel, who is on our U.S. Court of Appeals for the D.C. Circuit. She taught several of his children, and others as well.

Mr. Granof: And she taught second and third grade?

Judge Kennedy: Second and third grade. She taught at Chevy Chase Elementary School almost from the time that my family moved here, to D.C., until fifteen to twenty years ago. I'm rather distressed that as a public official who has occasion to handle cases involving, for example, kids with disabilities whose parents make claims under the IDEA, the Individuals with Disabilities and Education Act. It just seems to me that just as a general matter the society is not sufficiently appreciative of the importance of the teachers of kids who are in elementary school. It's there where they get their foundation. It's absolutely clear that unless kids get a good foundation in those early grades -- first, second, third and fourth grade -- it is likely that they're not going to be able to achieve what they would be able to achieve if they did get this good foundation. So why we don't just support our elementary school teachers more, I just don't know.

Mr. Granof: One thing that is good is a school like Chevy Chase. You do have, I assume your mother would probably say, tremendous parental support.

Judge Kennedy: Absolutely.

Mr. Granof: And that's all to the good.

Judge Kennedy: When I talk about my distress, I'm not talking about places like Chevy Chase Elementary School. I'm talking about some other places here in the District of Columbia. Now, you know, I went to the D.C. public schools. When my family first moved here, we lived in Southeast Washington, D.C. I went to Turner Elementary School. I went to Turner when I was in the third and fourth grades. And then my family moved to Northwest Washington, D.C., and I attended Whittier Elementary School. And then I attended Paul Junior High School. Paul is now a charter school. And then I attended Calvin Coolidge High School. And looking back upon my educational experience in the public schools, I remember having some very, very fine teachers and think that I had a very good experience. I can't say that my experience was, in terms of academic development and training, on par with my brother's however. But when I compare the quality of the education that I think I received with what I see around me now, I'm not impressed.

Mr. Granof: When you went through the D.C. public school system, was it the segregated system.

Judge Kennedy: No. Certainly there was no *de jure* segregation. Now when I was at Turner Elementary School, I don't remember there being -- I'm trying to

think -- I don't remember there being any white students in the class or in the school. I just don't remember, but I suspect that there were some, but I just don't remember now. When I was in Whittier Elementary School it was integrated and I remember two of my teachers, when I was there, were white. And all through my middle school and high school years I was in an integrated setting. As time went on, there was quite a bit of what was called back then "white flight." And so the numbers of white students declined each year that I was in the school.

Mr. Granof: Now swimming was your first passion?

Judge Kennedy: Yes.

Mr. Granof: But ultimately you became interested in tennis?

Judge Kennedy: Yes.

Mr. Granof: And how did that happen?

Judge Kennedy: It kind of happened in two stages. One, there came a point in time when I really had reached my potential as a swimmer. I was a very good swimmer, but I started competing against kids who were being trained to be Olympic swimmers.

Mr. Granof: They swam during the wintertime? All the time?

Judge Kennedy: Oh, not only swam during the wintertime, they would swim twice a day during the wintertime. And I remember going to swim meets not doing so well, and my father, one time I remember he said, you know, "We need another sport." He actually said that. "We need another sport." Because I wasn't doing as well as I wanted to do, and I just wasn't able to train as

much as I would have to train to compete at that level. There was a time that I started, when I was in high school, that I actually, in order to try to train at a level that would permit me to compete against kids who were, as I said, training for the Olympics, I used to work out with the swim team at Howard University. And I always appreciated that. I'll always be very appreciative of the coach there. His name was Clarence Pendleton, whom my father had sought out. He actually let this -- I was back in Junior High, ninth and tenth grade -- this kid come and train with this college swim team. But I was not doing as well as I wanted to do, but one of the things that my father insisted upon when we moved from Southeast Washington, which was an apartment, to Northwest Washington, he insisted that we live near a park. He wanted his sons to be able to run around. Play sports. To have a healthy environment. So he insisted upon living close to a park. And the park that we lived close to was Takoma Park. At Takoma Park one of the main activities during the winter was Ping-Pong. And there came a point in time after school I'd go down to Takoma Park and we had a system there where basically two people would play, the winner stayed on and would take on all comers. And you kind of got into a line, and I just started playing and trying to win so I could continue to play. And I came to really like Ping-Pong. I mean I loved Ping-Pong. And I'll never forget this Christmas --

Mr. Granof: Do you play today?

Judge Kennedy: No. I asked my father and mother for a Ping-Pong table for Christmas, and to make a long story short, I'll never forget this Christmas morning I came downstairs, hoping that Santa would have brought me a Ping-Pong table. You know, when you're a kid you don't have any judgment. Our house was not large enough for a Ping-Pong table, but there was this tennis racket and a can of balls under this Christmas tree, and I must tell you I was very, very disappointed. My father, and I'm sure I registered my disappointment, he said, "I know you asked for a Ping-Pong table, but this is a tennis racket and a tennis ball. And it's just like Ping-Pong, except that you play it outside and it's on a bigger table." And I was so disappointed. So disappointed with that, as a matter of fact, that I just picked up the racket and went down to the schoolyard -- it was in the dead of winter -- and just started smashing the ball against a backboard or the cement board. The ball came back and all of a sudden, hey, and I just started to like this. And that's how I got started.

Mr. Granof: And so you did this without any lessons?

Judge Kennedy: Just went down there, starting hitting the ball. And I'll tell you, you know, any kind of history of my life should reveal that all along the way I have come across people who have just befriended me and wanted to do what they could to help. So what happened, I'm just starting to play against the wall. Men would come by and see me. After a while, I would go down to the tennis courts. There are men playing. You know, they are avid tennis players. One says, "Hey, come on out here. I'll play with

you." I'll never forget one of those men, David Lipschutz, a wonderful tennis player. Very, very avid tennis player, and for some reason he just started playing with me. And I would watch him, and he would give me lessons. I mean he would tell me. He was a good player. I'd pick it up. And after a while I became very, very passionate, so I also started reading and watching, and that's how I got started.

I do want to say, though, when I mentioned lessons, these men who were down at the tennis courts, when I say they gave me lessons, they weren't paid lessons. They just gave me tips on how to play. And I really very much appreciated it. They were very good, and from that point on I have been very much involved in tennis and attribute to tennis just much of my enjoyment in life.

Mr. Granof: But I think just to say that you were interested in tennis and that you play it doesn't really do it justice. You're a pretty competitive tennis player and you've had some success, haven't you?

Judge Kennedy: Yes. I'm very proud of the fact that my senior year Coolidge High School won the city championship. I was the captain of the team for two years. And actually there was a point in time when I thought about becoming a professional tennis player. Between my junior year in high school and my senior year I had the good fortune of being invited by a man whose name is R. Walter Johnson. R. Walter Johnson was the discoverer of Althea Gibson -- and was her mentor -- and Arthur Ashe. He was a physician, a Black physician who, himself, was a wonderful football player. As a

matter of fact, his nickname was Wizard Johnson. He went to Lincoln University up in Pennsylvania, became a successful physician and, for some reason, and I don't know this, but he became very, very interested in tennis. And he wanted to develop young Black players who'd be able to play in the best tennis competitions in the country. And what he would do is basically keep his eyes and ears open about Black tennis players, young Black tennis players, and he would offer a few of them -- the summer that I went down to his house -- the opportunity to come down to his house, which was in Lynchburg, Virginia. He lived in Lynchburg, Virginia, which was where he had his medical practice. And he had a tennis court in his backyard that he had built, and we had a tennis academy there. And it was one hell of an academy. While a couple of kids were able to stay at his house, other kids were housed in places around the City of Lynchburg. And what would happen is every morning, 7 o'clock in the morning, you had to be at the tennis court ready to play. That meant that you had to wake up very early in the morning and then run to the tennis court -- to his house. And that's what I did for an entire summer. And I can assure you I was in great shape.

Mr. Granof: I bet you were.

Judge Kennedy: I actually stayed with -- me and another guy who is a teaching pro now in Knoxville, Tennessee -- with his secretary. So for an entire summer, wake up about 4:30, 5:00 o'clock in the morning, and get something to eat, and run like hell to the tennis court because he would not -- the idea of being

late for one of those tennis sessions, I mean no one would every consider it. This man was stern in a way that I can't describe. He was serious of purpose. He, for whatever reason, had this desire to develop tennis players -- Black tennis players -- to compete with the best in the world, and, you know, if you did not have a similar type of ambition and spirit, this was not the place for you. And so I had that opportunity. And so the next year, I was really good. I got really good and I certainly beat everybody in this area and ended up defeating a fellow who was up and coming -- who was younger than me -- but my victory over him really raised eyebrows. His name was Harold Solomon. Harold Solomon played for the U.S. Davis Cup team for many years. I think his best performance was at the French Open where he lost in the semifinals to Adriano Panatta, a great Italian player. But I beat him in a summer tournament. And I, at the time, was thinking -- because at the time tennis was starting to break where you could start to make some money. Before then, everything was kind of under the table except for the touring pros.

Mr. Granof: The really big names?

Judge Kennedy: Yes, like Jack Kramer, and Rod Laver. They were like their own little business. And the rest of the people were "amateurs," and you couldn't make any money. And in order to be involved with Jack Kramer's business you would already had to have been a world-beater. So for a little while I thought, "Ah, maybe that's what I'd like to do." But my father said -- looked me dead in the eye -- he said, "Nope." You know, he

can't let me do that. "You really aren't good enough. You're not a good enough tennis player." And he was right. He was right. He was the kind of guy who -- I mean he --

Mr. Granof: Well certainly he had good judgment and common sense.

Judge Kennedy: Good judgment, good common sense. He said, "Nah, nah." He said, "You know, you can play tennis. I know you love tennis." But by that time I had gotten into Princeton University. I had gotten some tennis scholarships from other places, but I had gotten into Princeton University. And he said, "Nah, you go to Princeton University."

Mr. Granof: Were you ever tempted to play football?

Judge Kennedy: No. I mean I'm so small. You know my father always loved football. He had played it, but he never --

Mr. Granof: Never pushed you in that direction?

Judge Kennedy: Never pushed me at all. No.

Mr. Granof: But did you play tennis for Princeton?

Judge Kennedy: Yes. I played for Princeton.

Mr. Granof: And you were probably pretty good.

Judge Kennedy: I was pretty good, although I must say I didn't play in the upper ranks on the team. I was always struggling, actually, to make the team at Princeton. We had a fabulous tennis team. We won the Ivy League championships and we would compete against the best schools in the country in tennis -- UCLA. And, as good as I was, we had several people on the team who were better. And I was kind of always struggling, as a

matter of fact, to make the traveling squad. And you know it's really interesting. Because I guess, unlike some of those players who were just great players in college and that didn't continue playing competitive tennis, I always feel that perhaps I was never gratified and so I have continued to play.

Mr. Granof: Was that kind of a letdown for you? I mean, here you had beaten everybody around you in high school in the D.C. area. Then you get to Princeton and you find it's tough.

Judge Kennedy: Yes. Well, it was.

Mr. Granof: So it was, "My dad is really smart?"

Judge Kennedy: Oh, yes. Princeton did that. There was several ways in which that happened. I mean I had done very well in high school as well. Just academically, you know.

Mr. Granof: Well I was going to get to that. But just to finish tennis, now you have continued to play competitive tennis, and you have been fairly successful at it?

Judge Kennedy: Yes I have. I've been successful. I've never won a USTA national championship, but I got very close.

Mr. Granof: How close did you get.

Judge Kennedy: I got to the final four. I got to the semifinals of the U.S. Clay Court Championships two years ago, in 2005.

Mr. Granof: And is that in your age group?

Judge Kennedy: In the 55 age group.

Mr. Granof: So you really were one of the top four men's players in singles in amateurs in the United States.

Judge Kennedy: For my age group, yes. And last year I was ranked number 20 in the United States. I was really rising. I've had some success.

Mr. Granof: Why, more than some success.

Judge Kennedy: Yes.

Mr. Granof: I think a lot of people would say that for an amateur player, you've really reached the top ranks.

Judge Kennedy: Yes, and I must say I'm very proud. For many years Blacks were not able to play in tournaments sanctioned by the United States Lawn Tennis Association, now called the United States Tennis Association. And that broke down many, many years ago. But the Black tennis players developed their own organization. It's called the American Tennis Association. And I have won four American Tennis Association national championships, and I'm proud of that.

Mr. Granof: You should be.

Judge Kennedy: As a matter of fact, I just have to tell you that the last time my father saw me play tennis, he saw me win the ATA national championship. The same year I won it in two age groups. I won both the 50 age group and the 45 age group on successive days. One day I won the 45 national championship -- the ATA national championship -- and the next day I won the 50 national championship. And he was there, and he saw it. I was very, very pleased that he was.

Mr. Granof: He must have been pretty proud of you to do that.

Judge Kennedy: Yes.

Mr. Granof: So, when you were in high school not only did you have athletic success, but you had that combination. You must've been a good student to get into Princeton.

Judge Kennedy: I studied hard. Again, it was expected of me by both my parents. That was just the way that people in my family -- we just -- it just came, it was something you just didn't question. You did your best in school. You went to school each and every day, on time, dressed appropriately. You listened to your teachers, you didn't talk back, and you did your very, very best. People always ask me about whether, you know, my parents took any part in my homework. No. They never told me to do my homework because it was understood that I'd do my homework. And so, I guess I'm a person of average intelligence and I put that average intelligence to work and studied hard and, yes, I was fairly successful. I wasn't valedictorian though. I was number 14 in the class. It was a very large class though, 500. There were over 500 kids in my class.

Mr. Granof: That's pretty high up. So you clearly were above average, well above average.

Judge Kennedy: Yes.

Mr. Granof: But at that time, when you graduated from college was, I think, what, 1970?

Judge Kennedy: Yes.

Mr. Granof: So you were looking at in ‘64, ‘65, looking about where you would go to college.

Judge Kennedy: Yes.

Mr. Granof: And today it’s much, much more common for African American students to be looking at schools like Princeton and for the Ivy League and all those elite schools to be receptive because they would want a diverse student body. But that wasn’t true then. How did you decide, I mean, even think about going to a school like Princeton, particularly since you weren’t from parents who were celebrities or wealthy? Your parents were ordinary working people. Interested in education, to be sure, with a talented son, but still.

Judge Kennedy: First of all, you’re absolutely right. And the way I came to go to Princeton is as follows. I told you that tennis has always been special for me because it has played a kind of a crucial role or an important role in so many things that have happened to me. I mean, you know, serendipity; I use that word, but a lot of it just kind of surrounds tennis. I became interested and applied to Princeton because of a good friend of a member of the tennis team, who was my friend as well. That is, I had a friend who was on the tennis team. His friend, whose name was Harvey Freishtat, was two years older than me and Alan Green, my fellow tennis player. Harvey went to Coolidge High School, and Harvey was brilliant. Harvey was absolutely brilliant. Still is. He’s a lawyer up in Boston. He goes off to Princeton. One day we were at Alan Green’s house. Alan Green was

talking about going to Princeton. I was talking about other places. As a matter of fact, some schools had contacted me and, frankly, Princeton was the kind of place that, you know, that was not on my radar screen as a possibility. I was thinking about some of the historically Black colleges, some other places. And when Harvey Freishtat sensed that I wasn't even thinking about Princeton he said, "Henry, you should think about Princeton University." He said, "No, no. You really should." He said this: "Princeton University really is interested in having some bright Black students on campus." That's how I got interested.

Mr. Granof: And he was a couple of years ahead of you?

Judge Kennedy: Yes. He was at Princeton at that time. And he did come back, you know, it was during a break. I have been blessed with coming into contact with people who, for no reason other than driven by the impetus to bring out the best that is within us, decide to say something, do something that was very helpful. That's it. Harvey Freishtat put the bug in my ear that maybe, indeed, I could go to a place like Princeton. I ended up applying. I remember my parents certainly weren't all that confident because I ended up getting acceptance letters from at least one institution to which I didn't apply. My mother applied for me because she thought that these schools that I had applied to, you know, they were kind of out of our reach there.

Mr. Granof: Was Princeton the only school of that type that you applied to?

Judge Kennedy: Well, no. Actually I applied to several very good schools, but it was the only Ivy League school I applied to. A very good school, Hamilton College. Ohio Wesleyan University.

Mr. Granof: By the way, did you get into Hamilton College?

Judge Kennedy: Yes, I did get into Hamilton. Ohio Wesleyan University gave me a tennis scholarship. Gave me a full tennis scholarship. I didn't apply to Hampton Institute. My mother did. You know, Hampton Institute is an historically Black college.

Mr. Granof: How did you ever hear of Hamilton College?

Judge Kennedy: Well, I think during those periods of time places like Princeton, Hamilton, elite schools, had seen the light and had determined that it was just not acceptable to have these places that were well endowed, whose mission is to educate students, particularly students who are going to be leaders, not to have any Black students. And I think many universities kind of came to that conclusion at the same time. Now Princeton University, I can tell you, came to that conclusion clearly at the -- well, put it this way, it was the president of the university. A man by the name of Robert Goheen. He was the person who was the driving force to diversify Princeton's campus.

Mr. Granof: And it probably wasn't easy because, of the Ivy League schools, Princeton with its eating clubs had, I think, a southern flavor.

Judge Kennedy: Sure.

Mr. Granof: I don't know if that is true today

Judge Kennedy: No, it's not. But certainly back then, certainly the reputation was, you know, that this was certainly as far north, nobody was going to go up further north than New Jersey. But then it was about as far North as some of the sons of southern aristocrats were going to send their kids.

Mr. Granof: And so you applied, and you got in.

Judge Kennedy: And I got in. I'll never forget it. You know you get your acceptance letters in the springtime. I had gone to play a team. We had a wonderful coach. I'd love to mention his name. Mr. Hankins. White man, taught mathematics at Coolidge High School, and continued to teach there even when, as I just told you, more and more white kids and their families just kind of moved out of the neighborhood. But he stayed. And he loved tennis. And he made a point of getting us matches with the tony prep schools, including St. Albans and Mercersburg Academy. Mercersburg Academy is located in Pennsylvania. I'll never forget going up there playing this guy up in Mercersburg Academy. Mr. Hankins drove me to my house. He pulled up. My parents came out of the door, jumping up and down. I actually saw them jumping up and down waving something. And it was my acceptance letter from Princeton University.

Mr. Granof: So they must have been really excited.

Judge Kennedy: Oh, they were very excited.

Mr. Granof: And you were too. How many kids from Coolidge went to Princeton?

Judge Kennedy: That year?

Mr. Granof: That year. One?

Judge Kennedy: Yes, just one.

[This concludes Interview No. 1]

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

Second Interview
29 May 2007

This is the second interview of the Oral History of Judge Henry H. Kennedy, Jr. as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Monday, May 29, 2007, at 2:00 p.m.

Mr. Granof: Judge Kennedy, I think the last time we talked we had gotten you to the point where you had been accepted at Princeton and you were preparing to go. So you started Princeton, when?

Judge Kennedy: I started Princeton on September of 1966. I remember it very, very well because my parents drove me up in our family car. My parents were very, very pleased that I had been accepted to Princeton, the caliber of school that Princeton was. However, it was pretty clear to me that they, like I, were somewhat intimidated by the very sight of Princeton. Princeton is a very beautiful place, large buildings built in the collegiate Gothic style. Many of the buildings look like chapels, very grand chapels. Even the classrooms. And I remember my father and mother taking me up. We unloaded the car and, unlike when I had taken my girls to Princeton -- you know they both now attend Princeton -- where we stay around, talk, meet some of the other students' parents who are dropping them off. Just treat it as a rather leisurely and enjoyable event. My parents dutifully dropped me off and then headed back to Washington that same day. Very shortly after dropping me off. And I remember feeling very much alone. And,

again, just uneasy because the atmosphere of this place was just unlike the atmosphere that I had ever experienced before. And the very thought that I would spend more than a few days there -- indeed, I was anticipating spending four years there -- really rested on my mind with somewhat of a burden. It was September 1966.

Mr. Granof: And it was intimidating?

Judge Kennedy: Yes.

Mr. Granof: Now, you were assigned to a dormitory and you had roommates?

Judge Kennedy: I lived my first year in Pine Hall, and I was originally slated to live with two young men. One, whose name is Rick Webber -- who is a partner at Arent Fox -- I still keep in touch with, and we have lunch at least once a year and we keep up with each other. The other person -- whose name I do remember but I won't repeat it now -- lived with Rick and me for about three weeks. I found out later that this young man, and probably more accurately, this young man's father, was not pleased that his son was going to live with a Black guy. I was told by Rick many years after we had graduated from Princeton that while my family was unloading the car this fellow's father made a comment. Our procedure was to bring bags up. There was a walk-up. We were, I think, on the fifth floor. There were no elevators at the time, so we would walk up these stairs, drop off our luggage, and then all go back downstairs to the car. Well, apparently one time when we went back down to the car, according to Rick, this fellow's father said in Rick's presence -- Rick was white as was this

fellow that I'm talking about now -- he said, "You know, you can change roommates."

Mr. Granof: Was he from the South?

Judge Kennedy: No, he was not. That's very, very interesting. He was from New England. That's where he lives now. And sure enough after about, again, after about three weeks, he moved out for no reason that he told me about. I can say that during the time that we did live together, we had a perfectly fine time. But he did move out, and that's that. The good news is that I lived with my other roommate, Rick Webber, for three years. And that's very unusual. To live with the same person for three years.

Mr. Granof: You obviously got along.

Judge Kennedy: We certainly were comfortable. We were certainly comfortable, and certainly liked each other, but he came from an entirely different background than I did. He was from the Midwest. He came from Minnesota -- Minneapolis, Minnesota. He had gone to a very tony prep school -- The Blake School. At least one of his parents was a physician. I don't know what his other parent did. But in any event, we got along fine, and we certainly liked each other and enjoyed each other's company enough so that I lived with him my freshman year, all throughout my sophomore year -- second year -- and junior year. And would have lived with him my final year -- my senior year -- if I hadn't decided to become a part of a group that started a community action house. We called it Community House. There was a young man by the name of Gary

Hoachlander. Now this was the time when community action programs were all in the news and there was a lot of activism throughout the country. And Gary Hoachlander was a very energetic guy who wanted to do something for others that was not limited to work on campus, and he managed to get a grant from the Ford Foundation to set up a community action house where we students -- and there were about six or seven of us in this house -- rented a house off campus. Ninety-nine percent of students, if not all students, to that point at Princeton lived on campus. That's one of the great things about Princeton because you lived on campus rather than have to rent places out in the city. But we moved off campus and we would tutor neighborhood kids. I was in charge of renting movies. I'd show them. I did that my senior year. And Rick roomed with someone else his senior year.

Mr. Granof: When you were in college, those years '66 to '70, probably in '66 was maybe the beginning of activism, because it was sort of getting into the height of the Viet Nam war. And so they must have been very interesting times on campus.

Judge Kennedy: It was most interesting times. I try to convey to my daughters -- again who both are at Princeton now -- what it was like then. Of course, Princeton at that time was all male. I remember the day that Martin Luther King was shot and killed. I remember students, a great number of students, being just very, very agitated and marching. I actually wasn't a part of this march, but I remember that there were those who marched to

the president's house, which was on campus at the time. And I don't know what, frankly, the students were expecting the president to do, but I remember that classes were suspended for a period of time. This was the time when the Black Panthers were a group that had found their voice, or certainly were loud and said some very, very provocative things. And I remember the Black Panthers coming to the campus, and there was quite a stir that caused. At the time, at least among the group that I hung with, there were people who welcomed them on campus, but there were others who really thought that they should not be on campus. And so there were these groups listening to this fiery rhetoric by the Black Panthers and I was there. It was quite something.

One of my most vivid memories was when Muhammad Ali came to campus. You might recall that Muhammad Ali had become the heavyweight champion of the world. He was the heavyweight champion of the world, but he would not answer to the call of the draft. And he was stripped of his title. And to make money, he would go around the various college campuses to give talks. He lost a lot of money being stripped of the title, and this was what he was doing. He was going around, actually, as I understand it, to make money. And I'll never forget the time when he visited the campus. He gave a talk at Whig-Clio Hall -- which is a debating society -- and I remember him walking down the steps and I always just idolized this guy. I remember listening with my father on the radio when he fought Sonny Liston, the Bear. Sonny Liston was an ex-

convict, and he was just a ferocious figure. And at the time many, many people thought that Cassius Clay, as he was known then, had really bitten off more than he could chew.

Mr. Granof: I had forgotten his real name.

Judge Kennedy: Cassius Clay. And I thought that this mean, big, former ex-con was going to kill him. And I remember one night, sitting by the radio, listening to the color commentary about the fight. And I remember how there came a point in time when Liston got knocked down and didn't get up. And you know Cassius Clay at the time was very glib. He was entertaining. I just loved the guy. I just loved him. Then he became a Black Muslim and I just followed him. But the point is I just idolized this guy. And I remember seeing him come down these stairs and I ran up to him. And I said, "Mr. Ali. Mr. Ali, I really am so pleased that you're here. I'd like to just shake your hand." And I put my hand out there for him to shake. His hand was so large, he basically engulfed my full arm and hand in his. And he shook my hand, and he was very, very gracious. And I followed him and his entourage to Alexander Hall, which is where he gave another speech. And I just loved the speech. It was a very uplifting speech; it was a speech that talked about Black power and Black pride. And I have to tell you that there was a line there that I'll just never forget because there were many Black people in the audience. We had very few Black students at the university. Sixteen Black students in my class, and there were fewer Black students in every class below that.

Mr. Granof: Sixteen out of a class of one thousand?

Judge Kennedy: Eight hundred and twenty five. But there were some Black people from the town who had come to see this. And I'll never forget Muhammad Ali said -- well you know, just talked about racism -- "And everybody knows the blacker the berry, the sweeter the juice." It's a silly saying, but I must tell you it drew wild applause from the audience, and I was part of it.

I came down to Washington for the march against the war. A march right down here at Constitution Avenue. I came down for that.

I'll never forget the time when the Secretary of Agriculture -- his last name was Hickel, I'm pretty sure it was -- came to speak on campus. And at that time everyone involved in government, there was a lot of suspicion about them.

Mr. Granof: They were the enemy.

Judge Kennedy: They were the enemy. They were the enemy.

Mr. Granof: Don't trust anyone over 30?

Judge Kennedy: That's right. And certainly don't trust anybody from this administration that was keeping us in the war. And unlike now, it was very personal to us because --

Mr. Granof: There was a draft?

Judge Kennedy: There was a draft. So it was a big thing when the Secretary of Agriculture came, and I'm sure he was talking about environmental things. But in any event, it was a real controversy on campus because the students who

attended his presentation heckled him. As a matter of fact, I remember the daily Princetonian headline "Students Heckle Hickel."

And the university -- Robert Goheen -- just one of the finest men to ever walk this earth as far as I'm concerned -- was very embarrassed. Very upset that at this institution where learning is what we're supposed to do, that the students had acted irresponsibly.

Well, I tell you that story as a backdrop to the visit of a controversial figure. George Wallace came to campus. And the Association of Black Collegians was what we called ourselves. There was a discussion as to, well, what were we going to do in making it known that we protested, I think, his presence. But certainly we were protesting what he stood for, at least what he had stood for. And frankly at that time our analysis was very nuanced. And I don't know where George Wallace was at that stage in his political career as to his thoughts about segregation. At one time, you know, actually when George Wallace first ran for office, he ran as a kind of a Liberal and he lost to a person who used racial strife and segregation against him. And he said, "I'll never be out-segregationed again." And then he became someone, you know, who stood for segregation. And then, of course, towards the end of his life he changed back. But, in any event --

Mr. Granof: After he had been shot?

Judge Kennedy: After he had been shot. But, in any event, there was discussion about what to do. Well, I can tell you one of the memorable times in my college

years was what we decided to do. And it was after some really heated debates about what to do. The Black students marched into the auditorium, and we took our seats. We all were dressed very formally. Ties. Mr. Wallace came in and just before he gave his speech, as one we all stood and without saying a word -- without heckling -- walked out. And I remember the applause that we got from the other students. I mean it was really -- they stood and just applauded what I think was their appreciation of the way that we had protested. Demonstrating our protest but also not doing something like just shouting someone down.

Mr. Granof: It does seem like from someone who came to Princeton somewhat intimidated that you were able in not too long a time to get very involved in all sorts of things at Princeton. I think you told me that you did play tennis for a while.

Judge Kennedy: Yes. I played tennis all four years that I was there. But these things that I'm telling you about now are things that took place in very concentrated periods of time.

Mr. Granof: I do remember Columbia, the takeover there. And Berkeley, of course, everybody remembers.

Judge Kennedy: Yes.

Mr. Granof: And even at Harvard, I think, there was a huge fight with the police.

Judge Kennedy: And Cornell.

Mr. Granof: And Cornell where the Black Panthers were involved.

Judge Kennedy: Right.

Mr. Granof: But I don't recall Princeton having that level of activity.

Judge Kennedy: I don't think there was. These are things that I tell you about because I remember them, but I don't recall that any of these events gained national attention because the level of activity and the kinds of activity that took place on Princeton's campus, when compared to what was happening at Berkeley, Columbia, Cornell, Harvard, it just was not the same level of activity.

Mr. Granof: Aside from tennis, and I think you said Community House --

Judge Kennedy: It still exists. I'm just as proud as I can be of this project that I helped start -- I was one of the founders. Now, as I said, Gary Hoachlander, he was the main mover, but the rest of us we had to help him, and had to kind of consent to living off campus in the community and doing something different. It's still going on. Now the house itself, Princeton made the students come back onto campus. I think that what happened is that Princeton is very sensitive to the members of the community. And I have never talked with anyone about this, but I think what happened is that the university was a little bit uneasy with these kids basically willing to pay a rent that was higher than the rent that could be afforded by the other residents, and maybe even driving up the housing prices. I think that caused a reassessment as to the wisdom of having this house in the community on Witherspoon Street. It now still exists, but on campus. And there's a program called Community House.

Mr. Granof: Could you describe in more detail exactly what its mission was and what you did?

Judge Kennedy: We wanted to be helpful to the community in ways that we could and knew about. We would organize outings for kids in the neighborhoods. We would take them to concerts. I'll never forget taking about fifteen kids who had never left the Princeton area up to New York City and other places. Just outings. The outing to New York City was to see a concert by some popular group. We wanted to tutor them. We sensed that some of these kids just were struggling in school, and so we would actually tutor them in reading and writing and arithmetic.

Mr. Granof: Princeton is a tough area in the sense that it's very much a university town, and people want to live there, even those who are not connected to the university. You know, lawyers, doctors, investment bankers.

Judge Kennedy: I think you've hit it right on the head. Princeton is a very interesting town. Princeton Township is what it's called. Yes, some very, very wealthy people, many of whom actually work in New York. I mean Princeton is kind of a bedroom community commute to New York. You have, of course, the people who are connected to the university, the professors who are pretty well off. But again, down Witherspoon Street at the time, there was this lower-class community. I wouldn't call it a ghetto. Now certainly I've been to many places that seemed poor, where there was even more trash, but that's where we did our thing.

Mr. Granof: And obviously you were motivated to do something very constructive.

Judge Kennedy: Yes. When I went to Princeton I had thought about being a doctor. That was my ambition.

Mr. Granof: I was going to ask you if when you came to Princeton you had some idea of what you wanted to do.

Judge Kennedy: When I entered I really had thoughts about being a doctor. I thought, "What a wonderful thing it would be to be a doctor. Be a person who had the skills to actually make people feel better when they fell ill." Well, I kept that ambition until I took some of the hard science courses. Biology, it was just too much for me. I just didn't do well, and I'll never forget I felt very, very -- talk about intimidated, I sat in the seat that had a little brass plate on it that said Albert Einstein sat here.

Mr. Granof: That would be intimidating.

Judge Kennedy: And so it dawned on me pretty early on that maybe the hard sciences were not really where my talents were. I was struggling a bit. I passed all those courses, but I didn't do particularly well.

Mr. Granof: Did you go beyond biology?

Judge Kennedy: No. That was it. And then I came to really enjoy economics. I had a wonderful economics professor -- Burton Malkiel was his name -- and he taught the introductory course, Economics 101. He just made the subject come alive for me, and I became very interested in economics and thought for a period of time that I would major in economics. I took courses from Professor Malkiel, Economics 101, which was a course in macroeconomics, and then I took Economics 102, which is

microeconomics. And then I remember taking a course from Sir W. Arthur Lewis. Sir W. Arthur Lewis was a Black man -- he was actually born some place in the Caribbean. I think he was one of the very few Black professors on Princeton's campus at the time, so he stood out for that reason alone. But he also stood out because he was just a brilliant man. He won the Nobel Prize for economics -- the economics of under-developed countries. And he had been the chancellor for a period of time at the University of the West Indies. But anyway, I took economics courses from him, and that kind of got me involved in public policy. And I decided that I would try to gain admittance to the Woodrow Wilson School of Public and International Affairs.

Mr. Granof: Now, when did you decide?

Judge Kennedy: By the time I had completed my freshman year at Princeton I knew that I didn't want to be a doctor. It was a nice thought, but not something that I really thought would be a good thing for me. My interests and talents simply didn't fit. And so I started hanging out with some friends who were just more interested in the social sciences -- politics, history -- and so I applied to this program. This was one of the only majors at Princeton that you have to apply to. But I had done well enough to gain admittance to the Woodrow Wilson School of Public and International Affairs, which is a kind of an interdisciplinary program where students are expected to take courses in politics, history, economics, and sociology. And one of the features of the concentration or the participation in the program at the

Woodrow Wilson School of Public and International Affairs was what are called policy conferences. What they were at the time is students studying an actual public policy issue and coming up with some answers. My first semester junior year, there had been a real serious dispute -- community dispute -- in Newark, New Jersey, because of an urban renewal program where the New Jersey College of Medicine and Dentistry was moved from one place -- I've forgotten where it was -- to Newark, New Jersey, and plopped right down in the middle of an area of town where some of the residents just didn't want it. And in New Jersey, there was a lot of talk about that. And so the policy conference that I participated in involved studying the controversy and trying to figure out its causes, how things could have better been done, how such problems could be avoided in the future because urban renewal was a big thing at the time. So that's what I did. And I really enjoyed that.

Mr. Granof: It appears that you could remain an undergraduate at Princeton, but under the umbrella of Princeton you had to apply for and participate in the Woodrow Wilson School.

Judge Kennedy: Right.

Mr. Granof: And when you got your degree it was a Princeton degree?

Judge Kennedy: Oh yes. The Woodrow Wilson School of Public and International Policy is part of Princeton. It's right there on Princeton's campus. I don't know why it's so separate actually, but that's where it is. So yes, I received my

Bachelor of Arts degree from Princeton with -- I think this is a certificate. What would you call this?

Mr. Granof: It seems like a Princeton degree plus.

Judge Kennedy: Yes.

Mr. Granof: In an area of your specialization.

Judge Kennedy: Right.

Mr. Granof: So was it your freshman year or junior or sophomore year that you went to the Woodrow Wilson School?

Judge Kennedy: You apply after your first semester sophomore year.

Mr. Granof: And you knew based on the courses you had taken, particularly the economics courses?

Judge Kennedy: For some reason I just gravitated toward the school; it just seemed like something that I really wanted to do -- you know, that would interest me. I really liked the interdisciplinary approach. I had taken, by that time, some history courses. Took a history course from a magnificent professor, James McPherson, who was an authority on the Civil War. The Civil War era was his specialty of American history. He ended up being my thesis advisor. There were just so many things about this program that recommended it.

Mr. Granof: And Professor McPherson clearly stands out. I mean you obviously developed a close relationship. What was your thesis on?

Judge Kennedy: The title of my thesis was “Black Politics In Indiana from 1888 to 1902.”

At Princeton you had a thesis advisor and I had become -- I can't say friends with James McPherson -- but I certainly came to really like him an awful lot. I took a couple courses from him, and asked him whether he'd be my thesis advisor, and he agreed. And so I talked about things that he might be interested in. I was very interested in Reconstruction and how amazing it was that there were these former slaves who started occupying places of power in the South. That ended in about 18 -- whenever that was -- and I wanted to study what happened to Black folk who were interested in politics. I found out that the State of Indiana was a place where there had been a substantial number of Black people who involved themselves in politics in both the Republican and Democratic parties. Now, of course, most Black people were Republicans at the time, of course this being the party of Lincoln. But for some reason, in Indiana there were some Black Democrats, and Indiana also was one of the few states that had newspapers that were owned by Blacks and published by Blacks. One of the things that Princeton requires is a kind of original research.

Mr. Granof: How did you find this out about Indiana? Was it through Professor McPherson?

Judge Kennedy: Just talking about it with Professor McPherson. Yes. And so that's what I did.

Mr. Granof: So did you go travel to Indiana for your original research?

Judge Kennedy: No, I never traveled to Indiana. But Princeton has a fabulous library system. And I knew that because I worked in the interlibrary loan program. Under this program Princeton could get documents and books from any library in the world. And so I would actually, through the interlibrary loan program, get the original papers from libraries in Indiana and have them shipped to Princeton and I would read them there at Princeton.

Mr. Granof: Pretty remarkable.

Judge Kennedy: It really was remarkable.

Mr. Granof: I've heard Professor McPherson lecture at the Smithsonian.

Judge Kennedy: Oh, Professor McPherson was just a wonderful, wonderful teacher. Just so knowledgeable. So unpretentious. If you hear him talk and meet him, you would just not know that he is the world-renowned person that he is. Yes, I loved Professor McPherson. And there was another professor of history there whom I came to really like and respect. Took a couple of courses from him. Martin Duberman is his name. He's not at Princeton any longer. I was so disappointed that James McPherson retired second semester of my daughter's first year at Princeton. She tried as hard as she could to get into his course, but it was over-subscribed. And there was nothing we could do.

Mr. Granof: Did you have to work your way through Princeton? Did you have to have a job?

Judge Kennedy: Yes. Absolutely. Princeton was -- well, from my point of view now -- and I was on the Board of Trustees at Princeton -- As a matter of fact, I served on the Finance Committee, and so I know about the philosophy of Princeton. And frankly, Princeton is very, very pleased with the amount of money that it offers students to come. I tell you that so that you can understand that while I, today, think that Princeton was very generous, my parents didn't think so at all. And while I got a scholarship from Princeton, I also had to take out loans and Princeton had this policy of having students work. Part of your financial aid package, a typical part of the financial aid package, was part scholarship -- an outright grant -- part loan at a reasonable interest rate, and part income to be derived from the student working at a job. And so, yes indeed, my first job at Princeton was working in Commons. Commons was the place where all freshmen students ate. And I basically bussed -- I washed dishes. Very, very interesting time. I did that my entire first year. And then my first semester sophomore year I was able to get a job at Chancellor Green. Chancellor Green was a place on campus that served food, but it was not the main dining hall. But I was able to get a job there, again washing dishes and also waiting tables. But then I stumbled upon the best job any student could ever have. I started working in Firestone Library in the interlibrary loan program. And I think I started that my second semester sophomore year. And it's just the very best thing that any student could do because you go to the library and, frankly, I would study. And every once in a

while someone would come and you'd have to help him out because he wanted a book on so and so. And I'd have to do research and find out where this book was. Maybe it's in the library in Cambridge or Oxford. But that didn't happen very often. So I was paid to come to the library, work in the interlibrary loan program, and another benefit is that I really knew exactly how to get papers that I would need for my senior thesis. It was a great, great experience. Also there were things at Princeton -- it's kind of perverse, I suppose -- but it's a big thing at Princeton for upperclassmen to have these, what are called carrels. Carrels are these little rooms. And when I say little, I'm talking about little. Where there's nothing but a desk, a chair, shelves, enclosed, with a door, and they gave you a key. And when you're doing your research project you can go into your little cave at any time. You could leave books there that you needed. You didn't have to retrieve books from anyplace. And you could study at your carrel. Well I got a carrel myself for a year. Because I was there, I had some friends in high places. I was able to get my carrel. And I remember being very, very pleased about that. But, yes, I worked. Oh yes indeed. Every year. Princeton is fabulous though, I'm just telling you. Just fabulous. It's terrific in many ways. They also made it easy for you to make the money that you needed. Frankly, I think any student who comes up with an idea that has anything to recommend it, Princeton would pay for it. For instance, my senior year I developed this little program

where I went to and worked at Time Life, Inc. as a reporter and Princeton paid me to do it. It was part of my kind of work-study program.

Mr. Granof: And what did you do as a reporter?

Judge Kennedy: Not much. But I went there and actually I was assigned by the editors to do what I could do. I really couldn't do very much, but I'll never forget the Prime Minister of Canada, who I think was Pierre Trudeau, was reported to have had some type of relationship with a starlet. I think it was Barbra Streisand. And the editor of the Style section asked me to look into it and see if I could find out anything about this.

Mr. Granof: What a great assignment.

Judge Kennedy: I remember calling around trying -- I didn't find out anything -- but I mean I would call agents and make inquiries and I started feeling very impressed with myself.

Mr. Granof: Now, was this in New York?

Judge Kennedy: I would go to New York twice a week and get on the bus and go up to New York and spend the entire day there and then I'd be told to do things. And I did them.

Mr. Granof: It does strike me that between original research on your thesis, playing tennis, and a demanding academic program, and being involved in Community House, when did you find time to do all this?

Judge Kennedy: Oh, I don't know. It's really interesting. To me, at the time, it didn't seem like I was doing that much. I suppose that I have always been blessed with a certain amount of energy. I must say it didn't strike me

that I was doing anything out of the ordinary. And I just have to tell you that my classmates -- there were people who were just really doing a lot of things and a lot of things well. And so I just got caught up with them.

Mr. Granof: And what kind of social life? I mean Princeton was then all male and so you didn't have women students there.

Judge Kennedy: My wife and I talk about this all the time. I had no social life.

Mr. Granof: But it was very difficult to have a social life?

Judge Kennedy: Yes, that's one thing I can say. Actually my sophomore year I --I think it was my freshman year, but we didn't actually start dating until my sophomore year -- I met a girl from Washington, D.C., who had come up there to be the date of another fellow. I ended up meeting her. And there were a couple times that she would come to visit the campus, but I must say I just had virtually no social life. At the time I didn't care. I really knew what I was there for and I always felt just very lucky, privileged to be at a place like Princeton. It was not easy for me, and so I knew that I had to study. So I studied a lot, and I did involve myself with tennis. That was the big chunk of time. Studying and tennis, and then these other things that we've talked about, I would do. So there was really no time for a social life. I didn't join an eating club.

Mr. Granof: I was going to ask you about eating clubs. I mean Princeton is known for that. I don't remember how many undergraduates, but a percentage of the undergraduates were involved in eating clubs or joined eating clubs. Did you have to --

Judge Kennedy: No, you didn't have to join eating clubs. I would say most of the guys, the vast majority, joined these eating clubs. There were what are called alternatives. I ate at Woodrow Wilson College. It is an actual college, but at the time it was basically a building on campus that had a cafeteria. And there were some study rooms. And that's where I ate my meals my junior year. The first two years people would eat at Commons. Everybody would eat at Commons. But after your second year, the vast majority of students at Princeton joined eating clubs. And that's where they'd take their meals. But my junior year I ate at this place -- we called it Woody Woo -- which is Woodrow Wilson College. And my senior year I ate at the Community House. That was a most interesting experience because what we did -- six or seven of us -- was that each of us would have a day when we would be responsible for cooking dinner. So once a week I would be in charge of cooking, preparing, buying the groceries for the house.

Mr. Granof: Have you kept up your cooking skills?

Judge Kennedy: Actually I was very good, but I must tell you once I got married I stopped. To my wife's chagrin.

Mr. Granof: Do you have any bad memories of Princeton? It sounds like you had a wonderful time there. It seems that both academically and intellectually it was a wonderful experience for you.

Judge Kennedy: You know, I think we all have a tendency to look back through time through rose-colored glasses. I don't know what it is. But at least that's

what I do. When I think about my life, which has been absolutely privileged, I have had a wonderful, wonderful life. So, when I look back through these years I think that the rose-colored glasses just tend to filter out some of the things which in the big scheme of things really just don't mean a whole lot. For example, the fellow who moved out. It's really interesting. He comes back to reunions, but we've never talked about it.

Mr. Granof: I'm sure he's embarrassed.

Judge Kennedy: Yes. Well, I don't know. We've never talked about it. But I must tell you I don't have many bad memories. I do recall that my entire first year, even into my second year, I did feel uncomfortable. And it was not a nice feeling. Nothing bad happened, but I just had the sense that I was very much in the minority. The kids who were there just seemed to have a certain confidence. I mean -- and it's hard to articulate what I'm talking about -- because it showed itself in their talk and their demeanor. It was a certain confidence knowing that they belong. That they're going to be somebody. They will be a success. The only question is in what area and to what extent. I, on the other hand, really did question whether I belonged. I may have told you before that I'll never forget that time when we marched into Alexander Hall, which was one of the main halls, and the Dean of Students told us about the class and indicated that our class was a pretty good class. Pretty good class. And then start reeling off the average SAT scores of verbal and math. And Princeton was pretty crass. I mean, you know, I'd bet there're a lot of places that probably wouldn't

do that. But Princeton did, right there. The average SAT was a little better on verbal than last year. And I remember that average on an 800 scale at the time, was something like 690-something. The math was even higher. And I was substantially lower than the average. It was clear that if traditional criteria had been used, I would not have gotten into Princeton. It's just clear even though I had done very, very well. I mean I was National Honor Society in my high school, President of the Class, and what have you. But you know, I think there were about 350 presidents of the class. You know we have 250 presidents of the student council. Oh, you think you're good in tennis, well we have about 50 captains of the tennis team. Not only do we have 50, we have the persons who are ranked numbers 3, 5, and 7 in the ATs. I'll never forget this guy who I really liked because he didn't seem so confident. He was like me. He just seemed a little bit uneasy. Well, he was from Europe. He was a concert cellist. He was a prodigy. So it took me a while.

Mr. Granof: But I don't think your experience is entirely different --

Judge Kennedy: From a lot, yes.

Mr. Granof: Before your junior year you found, I can do this?

Judge Kennedy: Yes. And I'm going to tell you that was a good feeling. And I can't say precisely when it was. I know it wasn't my freshman year. I think it was probably toward the end of the sophomore year, I said, "Yes, Yes, I do belong here. I can do this." It was a superb feeling.

Mr. Granof: When did you decide that you want to be a lawyer?

Judge Kennedy: I did that toward the end of my junior year -- my first part of the senior -- and not before.

Mr. Granof: Did you ever think you wanted to be a history professor?

Judge Kennedy: No. I didn't think that I wanted to be a history professor or academician. I always assumed that I wanted to be in the public arena, or in the arena outside of the academy. I think that in 1968 -- '68, '69 -- I started to hear about these court cases, civil rights cases. Thurgood Marshall, I had certainly read about him. I remember my father talking about him when I would come home from school, from college. And he had mentioned this guy Thurgood Marshall before, but when you're out in high school, I didn't listen very much. But when I came home and my dad, who was born in the South in Chamberlain, Louisiana, really felt that he was not treated well.

Mr. Granof: It was the Jim Crow South.

Judge Kennedy: It was the Jim Crow South. So he was very interested in those who were doing battle for racial justice. And he let me know that. And one of his heroes was Thurgood Marshall. And how many times have I heard about the time when dad -- my father -- went to a courthouse in South Carolina when Thurgood Marshall, who was with the NAACP Legal Defense Fund, came and argued the case that overthrew a white primary. You know, it was a time when you went after the passage -- the Civil Rights Act was passed in 1965 -- I guess it was 1965. Some of the parties in the South said, "Well, you know, we are private parties. And, therefore, we don't

have to permit Blacks to vote in our primary elections." Well, Thurgood Marshall came and argued that case. And dad was there, and dad talked about this. He said, "Good-looking man." First of all, he was impressed with the fact that he was just a good-looking, big man. He talked about his voice. And he talked about just how proud he was. How proud he was that this Black lawyer came into that courtroom and argued the case and won it. I think it's a combination of things. Hearing my dad, reading in the newspaper about the advances that Black folk were making --

Mr. Granof: Well it was a huge time. It was the Warren Court.

Judge Kennedy: Warren Court. Yes.

Mr. Granof: So you must have made the decision to become a lawyer after both Robert Kennedy and Martin Luther King were assassinated.

Judge Kennedy: Yes. I started getting interested in law and decided I would apply to law school.

Mr. Granof: Did you talk it over with anybody? Did you have an advisor in the Princeton faculty who said --

Judge Kennedy: No. You know it's really interesting. No I didn't. I just decided that this was what I was going to do and I didn't talk to anybody about it. I just did it. I talked to my parents about it. Both my mother and father were just wonderful, wonderful parents because they were the kind that said if you can do it, do it. And that was that. They were not the kind of parents that needed, or even wanted, to talk at great length about your goals and ambitions. My father, in particular, conveyed that he just knew that I was

going to be a person of some influence and somebody. And it was just no question about that. And so, you know what's expected of you, so go ahead on and do it and, you know, I'll leave it to you --

Mr. Granof: But not a top tennis pro.

Judge Kennedy: That's right. And he was very, very realistic. But even after winning that very important match -- big match -- he had the good sense to say, "No, not in this arena."

Mr. Granof: I said that more as a joke because it sounds like in a subtle way he knew where your strengths were and encouraged you in that direction.

Judge Kennedy: Yes.

Mr. Granof: So, you decide to go to law school, and the question is where?

Judge Kennedy: Well, see that's one of the great things about going to a place like Princeton where people think pretty well of themselves. And so I just naturally decided that I would apply to some of the top, elite law schools. And I applied to Harvard, Yale, George Washington University --

Mr. Granof: Columbia?

Judge Kennedy: Columbia. I don't know if I applied. I remember those. I might have applied somewhere else; I think maybe the University of Michigan, but I'm not certain.

Mr. Granof: All of them top-tier law schools.

Judge Kennedy: All of them top law schools, and I got into Harvard, and went. And --

Mr. Granof: That was an easy choice, I assume, if you're going to get into Harvard --

Judge Kennedy: Well, yes. I didn't get into Yale. I was wait-listed at Yale.

Mr. Granof: Which was a much smaller class.

Judge Kennedy: Yes. Yale, still, right now is very small. Harvard was a large class, about 500. Actually, the choice was between Harvard and Columbia. I did consider Columbia for a period of time. But I visited Columbia, I visited Harvard, and I chose Harvard.

Mr. Granof: Now, did you ever think, How am I going to afford this?

Judge Kennedy: Harvard gave me the same deal that Princeton did. I got some scholarship and some loans. Now I didn't work when I was at Harvard though. But I must say, and I'm very, very sensitive to this now with my own daughter who is going to Harvard, because I'm going to pay for her to go to Harvard. When I came out of Harvard I had the loans. I had the loans. I'll never forget every month tearing off that coupon and mailing in my payment. But that's what I did. Took out loans and worked during the summers, and --

Mr. Granof: You must really be proud of both your daughters and especially your oldest daughter who's going to start law school in the fall.

Judge Kennedy: That's right. I'm very, very pleased with her. And I'll just have to tell you this. Whereas I went to Princeton and I did okay at Princeton, but I didn't graduate with any honors. I think I was really in the middle of the pack. My daughter -- I don't know what her grade point average is -- but the entire time she was at Princeton, her lowest grade was a B plus. And she got one B plus. Every other grade was an A. Every other grade except for this one B plus, and she is mad as a wet hen.

Mr. Granof: About the B plus?

Judge Kennedy: Yes. And I'll never forget that I got, maybe, a couple of B pluses and I was glad. What amounted to B plus, it was a different grading scale then.

Mr. Granof: So your daughter must be terrific.

Judge Kennedy: She really is. I'm just very proud of her. She's just a very disciplined, focused young woman. As a matter of fact, I wish that she would kind of open up a bit, rather than being so focused.

Mr. Granof: But she's going to law school directly from college?

Judge Kennedy: Yes. I recommended against it. I said, "Morgan, you know there's all kinds of fellowships and postgraduate programs. Some take you overseas." You know my brother was a Rhodes Scholar. It was a wonderful experience. But she just said, "I want to go to law school. I'm going to law school."

Mr. Granof: Well, if she knows her mind, and after law school she may make other decisions.

Judge Kennedy: I don't know. Maybe so, but I think it's the unusual person who, after law school, does anything but get on the law track and stay there. I think once you invest all this time and money, you tend to just stay on that track. I think that's the norm. And that's fine.

Mr. Granof: So you're accepted at Harvard and you've got a financial aid package.

Mr. Granof: When you got there, was the first year pretty prescribed?

Judge Kennedy: Oh yes. It was absolutely prescribed. Everyone took the same courses.

Mr. Granof: Contracts? Criminal Law?

Judge Kennedy: Torts, Contracts, Criminal Law, Civil Procedure. And it seems to me that there's a fifth one.

Mr. Granof: Property?

Judge Kennedy: Property. And I tell you as enjoyable a time as I've had several years of my life, my first year at Harvard Law School, if not the best, certainly rivals the best on a day-to-day basis because my first year I roomed with my very best friend from college. I made mention of the fact that I have just had this charmed life, and I have. One of the things that makes it charmed is because I just so happened, during high school, to become friends with some guys -- my two best friends were just so much fun, so smart, so ambitious. And our friendship just goes on and on and on. I had dinner last night with one of my high school friends. Let me kind of put this in perspective. I went to a public school, and I had two real good friends. Actually, only one went to the same high school that I went to. His name was Robert O'Meally. Just a smart guy. And the other guy was Ernest Wilson. Ernie went to the Capital Page School that's of some notoriety now because of Congressman Foley's --

Mr. Granof: Folly?

Judge Kennedy: Yes. But we were these guys living in what I would say was our middle-class neighborhood, kind of solidly middle class. And for whatever reason we all were pretty ambitious. I'll never forget the day that we all received our acceptances into college, and all of us got into the places we wanted. I think every place we applied, we got in. And then you know

what was happening is people like Bob Goheen, who was the president of Princeton, and the other universities were coming to the realization that there really was a moral imperative that these universities open up their doors to more Black students. And so I think they were really looking for us, to tell you the truth. And so we all got our acceptances, and I'll never forget we got into our car, we just met at Ernest Wilson's house and we were just ecstatic about all the places that we had applied to and gotten into. And as it turns out, Chico went to Harvard -- Chico, Ernest Wilson -- Chico, that's his nickname. And my other good friend, Bob O'Meally, went to Stanford. Well, Bobby applied to and got into a PhD program in literature at Harvard, and I was going to the law school at Harvard. And we decided to room together. So Bobby and I roomed together at Harvard that first year, and we just had such a good time. I think we just felt good that we were both at this place. I mean this place at the same time. It wasn't lost on us that, again, this is pretty big stuff being up here at Harvard. We talked to each other about our disciplines that we were interested in. And I would talk with him about literature. He would talk with me about law. We would have these discussions about the use of language. He's now a tenured professor of literature at Columbia University, and he's a well-known professor of literature. But, you know, whether or not it's proper to use a participle always in a certain language, "the plaintiff did such and thus," or is "plaintiff did such and such"

sufficient. The spelling of "judgment." You know you guys all spell judgment j-u-d-g-m-e-n-t. Now really, the better phrase is judgement, j-u-d-g-e-m-e-n-t. "No it's not." "I'll talk to my law professor about that." "Well, I'll talk to --" He became very interested in the logic of the law. And I became very interested in the people he was studying. And so we would just spend time together.

Mr. Granof: Where did you guys live?

Judge Kennedy: We lived in Perkins Hall, which is a graduate student dorm. As a matter of fact, I had to get special permission. It was not a law school dorm. But it was very near the law school. As a matter fact, it was on the same plot as the law school, but it wasn't a law school dorm.

Mr. Granof: Now, it doesn't seem like you were intimidated at all during your first year. Maybe it's because you spent time with people who were not in the law school.

Judge Kennedy: I was not. I must tell you. I felt a comfort level at my first year at Harvard that was much better than my first year at Princeton. I think truly, truly that having gone through that first two years at Princeton where I just was wondering, Do I belong?, and finally coming to the realization that I did belong. Harvard is no cup of tea. I don't know who you had as a professor, but I had Charles Dawson for Contracts. You know these guys Leach, Dawson, Byse, Casner. These were giants and

just brilliant people and they had expectations. But for whatever reason I just was not intimidated and had a great time.

Mr. Granof: Did you have Byse for Contracts or did you have Dawson for Contracts?

Judge Kennedy: No, I had Dawson for Contracts. I had Abram Chayes for Civil Procedure. I'll never forget him. He was a wonderful man. He taught Civil Procedure, but what he really became famous for is International Law. But I had Dawson for Contracts, Chayes for Civil Procedure, Weinreb -- Lloyd Weinreb for Criminal Law, Jaffe for Torts, and what's the other one? Property. Oh, I had a person whom I really came to not like at all, Lance Liebman, who became the Dean of Columbia University Law School. Is he still the head of the American Law Institute? At one time he was the head of the American Law Institute. Professor Liebman, first of all he was young and inexperienced. Obviously a very, very bright fellow, but I just remember his was one of the only times in a class where I felt that the use of the Socratic method in which you would state something, you would address an issue or problem, and then the professor would point out another way of addressing the problem or thinking about it -- I remember an occasion where I really felt put down. Very much put down by him, and feeling that he had displayed, perhaps deservedly, I don't know -- but I don't think that any professor should ever make a student who is at least trying feel like the student's answer was just stupid and not worthy of much consideration by anyone. And I remember there was a time in that class where I was made to feel that way. You know we

were just talking about looking back through time and having your rose-colored glasses filter out some of the bad times. My rose-colored glasses to this day haven't filtered that out. But I must say I felt that the professors whom I had at Harvard were uniformly just very, very good. Very, very good. Perhaps my favorite professor, however, amongst this group was Archibald Cox, from whom I took Constitutional Law. Professor Cox was good for any number of reasons. One, he spoke with such authority and was so knowledgeable about Constitutional Law. He was also interesting. He was very upright --

Mr. Granof: Very New England.

Judge Kennedy: Very, very New England. He wore this bow tie. I'm from the South and so southerners -- a lot of southerners -- talk slow, and I think I talk slow. Well, he was from the North, but the pace of his speech was, I found, very nice. He had a very deliberate cadence to his speech. I'll never forget the time when Archibald Cox was teaching about the Bill of Rights. What's the Bill of Rights? And I and a couple of other people really had not wrapped our minds around the proposition that, what the Bill of Rights is, is this country's attempt to shield citizens from the power of the Government. It says there are some things the Government just can't do. Freedom of speech. You know, you're going to be able to speak your mind. You're going to be able to be free from unreasonable searches and seizures. And now this is the first semester's sophomore year, and I don't know what it was but I was getting confused about the difference between

Constitutional Law and Tort Law. Which, of course, you know, tort law governs interactions between people, not government. And there came a point in time when I revealed this ignorance about the two kinds of laws. And he said, "Oh, well let me just tell you." And since civil rights again was in the forefront of the news, he said, "Now the Constitution may prohibit discrimination on the basis of race. Under the Fourteenth Amendment, the Government cannot display racial animus," so on, so forth. "However, as a private person I have a party" -- and there are two Black kids in the class, me and a guy named Bob Malson -- "and if I did not want to invite you, Mr. Kennedy, to my party because you are Black, I could do that. And there's no constitutional violation. There's nothing unconstitutional about this." And he said this to make the point. And then it was clear that the words rang in his ear. "But of course I would never have a party and invite students and not invite you and Mr. Malson." He actually said this. I mean this man was so pure; I mean he wanted to do the right thing and say the right thing so much. And so I was touched, I was absolutely touched by this display of a man wanting to do his job, really wanting to teach me the difference, to clear up my confusion, and doing so in a way that I could understand because it was a race matter. Unfortunately, that can cause such controversy even now. But then really being sensitive to how I might feel. So it was a great course. I think I really, really came to understand and know constitutional law because of his teaching.

And it turned out we had the same pattern to our day. We both -- Archibald Cox and I -- would wake up very, very early in the morning and go to the cafeteria. And, as it turns out, I ended up the one semester at least three times a week having breakfast with him. And we would just sit there and talk. And I just, even then, knew that that was special. To have a conversation with this wonderful, wonderful teacher. We talked about all kinds of things. I asked him about -- he put ketchup on his eggs, every morning. It looked awful. And so we talked about his taste in food, and what have you, and I must say I was very, very pleased when my brother bought me his biography and he signed it, and he said some very, very nice things. He remembered me and said so in the book.

Mr. Granof: Who else did you have at Harvard that you thought --

Judge Kennedy: There were so many. I must say my thinking about Professor Cox, for the reasons I've indicated, was very, very special. I didn't have the same type of relationship, contact, with anyone else. I remember talking with Abram Chayes about various class assignments, and I was very, very impressed with him. And I thought that he was a very good teacher. Lloyd Weinreb, who taught me Criminal Law, I got to know a little bit and really liked. I remember Vern Countryman. Vern Countryman taught Secured Transactions, and that was a tough, tough course. And he was a tough, tough cookie. And I remember that course very well.

Mr. Granof: Did you find that law school changed the way you thought about things?

Judge Kennedy: Yes, indeed. I think that a law school, Harvard Law in my case, did bring about first of all a respect for the rule of law and an appreciation of the different ways to look at things. And also an appreciation for the importance of the use of language. Because, I mean, that's how human beings communicate. That's how we should communicate. Unfortunately, sometimes we communicate using fisticuffs, but we're supposed to communicate by the use of language. And I think that Harvard really did a good job in instilling an appreciation for all the things that I've just mentioned, including, again, the use of language. Really understanding the importance of the meaning of words. Appreciating that the English language, in particular, is a very -- what should I say -- profound language. Words can be used in different ways. Nuances in words. Certainly in the structure of a sentence, depending upon where you put a comma, can change things. And I came to appreciate that and really enjoy it. I must say I came to really enjoy the law. And still do.

Mr. Granof: Did you find time to engage in other activities?

Judge Kennedy: No, I did not. At law school I only studied. However, I had much more of a social life. I did much more socializing in law school than I did in college, which is generally the other way around. I went to parties with my good friend Bobby O'Meally, and that first year we would, every weekend, do something social. We had never been to Canada before, so we jumped in a Volkswagen Beetle and drove to Canada, drove to

Montreal. Didn't have anyplace to stay. Well, of course, we didn't even think about it. Slept on the grounds of McGill University.

Mr. Granof: When did you meet your wife? Was this after law school?

Judge Kennedy: Oh, I met my wife after law school. But it's very interesting that you should raise that issue because I could have met her my sophomore year at Princeton because she went to Goucher College. And Princeton, during those years, had a tradition of having a week where girls from colleges on the East Coast would come to Princeton for a week. She was one of those girls who came to Princeton, was there for a week. As a matter of fact, went out a couple of times with a guy that I know. But, as I told you, I wasn't about anything other than studying and playing tennis at the time, and so I didn't meet her or anybody else that was there. I just didn't participate in any of those activities that involved the girls. And I met her -- we've been married 26 years; it'll be 27 years in September -- but I met her after I came back to Washington and when I was an Assistant U.S. Attorney.

Mr. Granof: But it appears that you had a wonderful social life at law school.

Judge Kennedy: Oh, I did indeed. I did indeed. There were a couple of ladies that I dated up there. I had a very full life.

Mr. Granof: Did you decide that you were going to go back to Washington to practice law?

Judge Kennedy: No. Those kinds of things, you know, they just kind of happen. So many of my friends wanted to work on Wall Street. They wanted to work for

some of the silk-stocking law firms on Wall Street -- Cravath, Swain & Moore; Sullivan & Cromwell. There were about 6 or 7 of them. And I was no different. I remember -- I guess this was during my second year -- representatives of these law firms would come up to campus, they would stay at the Hotel Sheraton Commander. And you'd go there and interview to try to get a spot on Wall Street. And that's what many of my classmates did, and that's what I did. And I ended up actually getting an offer from Patterson & Belknap.

Mr. Granof: Yes, I remember that firm.

Judge Kennedy: Yes. At One Wall Street. I remember being very impressed with the address. I almost worked there. I was interviewed up in Cambridge, then they invited me to come down to New York for an interview. And I went down, and I'm telling you, what I was hearing didn't sound all that great to me. They were talking about just how hard their lawyers worked. And mind you, I didn't mind working hard, but it just didn't strike me as something that I really wanted to do. Perhaps that day New York City was all cloudy. And you know how New York City is. I mean as far as I'm concerned, New York City has to be one of the most, if not the most, vibrant cities in the world. But I'd walk down some streets and they were just crowded, and the buildings were close. And you'd look up and you saw a little part of the sky. So I did get an offer from Patterson & Belknap and I think a couple of other Wall Street firms, but was very glad that I got some offers from firms down here. And I ended up going to Jones, Day,

Reavis & Pogue. When I worked at Jones Day, which was paying the standard salary, I remember thinking that the amount of money that they were paying me, $300 a week, was all the money in the world. I mean that money was, wow. And I was so impressed. I worked between my second and third year at Jones Day here in Washington, D.C.

In my third year at Harvard I participated in a clinical program. It was the Harvard Voluntary Defenders Program. I had really enjoyed that. I liked the courtroom work, and I came under the influence of a fellow named John Stein -- he used to be a member of the Bar here -- who was in the U.S. Attorney's Office. And John Stein, whom I would play tennis with, let me know that he could not imagine a better job than being an Assistant U.S. Attorney. And so he talked to me about the U.S. Attorney's Office, and I ended up applying to the U.S. Attorney's Office in my third year, getting the job, and that's how I became an Assistant U.S. Attorney right out of law school.

Mr. Granof: Oh, you got the job right out of law school?

Judge Kennedy: Right out of law school. That doesn't happen anymore these days. But that's right, I graduated in June of 1973. I didn't go back to the graduation ceremonies, by the way. Actually I had planned to go back for graduation ceremonies. But I came down here to Washington to register for the Bar exam, and I ran into some people who told me about the pass rate here in the District of Columbia. A couple of guys said, "We know some people from Harvard and Yale who didn't study and flunked it."

That was not in the cards for me. So I came down here and I started immediately studying for the Bar exam. Well you couldn't start in the U.S. Attorney's Office until you had passed the Bar. And so that was another reason I had to pass the Bar. I took the Bar -- I think it was in July, but didn't get the results back until late November. I was sworn into the Bar on December 7, 1973, and I was sworn in as an Assistant U.S. Attorney the same day, December 7, 1973.

Mr. Granof: So you worked at Jones Day just during the summer?

Judge Kennedy: Well, just during the summer, and then they did something that I was just so appreciative of. They had made me an offer to come back, but I turned them down. Then I took the Bar exam but couldn't start working as an Assistant U.S. Attorney until I had passed it. And you didn't know when the results were going to come out. And so I went back and talked with Eldon "Took" Crowell. At the time I worked at Jones Day, he was a partner there, but later left to establish Crowell & Moring. Even though I had turned Jones Day down, I needed some place to work while waiting for the Bar exam results. Jones Day let me work there, and I did so from July 15 -- the day after I took the Bar exam -- until December 6, 1973. And so I have about five months where I was associated with Jones, Day, Reavis & Pogue.

Mr. Granof: You really are extraordinarily fortunate. At least to become an Assistant U.S. Attorney.

Judge Kennedy: My brother and I talk all the time about this. Why we have certain attitudes. And I don't know why it should come as any surprise, but I think that the way I look at the world is influenced by the fact that I have been very privileged, very lucky. I've had people come into my life who've been such wonderful influences, and that's the way it is.

Mr. Granof: But, you know, it's true. You have been fortunate. But also fortune smiles on those who make their own breaks. The breaks wouldn't have come your way if there hadn't been a basis for them to be there.

Judge Kennedy: Yes, I don't mean to be falsely modest. I put in the time and the effort.

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

[This concludes Interview No. 2]

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

Third Interview
July 18, 2007

This is the third 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 Monday, July 18, 2007.

Mr. Granof: Judge Kennedy, this is the third session. When we had talked last time, you had gotten through law school and you had spent, I guess, an internship at Jones Day?

Judge Kennedy: That's correct. Well, it wasn't an internship because I was paid. But yes, indeed, after I graduated from law school in June of 1973 I came back here to D.C. and faced the D.C. Bar exam. And though I had been made an offer to work in the U.S. Attorney's office it was understood that I would not be able to be sworn in as an Assistant United States Attorney until I actually had passed the D.C. Bar. Well, the D.C. Bar examination was given in July, and no one really knew how long it would take for the Bar examiners to make their decision as to who passed and who didn't. And at this time I was living in an apartment in Southwest Washington and I needed some resources to live. And so I called Jones, Day, Reavis & Pogue, with whom I had worked between my second and third year of law school, and they were accommodating of my request to just work at the firm until such time as I could start in the U.S. Attorney's office. So as it turns out I worked at Jones, Day, Reavis & Pogue. I wasn't a

member of the Bar so I don't know what my title was. But I worked there from July 1973 to December 1973, when I received the very good news that I had passed the Bar. And then on the same day that I was actually sworn into the D.C. Bar, I was sworn in as an Assistant U.S. Attorney. Just a wonderful day because I was really looking forward to doing this. I was sworn in by Judge Pryor, who at the time I think was on the Superior Court of the District of Columbia. Now he is a Senior Judge of the D.C. Court of Appeals. But at the time he was on the Superior Court and he swore me in on that day.

Mr. Granof: When you were at Jones Day -- and it was about six months -- what did they have you doing?

Judge Kennedy: Oh, I remember that Jones Day was doing some pro bono work for some agency of the District of Columbia Government. I don't remember exactly what it was, but I was assigned to assist the partner who was working on that project; exactly what it was I don't even remember now at all.

Mr. Granof: So it wasn't something that was exactly tremendously memorable?

Judge Kennedy: No. Well, it was not. What was tremendously memorable though was actually doing a little research for the former Dean of the Harvard Law School.

Mr. Granof: That was Dean Griswold?

Judge Kennedy: Dean Griswold, who at the time was a partner at Jones Day. Jones Day, at the time, represented Eastern Airlines. I don't know if you remember Eastern Airlines.

Mr. Granof: Very well.

Judge Kennedy: The firm represented Eastern Airlines. I'll never forget being summoned to Dean Griswold. That's how I knew him and, as a matter of fact, everybody else around the firm referred to him that way as well.

Mr. Granof: As the dean?

Judge Kennedy: As the dean. Dean Griswold. I'll never forget talking to Dean Griswold and being given an assignment to do. And I had to do something for the firm's client, Eastern Airlines. I don't even remember what the assignment was, but it involved doing some research in the old CCH, the Commerce Clearinghouse, volumes. And what was so memorable about those volumes was that they were the smallest print I've ever seen.

Mr. Granof: I've had that experience.

Judge Kennedy: I remember doing the research and just having some contact with Dean Griswold being just as intimidated as I could possibly be.

Mr. Granof: He was a formidable figure.

Judge Kennedy: He was a very formidable figure, and I must say I was very, very pleased when he seemed to be pleased with the work that I did. But I was there for a fairly short period of time before becoming an Assistant U.S. Attorney, and that started a part of my professional career that was just wonderful.

Mr. Granof: Were there many people taken directly from law school? My impression of the U.S. Attorney's office is that they, certainly in later years, they tended to take people who'd been out for a couple of years.

Judge Kennedy: Yes. That certainly is the case now. My law clerk this year is going into the U.S. Attorney's office, as did one of my law clerks last year. The law clerk last year worked at a law firm for one or two years. This clerk clerked on the U.S. Court of Appeals for the Fourth Circuit. Before that she had spent some time in private practice. The point is certainly now I think most of the newly appointed Assistant U.S. Attorneys have had some legal work experience. Back then, I don't know for sure, but my impression was that many of us were hired right out of law school. And, as a matter of fact, I must tell you that that was one of the real good things about working for the U.S. Attorneys Office. You are just a wet-behind-the-ears new lawyer and, presto, here you are representing the United States of America in court. Actually trying the case. Being in charge of the case. Very heady stuff, and I must say I loved it. Absolutely loved it.

Mr. Granof: Maybe you had better training than I did, but when I got out of law school I really didn't know anything about trying cases. Law school was a very academic exercise in which you read appellate opinions.

Judge Kennedy: I graduated from law school in 1973. So there is a period of time there that I think that Harvard, as well as all of the top-tier law schools -- and perhaps all law schools other than some that make a particular point of practicing trial advocacy -- they all, as you say, dealt with doctrine,

concepts, and philosophy, some would say. But later on, I must say, I did get some training at Harvard in trial practice. As a matter of fact, today I'm going to a reunion of former participants in what is called the Harvard Voluntary Defenders. And that's what I did in my final year in law school. I was in a program where law students were certified to actually represent clients before the district courts -- what are called the State District Courts -- in Massachusetts. And so I did have some experience.

Mr. Granof: So you actually had gotten into court?

Judge Kennedy: Yes, I did. And so I did have some experience, but you're absolutely right, I didn't have much. But I can say this, that the United States Attorney's Office had a tremendous training program.

Mr. Granof: I was going to ask you about that. What was that like?

Judge Kennedy: Well, it was very, very good. Some of the senior lawyers in the office would actually come and teach us about trial advocacy. Also, at the time, the United States Attorney's Office -- or the Department of Justice -- had a contract with business entities that actually did teaching. Remember the LEAA, the Law Enforcement Assistance Administration? And there was this agency, whose mission I think is explained at least somewhat -- and I can't tell you exactly what its mission was -- but the name of the agency was Law Enforcement Assistance Administration. And I think one of the things that that agency did was to provide training to prosecutors. And so I can say that we received some great training in the U.S. Attorney's Office.

Mr. Granof: Oh, maybe twenty years ago I went to a program, the National Institute of Trial Advocacy, NITA --

Judge Kennedy: NITA. Yes.

Mr. Granof: - - which was their two-week course.

Judge Kennedy: Yes.

Mr. Granof: And it was a hands-on kind of training.

Judge Kennedy: Yes

Mr. Granof: And I wondered if the U.S. Attorney's Office was similar?

Judge Kennedy: I think so. Actually I participated in one NITA course as an instructor. And I think that that's exactly right. A hands-on instruction. As a matter of fact, I'm looking around now but for the longest time I kept in my chambers close by -- I'm sure I have it here somewhere because I don't think I've thrown them out -- the binders that were given to the Assistant U.S. Attorneys. Those binders contained material about all of the things that a trial attorney would have to know, including a practical, working knowledge of the rules of evidence, and however many exceptions to the hearsay rule; and how to actually impeach a witness on the stand by use of a prior inconsistent statement, and how the prior inconsistent statement can be considered by the jury -- whether it can be considered simply to impeach the witness, or for the purpose of actually considering the prior inconsistent statement for the truth of that which is contained in the statement. All of that. It's really kind of subtle stuff. But, we received some very, very good training, and I remember it very well. And I'm

going to tell you, I agree with you about law school. I mean I talk to my brother all the time about my -- I won't call it frustration, I think that's probably an overstatement -- but my thought that the law schools could do a much better job in educating people to become lawyers. You know, to become lawyers isn't that the reason you go to law school? To become a lawyer.

Mr. Granof: And take depositions, interview witnesses.

Judge Kennedy: Exactly. Exactly. And so I think that there is an unhealthy -- I'll put it that way -- defensiveness about what law school is. I think that some law professors would say, "Well, you know, we're more than a trade school." I don't know why, first of all, trade school should be the subject of such a pejorative connotation, but I think that the law school should teach people to be lawyers. And it is, of course, the case that a significant part of the law has to do with litigation.

Mr. Granof: And so even if you don't go into litigation as a lawyer, you should know?

Judge Kennedy: Absolutely. The fact of the matter is that some of the things that are taught are transferable to everything that a lawyer can do. What you are actually taught in terms of litigation. Because there is an approach, after all, there's a way of thinking in addition to certain practices and procedures. But there's -- what should I say -- a rhyme or reason to a proper litigation practice the mastery of which can transfer to other things.

Studying for the Bar was very helpful. Now, I know I studied for the Bar because I wanted to pass the Bar exam. But wouldn't it have been a good thing to actually study some of the things that are taught in the Bar review course over a, perhaps, longer period of time so that they could be digested, understood, and then employed afterwards. And I don't see any reason why the law schools should not do that. I think what is happening now is that probably every top law school, every law school, does some of that, but my impression is that that part of the curriculum is not -- what should I say -- not held in the same esteem as the other parts of the law school curriculum. And I think that's unfortunate.

Mr. Granof: When you were in law school you must have had some litigation experience when you went into Massachusetts District Court.

Judge Kennedy: I remember going into Dorchester District Court. We went into Boston. And I will never forget actually representing a guy who was in the armed services. He was picked up and charged with carrying a pistol without a license. And I actually defended him before a judge. It was a non-jury trial. But we went to trial, and I was very, very pleased when I won an acquittal. I presented a defense that this man only momentarily had the gun in his possession and, in fact, was going to take it to the police. There are very few defenses to carrying a pistol without license when you are arrested with the gun on you. I don't know if there's another defense, but that was the defense that we presented and it was accepted. And one of

the most gratifying times in my life was this young man gave a party for me and invited all of his friends and said, "This is my lawyer."

Mr. Granof: That's very exciting for someone in law school.

Judge Kennedy: Oh, it was absolutely exciting. And let me just say this because people are always wondering. Some people who do not understand the process ask, "Well, how could you represent those kind of people?" This man was a good man. I presented the defense. I presented the defense that the evidence supported. That's what he told me, and I presented his case as well as it could be presented.

Mr. Granof: And you certainly did very well.

Judge Kennedy: Yes, I was very, very gratified that he did not have this mark on his record. It meant a lot to him.

Mr. Granof: So how many cases did you try?

Judge Kennedy: I tried about two or three cases.

Mr. Granof: So you did have, as you say, some actual in-court litigation experience.

Judge Kennedy: Yes.

Mr. Granof: What made you decide that you wanted to be an Assistant U.S. Attorney?

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Judge Kennedy: I can answer that very directly. It was a man, who now lives in Florida, whose name is John Stein. John Stein was a fellow whom I had met while I was in college. He was a competitive tennis player, a little older than me. And he was an Assistant U.S. Attorney. And we would practice tennis together and he would talk about his work; I would talk about what

I wanted out of life. And just from talking with him, I got the impression that here was something that I might like to do, where I could make a contribution, and that's why I applied. So, the answer is a friend who happened to be a competitive tennis player just talked about his experience. I thought about what I might do. I had worked for Jones Day between my second and third year in law school. They had made me an offer. I enjoyed that summer, but I didn't quite want to do it. It didn't fulfill all of the things that --

Mr. Granof: It's certainly not as exciting as getting up in court and saying, "I represent the United States."

Judge Kennedy: That's right. As you know, I've been involved with sports all of my life. Competition has always been something that has appealed to me. Being a litigator, in-court litigator, has an aspect of that.

Mr. Granof: Oh, more than an aspect.

Judge Kennedy: Yes. And that appealed to me. And that absolutely appealed to me. So, that's basically what happened. I wish I had a better story. I wish I had something else, but that is the story.

Mr. Granof: Also, I know that people go into the U.S. Attorneys Office and also D.A. offices because they get a kind of responsibility and experience early on that you just don't get elsewhere.

Judge Kennedy: That's exactly right. That just appealed to me to no end. And what you just said so resonated with me because, in fact, I just loved it when I would stand before juries and say, "Ladies and Gentlemen of the jury, my

name is Henry H. Kennedy, Jr.," and what I would say sometimes is, "and I represent the United States and the people of the District of Columbia." Every time I said it I was struck with what a privilege it was to have that responsibility, and to be able to truthfully say it. And yes, indeed, it made it all worthwhile.

I will never forget when my father, who was a very, very important man in my life, I'll never forget our talking about whether I should be an Assistant U.S. Attorney or perhaps stay in private practice. My dad asked me, "Well, you know, where can you make the most money." And I said, "Well Dad, you know, that's not really all there is to it." My dad, you know, he didn't understand this. I think I mentioned my father was a wonderful man, wonderful man. One of the most intelligent people that I have ever known, but he never finished college. But so much of his -- what should I say -- so much of his energy was devoted to caring for our family. Making enough money to care for the family. So much so that the idea that money would not be the most important thing was a bit difficult for him to truly understand. But I think he certainly came around.

Mr. Granof: Were you married at this time?

Judge Kennedy: Oh no. I was single, although my very best friends in the U.S. Attorneys Office were married, including the three Assistant U.S. Attorneys who were sworn in on the same day. One is Mark Tuohey, who was a president of the D.C. Bar. Another person who was sworn in on the same day was Bernard Panetta. He now has a practice in El Paso, Texas. And

the third person who was sworn in on the same day was David Addis. So you just asked me, you know, was I married. Well, I wasn't married but -- and it's just so interesting that the three other people who were sworn in on the same day -- every once in a while we'll get together and we talk about that they were married and I wasn't. But most of the other people weren't. And we worked hard. There was a real bond that was established. We socialized after work together. I'll never forget one day, it was in the dead of winter, two colleagues, Frank Weaver and John Kern, both Assistant U.S. Attorneys, got this idea that it would be a fun thing to do for a group of us -- all Assistant U.S. Attorneys -- to drive up to Vermont over the weekend to ski. So we hopped into the car on Friday afternoon, drove to Vermont -- up to Stowe, Vermont, which is north of Burlington, Vermont -- did a lot of sleeping in the car, skied on Saturday and then came back on Sunday, and went into the office on Monday morning. Absolutely crazy.

Mr. Granof: Had you skied before?

Judge Kennedy: No. My first time. My very first time skiing, but I tell the story because, well, it reflects a lot of things. One, it reflects just a wonderful camaraderie that we had in the U.S. Attorney's Office that I'm just so appreciative of. And now, some however many years later, when I look back I consider it such an important and wonderful time in my life. But it reflects camaraderie of the group and also the energy that we had back then.

Mr. Granof: Well, your experience seems to be a very common experience with U.S. Attorneys who find that to be one of the highlights of their legal career.

Judge Kennedy: Yes. I have to tell you it really is. I love what I do now, but I must say I feel very, very blessed. I feel just privileged at every stage. I've had just a wonderful professional life. But that certainly was a wonderful part of it.

Mr. Granof: Well here you are, it's December, you're sworn in as an Assistant U.S. Attorney. I don't know whether you report for training immediately, but what's the first thing that you did when you were not in training. Really, your first actual assignment. How did it work?

Judge Kennedy: Well, I remember we went through some training. But one of the first things we did, if not the first thing we did after training, we were assigned to papering. And what papering means is talking with police officers who had made arrests, and deciding whether to bring a criminal prosecution. Every time a person is arrested, or a police officer believes that a person should be prosecuted, doesn't mean that that person should be prosecuted. The Assistant United States Attorney must exercise discretion to determine whether a case should be initiated in court. I think that was the very first thing that I did.

Mr. Granof: Was there someone with you, or did they just say, well, you just go in there, meet officer so-and-so.

Judge Kennedy: I think that perhaps for the first half of one day there was somebody that was there, but after that, no. The United States Attorney had certain

policies that you were told of and, of course, you had to follow those policies. But you were expected to know them and, yes, you were on your own. Now there was a supervisor. As a matter of fact, there was a supervisor who, after you made your decision, would review the paperwork and would just make sure that the exercise of the United States Attorney's discretion was in keeping with his policies. But, I don't recall ever, frankly, having my decisions overturned by the supervisor.

Mr. Granof: Do you remember any of the cases that you had to make a decision on? That's a lot of responsibility for someone who is, what, twenty-five, twenty-six years old.

Judge Kennedy: It is. To tell you the truth, I don't remember very much about that time in the office, other than what I've just told you. But I do remember vividly a period of time after I had been in the U.S. Attorney's Office for a period of time, and I became what we called the office DA. And the office DA was one of the people in the misdemeanor trial section. So I was the office DA in the misdemeanor trial section, and I had obviously gained the confidence of the U.S. Attorney, who was Earl Silbert, so he named me office DA. I wasn't the chief of the misdemeanor trial section -- at the time that was Thomas Queen -- but I had some supervisory authority and I would look after some people who were junior to me. And I'll never forget the time when Earl Silbert left it to me to determine whether to initiate a prosecution of a lawyer. As it turned out a lawyer for a firm -- well-known firm in the District of Columbia -- had been charged with

soliciting for the purpose of prostitution. And it was this lawyer who was arrested. He and his attorney tried to convince Mr. Silbert not to prosecute the case, and Earl Silbert -- whom I just have to tell you, I just admired that man as much as I could admire anybody -- decided to give the case to a person who had been called upon to make these kinds of decisions before. I mean the United States Attorney doesn't generally get involved in these things, and he assigned me to do it. Assigned me to make the call. That involved talking with the undercover police officer, and the undercover's backup. And hearing what they had to say. And also talking with the accused and his lawyer. And, finally, making that decision. So, that was one of the papering decisions that I remember very, very well. I also remember a case --

Mr. Granof: What did you do with the case? Do you recall?

Judge Kennedy: I ended up authorizing the prosecution. And, again, it was a very, very serious thing because this would have all kinds of effects on this man's life. You know, for anybody who is arrested for anything there's a consequence. But, for this particular man, it was truly a momentous thing to be charged. So, yes, that's why I remember that.

Mr. Granof: Was this at a time when the U.S. Attorney's Office had all complete criminal authority in the District for both misdemeanors and felonies and federal crimes.

Judge Kennedy: Yes, and it still does. For years and years there's been an effort to have the Attorney General of the District of Columbia -- which is a successor office

to the Office of Corporation Counsel -- prosecute serious criminal cases, but that effort has not been successful.

The whole issue is somewhat involved in what kind of jurisdiction should the District of Columbia have anyway. There are those who say, Well, this is a Federal City and it's, of course, appropriate that in the capital of the country, the United States Attorney -- a federal official -- should prosecute these very serious cases.

I remember the first time I actually tried a case, which was a gun case. And I'll never forget -- forgetting some of the protocol that I was taught -- taking a gun, and I forgot where the clerk sat as opposed to the court reporter. And I remember taking the gun, handing it to the court reporter, and I forget who the judge was but the judge --

Mr. Granof: Was this in Superior Court?

Judge Kennedy: In Superior Court. As a matter of fact, it was in the Pension Building. The judge said, "First of all Mr. Kennedy, would you please make sure that the gun is cleared." Something I had forgotten to do. I was, of course, told whenever you try a gun case the first thing you do is make sure that you give the gun to the marshal who will clear it so that everybody in the courtroom can see that we are not dealing with something that could cause a tragedy. But I remember that very well. The gun case trial. And then I remember --

Mr. Granof: Was that your first trial?

Judge Kennedy: If it wasn't the first, it was one of the first. That's right.

Mr. Granof: Did they start you off with misdemeanor cases?

Judge Kennedy: Misdemeanor cases. That's right. I spent time in the misdemeanor trial section. Actually, I only spent any real time in two sections of the office, the misdemeanor trial section and the appellate section. I spent more time in the appellate section in the U.S. Attorney's Office than I did in the misdemeanor trial section. The head of the appellate section was a wonderful, wonderful man, John Terry.

I had some great experiences in the appellate section. But in the misdemeanor trial section my most memorable case was a case that I brought on account of a police officer who had mistreated a prisoner. And I can tell you I'll never forget the difficulty in doing that. The Metropolitan Police Department -- at least it was some officers who were members of the Metropolitan Police Department -- tried to conceal evidence from me, so I had to be inventive about how to get the evidence. But I ended up prosecuting this police officer, and he was convicted for, basically, maceing a prisoner. And I remember getting the records of this particular can of mace.

Mr. Granof: And this was a case that you tried?

Judge Kennedy: Yes. I tried it. Before Judge David Norman. David Norman was a very interesting fellow. He had been an attorney in the Department of Justice, and one of the interesting things about Judge Norman is -- I don't know if he was totally blind -- that he was certainly legally blind. But I tried that case before him and won a conviction.

Mr. Granof: How many cases did you actually try?

Judge Kennedy: You know I had to answer that question when I was being considered for a judgeship on the Superior Court and a judgeship here. And I remember actually trying to figure that out. And I know I put a number down, but I don't remember what it was. But I must have tried at least 30 cases.

Mr. Granof: And were most of those jury trials?

Judge Kennedy: I would say at least half. At least half. And it might be more than 30.

Mr. Granof: And this was over a couple of years?

Judge Kennedy: About a year and a half. Less than a year and a half, because I spent about a year and a half in the appellate section of the U.S. Attorney's Office. I left the U.S. Attorneys Office in less than three years. That was a kind of -- what should I say -- not a controversial thing, but the commitment to be an Assistant U.S. Attorney, it was a three-year commitment. And there were those who felt that even though I had been appointed United States magistrate, a commitment is a commitment. And so I was just short of three years.

Mr. Granof: I would have thought that's the kind of commitment which has to be placed in the context and can be waived? It's not as if you went into private practice for a lot of money.

Judge Kennedy: Yes, that's right. Absolutely. And let me just tell you. See that plaque right there on the wall? That was the plaque that was given to me. I was very concerned that it might not be given to me because, again, of this not fulfilling the commitment. But it was.

Mr. Granof: Was Earl Silbert still the U.S. Attorney?

Judge Kennedy: Earl Silbert was the U.S. Attorney, and I can just tell you that I was just very pleased when it was presented to me. And it reads, you see that, "Department of Justice."

Mr. Granof: Yes.

Judge Kennedy: Isn't that handsome?

Mr. Granof: This is a plaque that Judge Kennedy has just taken from the wall, and it's a very handsome plaque which is presented to Henry H. Kennedy, Jr., Assistant United States Attorney, District of Columbia, 1973 to 1976, by his associates. So I can understand why you are proud of that.

Judge Kennedy: Very, very, very proud of that. Very, very, very proud of that, that my colleagues would give me -- I mean this was given, I think, to every Assistant U.S. Attorney who fulfilled his commitment. Who did the work of the United States as best he could, and over whatever amount of time he or she spent there. So this really meant something to me. So I had a great time.

Mr. Granof: Well, if you're trying more than 30 cases in a period of probably less than a year and a half because you had some time for training, some time in the papering section --

Judge Kennedy: Yes.

Mr. Granof: You've got a trial every couple of weeks.

Judge Kennedy: Yes.

Mr. Granof: And I assume that's not the only thing that you had to do.

Judge Kennedy: Oh yes. But back then, when you were in the trial section, you might try 3 cases in a week. By the way, you know, when I was assigned to the papering section, I wasn't trying cases. But when I was in the trial section, you could go into work, you'd get a file and, at the time there was this master calendaring system. You'd have to listen for where the case was to be tried, and you'd go before that judge, talk to your witnesses shortly before trial, and put on your case. You know, select the jury, put on your case. And the cases rarely would last more than a day.

Mr. Granof: But even so, a trial is a trial. A day's trial which included selecting the jury.

Judge Kennedy: Absolutely.

Mr. Granof: How did you do that? I guess you certainly learned to think fast on your feet.

Judge Kennedy: You certainly did. I mean that's one of the wonderful things about it. I tell my law clerks here, you know. I always ask the law clerks, "What is it that you want to get out of this experience?" So many of them say, "Well, I really would like to learn something." And I say, "Well, yes. You will." And I say, "You will learn in the best way that learning takes place. You will learn by doing." And that's what happened when I was an Assistant U.S. Attorney. And I think that was the experience of virtually all of the Assistant U.S. Attorneys. You learned by doing. I can just tell you that the hearsay rule, to actually master it so that on a moment's notice you can either raise an objection that some testimony should not be permitted

because it calls for hearsay evidence or object to some evidence that's being presented. To have to do it, and then be basically given a test. A test where it counts, because after all you're standing before a jury. You know, "What is the basis of your objection Mr. Kennedy?" and you'll have to state it. Not only that, you'll have to state it in a way that is not prejudicial. You can't always say, "I'd like to approach the bench, your Honor," because, first of all, the judges kind of knew when you said that sometimes you were just stalling for time. "Now what is your objection?" So you had to know it. And we knew that. And we did. And it was a wonderful, wonderful, wonderful thing.

There are probably some people who really wonder why I love tennis so much. What is it about this thing of recreating by going out, putting your ego on the line, perhaps losing? It's very uncomfortable because sometimes you're playing, you know, when it's very, very hot and humid. You know, "What's that all about." I mean, "Why do you love it?" Well, I don't know, but I do. Just like I love actually standing in a courtroom, being tested, perhaps losing. I don't know what it is.

Mr. Granof: But when you do a good examination, a particularly good cross-examination, it's a high isn't it?

Judge Kennedy: It certainly is. And certainly that was just a wonderful period of time. And we've just talked about the misdemeanor trial section. As I said, I spent more time in the appellate section which was equally enjoyable and challenging.

Mr. Granof: I wanted to ask you a little bit before you got to the appellate section about the trial section. Did you have any bad experiences? I mean you didn't win all 30 cases.

Judge Kennedy: No, I didn't win all 30 cases. And there were times when, say, a police officer was very, very dissatisfied with my decision about whether to go forward or not. As I explained, an Assistant U.S. Attorney does paper the case, and there's a supervisor who would review it, then the case goes forward. Well, you know, sometimes, when the case comes up to be tried -- as I mentioned, you talk to a witness -- you might find something that was not included in the papers; something that was said or that was not said to the police officer, but you learn it. And I remember one case where I decided, after the case had been papered, that I would not prosecute the case. And I can tell you a police officer was just livid. Just livid. And, you know, I was going to use the word "threatened" me. I mean that's not quite an accurate characterization of what he did, but he was very, very angry and said that he was going to go directly to the United States Attorney to complain about what I had done, so on, and so forth. And I must say that was not a very pleasant experience. And I don't know what happened. I never heard about it after that.

Mr. Granof: It's easy for a police officer or somebody who wants to prosecute, but they don't have to face the judge and the jury; you do.

Judge Kennedy: That's exactly right. An Assistant U.S. Attorney, a prosecutor, must be concerned with certain ethical rules that come into play. A prosecutor

should not, ethically cannot, bring a prosecution against a person if he does not believe that there is sufficient evidence to show that the person is guilty beyond a reasonable doubt. Now if a prosecutor concludes that the evidence -- even if he might believe that the person is guilty, really believe it -- is not sufficient to back up that belief, he shouldn't bring the case. I think we have a recent case -- talking about the case of the students at Duke University -- in which the charges were brought by a prosecutor but the case has now been dismissed, and the prosecutor is under investigation. Because, again, it's not enough for a prosecutor to feel, you know, the way he feels. The system simply doesn't permit a prosecutor to act just on belief. You have to have evidence. And so I made the call, and maybe the police officer didn't complain after all.

Mr. Granof: Trying 30 cases you must have developed a lot of self-confidence.

Judge Kennedy: I did.

Mr. Granof: Were you nervous at times going into trials?

Judge Kennedy: Certainly in the beginning I was very nervous. Again, I keep bringing up these sports analogies. That's just the way it is. It's like walking on the field. Right now the best tennis player in the world is Roger Federer. I hate people who say these kinds of things because these intergenerational comparisons are always very hard to make. Some have said he's the best that has ever played the game. Roger Federer talks about how he gets nervous when walking on the tennis court. And I'm not talking about just at Wimbledon. Some of the lesser tournaments. He gets nervous. So,

yes, I'm here to tell you that even after trying a number of cases I got nervous. Less nervous at the end of the time that I was in the misdemeanor trial section than I was at the very beginning. But, nevertheless, nervous.

Mr. Granof: Were all these trials in Superior Court?

Judge Kennedy: That's right. They all were in the Superior Court. I never tried a case here in the United States District Court.

Mr. Granof: What was the quality of the judges that you were before? Was it uniformly good? Was it uneven?

Judge Kennedy: I would say that 90 percent of the judges were excellent. There were some judges that I would not put in that category, and I just wouldn't call them excellent. They were all competent. But there were some judges whom I just got the impression were not as attentive, particularly at the end of the day, as they should have been. There were some judges whose temperament was not of a quality that I believed that the best judges have, which is to say that there were some judges -- again, relatively few; very, very, very few.

Mr. Granof: Were there judges that were really outstanding that you have a particular memory of?

Judge Kennedy: Oh yes I do. Margaret Haywood was a judge that I appeared before who was just particularly careful, punctilious. Had a temperament that I felt was absolutely perfect. I appeared before her. A couple times I appeared before a judge named Leonard Braman, who was just really smart. When

I think of what is the first thing that you would say about Leonard Braman, smart would come to mind. He would know the rules of evidence as well or better than anybody else in the courtroom. He was unfailingly polite and civil. Judge Pryor, who swore me in, was just, just excellent. Just excellent. Luke Moore -- I don't know if you remember a judge by the name of Luke Moore. Judge Moore I appeared before a couple of times. It was very, very meaningful for me because he used to work with my father in the Post Office. Yes. He used to work with my father in the Post Office.

Mr. Granof: Now that's interesting.

Judge Kennedy: Yes. And at one time he was the United States Marshal for the District of Columbia. And in some of these documentaries about the civil rights era you'll see then-U.S. Marshal Moore accompanying some of the civil rights workers who had been threatened. Around my chambers I have things that just mean something to me. I mean these things just mean something to me. I have this. But one of the things that mean something is that man right there [pointing to a picture on the wall].

Mr. Granof: That's Frederick Douglas?

Judge Kennedy: That's Frederick Douglas. The connection between Luke Moore and Frederick Douglas is that Luke Moore was the second Black United States Marshal for the District of Columbia, the first being Frederick Douglas.

Mr. Granof: I had no idea.

Judge Kennedy: Most people don't know that. Frederick Douglas did a lot of things. Of course you know him as a great abolitionist.

Mr. Granof: Sure.

Judge Kennedy: But he became a United States Marshal of the District of Columbia. And Luke Moore, who -- I don't know all of Luke Moore's background, but I do know this -- that there was a period of time after graduating from college when he worked in the United States Post Office, and he worked with my father. My father was a postal clerk for most of his working adult years. And my dad used to always mention this guy who was going to law school at Georgetown University. At the time there weren't many Black law students at Georgetown University. And I think it's the case that Luke Moore was in the evening division of Georgetown University Law Center and during the day worked with my dad at the U.S. Post Office. And my dad would tell me about how this kid, who they kind of covered for, so that he could study. And let's fast forward. This kid graduates from Georgetown University. I don't know the sequence when he was United States Marshal versus when he was an Assistant U.S. Attorney, but at some point Luke Moore became United States Marshal, he became an Assistant U.S. Attorney, and was appointed a judge. Fast forward some more. I become an Assistant U.S. Attorney. So, there's this Luke Moore that my dad had talked about, whom I appeared before. And I have to tell you the things I remember about Judge Moore is he was just the most compassionate man. Just the most compassionate man. He wanted so

much to help everybody charged with a crime. You could just see it. He wanted to impress upon the person -- most times a man -- how unfortunate it was that he should find himself in these circumstances, and if he could, he would help that man. He would help that man. And then now we're jumping ahead, but I'll never forget when I was appointed to the Superior Court and then became a colleague of Luke Moore. I guess I had been a judge about two weeks, and I decided that I would just look in on a trial that Luke Moore was conducting. And I walked into the courtroom, and I'll never forget Luke Moore stopped the proceedings and introduced me to the members of the jury and the litigants. And he went on -- it was about 15 minutes -- and explained the connection that he had with my father.

And I was sitting up there listening to this and my intention was just to come and see a senior judge -- a judge who had more experience -- you know, do what he was doing. But that's what happened. And I remember that was a most memorable moment.

Mr. Granof: When you first appeared before him as an Assistant U.S. Attorney, did he recognize you immediately?

Judge Kennedy: You know I don't remember trying a case before him, but I don't remember anything like that happening. I just don't.

Mr. Granof: Were there any judges who you felt were less competent?

Judge Kennedy: There were some judges that I don't know that I would ever say any of them were not competent because, I mean, I think they knew what the

rules and the procedures were. But I felt that there were some who just were not sufficiently appreciative of the role that they played in this system.

Mr. Granof: In what way? There are probably different ways, because it does bear on how you approach being a judge.

Judge Kennedy: It really does. First of all, I think there were some judges who clearly did not like the type of cases that the United States Attorney had decided to bring, and let it be known in no uncertain terms.

Mr. Granof: For instance?

Judge Kennedy: They brought prostitution cases. I'll never forget trying a case, in which, as a matter of fact, I still remember the defendant's name. Ernie Terrell was the defendant's name, and there was a judge who clearly did not like prostitution cases. And I tried the case, and he let me know it in no uncertain terms. And I think, frankly, that some of his rulings reflected his antipathy for this particular type of case. I don't know if that's competency. The judge actually happened to be a rather bright man, but he evidenced, in my view, a misunderstanding of what his proper role was. It is the role of the executive branch of the government, represented by the United States Attorney for the District of Columbia in this judicial district who decides which cases to bring, and that's that. I don't think the United States Attorney would be doing his job were he to simply not enforce the law.

Mr. Granof: Sure. He couldn't say, "I don't like this law so I'm not going to enforce it."

Judge Kennedy: Exactly. Exactly. That was one judge, you know. And there was another judge, I remember, who had this running battle with the United States Marshal, who would do what I think are just high-handed things. I mean I think that people with power, and judges are people who have power, I think the more power that you have the more modest you should be in exerting the power. And make sure that you don't abuse power. Therefore, when something happens that's not to your liking, to summon the United States Marshal to come before you. You know, "You get the Marshal in here." I come from the South. And my grandmother, with whom I lived, she would condemn people with all kinds of characteristics. You know there are some people that were stupid. There's some people who were mean. But she would say this about a person and you'd know that that person had really been the subject of a harsh criticism. She'd say, "He has no manners. He has no manners." Now manners, in my grandmother's view -- and this is my view -- is simply the kind of way that you behave when interacting with a person that bespeaks, I suppose, respect and an understanding of the virtue of treating someone the way you would like to be treated. And there were a couple of judges who, to me, just didn't appreciate what I'm talking about. So even if you're going to, say, confront another government official, you do so respectfully.

Mr. Granof: Or even in dealing with attorneys, there is a way of telling the attorney that you're wrong without embarrassing him.

Judge Kennedy: Absolutely. Absolutely. Oh, well, I'm going to tell you that's exactly right. And I must tell you that's one of the things that I have truly tried to do during my time as a judge. And now I guess it's been a while, over 27 years.

Mr. Granof: I think it may be difficult at times because sometimes attorneys do things that you really want to say, "Cut it out."

Judge Kennedy: Sure. Sure. Why sure they do. And sometimes attorneys actually try to bait you. I suspect that is so, and they deliberately say and do things to get a reaction from you that will have a benefit for their client.

Mr. Granof: In a jury trial particularly?

Judge Kennedy: In a jury trial in particular.

Mr. Granof: They want the jury to think, "Hey, he's really leaning on me and my client. I'm the underdog. Help me out here."

Judge Kennedy: Absolutely. Absolutely. I think that happens. Every attorney has to determine for himself what the code of conduct that governs us permits us to do and not do consistent with our obligation to represent the interests of our client. But another thing that my mother, my grandmother, and my father always told me,

"You might not be able to control others, but you can control yourself."

And my idea of what a good judge is, is a person who will treat litigants -- the participants in the process -- in a way that I would want to be treated.

Simple as that. To really appreciate that reasonable people disagree, but there is no need to be disagreeable while disagreeing. That the process, in my view, is not helped when a judge is not civil to a lawyer. After all, the courtroom in this process is supposed to be about resolving disputes in a civil, reasoned way. So whenever the judge permits the process to be any other way than that does not provide an environment for reasoned and civil resolution of a dispute. And that's what we do here, you know, we resolve disputes. We're not transactional people. We resolve disputes. When you don't do that, you're not doing your job. As so at least that's what I try to do, and yes, indeed, I do remember some judges who didn't do that and I didn't think well of them. That's what I remember. But again, very few.

Mr. Granof: I've taken about 5 minutes beyond your time here.

[This concludes Interview No. 3]

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]

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

Fifth Interview
12 February 2008

This is the fifth interview of the Oral History of Judge Henry H. Kennedy, Jr. as part of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Tuesday, February 12, 2008, at 2:00 p.m.

Mr. Granof: So when we left off we had pretty much covered your tenure as a U.S. magistrate.

Judge Kennedy: Yes.

Mr. Granof: And that took you up to about '79?

Judge Kennedy: Yes, to '79.

Mr. Granof: And that was about three years?

Judge Kennedy: I was a United States magistrate for three years.

Mr. Granof: And then you went to the Superior Court?

Judge Kennedy: That's right. I enjoyed being a United States magistrate, but I thought it would be a good thing to be a judge of a court of general jurisdiction. And so when I learned that there was a vacancy, I applied. There's a Judicial Nominating Commission that posts notices when there's a vacancy. I was considered three times before being actually selected by the president for appointment. I'm sure you know what happens when there's a vacancy. The Judicial Nominating Commission sends to the president of the United States three names of persons who the commission believes would be suitable judges to be appointed. The third time was a

charm, and I was appointed by Jimmy Carter. Never met him, but I was certainly very pleased to get the appointment.

Mr. Granof: Now, aside from putting in your application, what do you have to do? Do you get support from people?

Judge Kennedy: Yes. Actually it was a while ago but, yes, as I recall, that's what you do. You try to determine who has influence with the powers that be in the party of the president of the United States and ask those persons to support your candidacy.

I have a funny story here because one of the persons that I approached to ask for her support was a woman by the name of Ann Brown. Ann Brown was the head of the Consumer Products Safety Commission, and she was known to be a person who was very active in Democratic politics. I called her up, and actually went to see her and asked her to support me. She looked at me -- she was a friend -- and she says, "Oh, Henry I'm afraid not because I am supporting Harriett Taylor for that particular seat." Harriett Taylor was appointed. I say it's a funny story because I then got the next seat and Harriett Taylor became my very closest friend on the court. When I was appointed it just so happens that my chambers -- the entrance to my chambers -- was right across from the entrance to hers. I didn't even know her before. All I knew is that she was the person whom my friend, Ann Brown -- and Donald Brown was her husband, a big developer in the city -- had supported rather than me. But as it turns out, I got to know Harriett Taylor very well. She's just an

absolutely wonderful person, and we became just very close. So close that we both decided that we would never move from our chambers on the first floor to anywhere else in the courthouse unless we could move together. So there would have to be two chambers side by side.

At the time, the Chief Judge of the court was H. Carl Moultrie, for whom the Superior Court building is named. He had this humorous, funny idea that the more senior the judge, the higher up in the courthouse, physically, the judge should go, so that the more senior judges should have their chambers on the third floor. That was just his way of thinking. That was just the natural hierarchy thing. So he actually tried to get us to move. He's saying you're becoming more senior, you know, you're supposed to move your chambers. We never did. When Judge Taylor died, years later, her chambers were still right next to mine.

Mr. Granof: Other than the president appointing you, there's no confirmation process?

Judge Kennedy: Oh yes there is. Oh boy, yes there is. Under the statute, the president nominates and there has to be Senate confirmation. But the hearings are not conducted by the Senate Judiciary Committee, which is the committee that conducts the hearings for Article III federal judges. Rather it's the Senate Committee on Governmental Affairs. And so it's that committee that held the hearing on me. And I'll never forget that because the chair of the committee was for a while the running mate for McGovern --

Mr. Granof: Oh, Senator Eagleton?

Judge Kennedy: Senator Eagleton. And he conducted the hearing. And I was very young at the time, and he commented on that. But he said since I was -- referring to himself -- I think he was Attorney General of the State, of whatever state he was from --

Mr. Granof: Missouri.

Judge Kennedy: Missouri, at the same age as I was being appointed a judge. He says he certainly can understand that perhaps a person's relative youth --

Mr. Granof: How old were you?

Judge Kennedy: Thirty-one or thirty-two years old.

Mr. Granof: And what's the confirmation process like? Does the White House provide an assistant to walk you through it? Or you just show up?

Judge Kennedy: For the Superior Court?

Mr. Granof: Yes, for the Superior Court.

Judge Kennedy: You know, it's so long ago. I don't remember anything like that. I don't remember any of the kind of vetting that is done for federal judges for the Superior Court. I just don't remember anything like that.

Mr. Granof: Did you deal with the committee staff beforehand at all?

Judge Kennedy: I don't remember. Other than submitting answers to questionnaires, and there were those. But nothing that I can remember like that, you know, which is very much different for the federal bench. My goodness. There's quite a bit of activity for that. There's, in fact, a whole division of the Department of Justice that is charged with preparing the president's nominees for the hearings before the Senate Judiciary Committee. I'll

never forget that. They give you these big, black binders with transcripts of other judges' hearings, and others talk about questions that you might be asked. Not suggestions as to how to answer but, you know, you give your answer and then they say, "Well, I don't know. Could you say it this way, you think? Do you think you could say it this way, and say the same thing, but without saying just that?"

Mr. Granof: So, obviously, you got through the confirmation process and apparently without much trouble.

Judge Kennedy: No, it went very, very smoothly. Very, very smoothly.

Mr. Granof: And you became a judge on the Superior Court.

Judge Kennedy: Yes.

Mr. Granof: But you had been, in fact, a judicial officer for three years as a U.S. magistrate?

Judge Kennedy: Right.

Mr. Granof: So how was it different?

Judge Kennedy: Well, I suppose the main difference came in the criminal area. As a United States magistrate in the criminal area one would conduct the arraignments -- or actually the presentments -- make bond decisions as to whether a person should be released pending the resolution of his or her criminal trial, or not. We set bond, we conduct preliminary hearings. But really, except for the most minor offenses, you didn't try the cases, and therefore weren't called upon to sentence anyone. I would say that the biggest difference had to do with handling criminal cases -- actually trying

them. I had been an Assistant U.S. Attorney so I knew how to try a case. But it came down to the aspect of sentencing, determining what the appropriate punishment should be. And this was a time, by the way, when there were no guidelines at all. There was what is called indeterminate sentencing where the statute would prescribe the maximum sentence, very rarely a minimum sentence. Sometimes there were mandatory minimum sentences. But for the vast majority of cases, there would be a maximum of, say, ten years. And the judge could impose any sentence that he or she wanted up to that. To be called upon to do that was a very challenging thing. And, you know, it's just a profoundly important thing, of course. So, that was a big difference.

Also, the Superior Court really is a court of general jurisdiction and handled just all kinds of things. One of the very important divisions of the Superior Court -- one that I think many people would not consider as all that important, but which really is -- is Landlord and Tenant Court. When you just think about it, of course, of all the things that are important to you, your housing is very important. Well, it was the Landlord and Tenant Court that basically adjudicated disputes between landlords and tenants. Often the tenants were not well-heeled people, and many of them had complaints about the housing that was being provided by the landlord. The landlord was operating a business and certainly expected to have the rent paid on time. And it is the judge who has to apply the law to the facts

and resolve these very important disputes. I found that to be very challenging and very interesting. And let me underscore "challenging."

Mr. Granof: Why challenging?

Judge Kennedy: For one thing, trial judges on the Superior Court really are trial judges. I say that in contrast to the trial judges on the United States District Court. I'm here to tell you that judges over here are not on the bench -- that's actually on the bench, trying cases, resolving disputes -- anywhere near as much as over in Superior Court. Now, what I have just said about the difference between the Superior Court and United States District Court is even more of a contrast when you think about what a judge who presides over Landlord and Tenant Court does. Back then, these assignments were for as long as three months, and every day for three months -- every day -- the judge would take the bench at a certain time and would be faced with fifty cases. Now there were systems to kind of weed out the cases, but the judge had to be there resolving these disputes, important disputes, day in and day out.

The body of law that is applicable in Landlord and Tenant Court is very complex -- the substantive law and the procedural law. So it was challenging, one, learning the law -- substantive law and procedural law -- and also for three months, every day, taking the bench. A lot of preliminary matters are taken care of before the judge gets on the bench, but you get on the bench at 10 o'clock and you're there on the bench until 5 o'clock just knocking out cases each and every day. And what was at

stake, again, a person's housing. Many of the litigants were not represented, and there was just a lot of -- what should I say -- emotion. I mean, just think about it. A person who is in danger of being thrown out of his or her house. A person who, perhaps, has a family member who is sick who can't afford to pay the rent. On the other side, suppose you are a person who owns an apartment building and that's your main source of income, and here you have tenants who don't pay the rent for no good reason. You're trying desperately to get somebody in the apartment who will pay the rent. And this is your retirement. Maybe you have social security coming in, but this is how you make your living. And so, the judge is there, trying to do justice and to apply the law.

Mr. Granof: Fifty cases. So you don't have a lot of time.

Judge Kennedy: No. And most of those cases, by the way, did not go to trial. Actually, as I recall, what you did was in the mornings you basically winnowed out things and found out which cases were left for trial. And maybe there'll be three or four in the afternoon, but that is three or four. And that's, again, day in and day out.

Mr. Granof: When you were talking about your experience as a U.S. magistrate you indicated that you were pretty good at effecting settlements, and you were pretty good as a mediator. Did that help you in Landlord and Tenant Court?

Judge Kennedy: Well, I like to think so. I mean I really do. I'll never forget there were some judges on the Superior Court who were really known for their ability

to effect settlements -- Judge Stewart, Judge William "Turk" Thompson -- and they had different kinds of techniques. I never felt like I had a real technique. What I always tried to do was to be as forthcoming as I could be with people. But everybody knows that one good thing about a settlement is that you could control at least a part of it, which is not what happens when you decide to go to trial where you have no control. And as much as anyone might say that they would just as soon lose rather than compromise, my instinct tells me -- and I think it to be true -- that that's not really so. That's not really so. And so, I would try to effect settlements, and I think I was pretty good.

Mr. Granof: Well, one of the things that I have been curious about is when you're on the bench day-in and day-out handling a huge number of cases -- and you really want to do justice and right and you have a sense that it's important for people to do that -- what happens if you come in one day and it's a bad day. You know, the traffic was bad, you had a flat tire, whatever. Maybe you're not feeling so great, you've got a bad cold. How do you deal with that and keep focused on it?

Judge Kennedy: Well, you know, to me that is what you swore to do, and you're paid to do. And that is to not let any of those things that you mentioned -- bad day, maybe your wife has said something that you would just as soon that she not say, your kids are driving you crazy -- but I think that all of us who are judicial officers, at least the people whom I've had the privilege of being associated with, really appreciate that this really is a trust where

one simply must, simply must be about the business of doing justice as best one can in each case. And I think most of us feel -- and I certainly feel this way -- that not only is it important to try to do the right thing and come out with the right answer, but also to be perceived by the litigants as doing so. The appearance of justice is absolutely -- I'll say it because I believe it -- almost as important as the eventual result. And, therefore, to convey that you are listening, that you are focusing your attention, that your decision and what you do is not affected by anything other than the merits of the respective parties' positions is absolutely crucial. And that's what at least I tried to do, and try to do it to this day.

Mr. Granof: I think that's an interesting approach. I've been in court where I've seen a case which is absolutely frivolous and ridiculous. And yet I've seen the judge be very solicitous of the litigant and say, almost apologetically, "I can't do anything for you. The law doesn't allow me to." And I take it that's sort of your attitude.

Judge Kennedy: Yes, that is my attitude. I have to say this. In preparing to be a judge on the Superior Court I talked to several people -- judges mainly -- about the job. And I must say, one thing that Ted Newman, who at the time was the Chief Judge of the D.C. Court of Appeals, one thing that he said that really did stick with me and became one of the principles by which I was guided, he said that it's absolutely essential to take one case at a time and not be influenced by the crush of the caseload. I must tell you that when you see a sea of people out there, there is this pull to want to bang the

gavel and get this case done and go on. Now I spent a lot of time resisting that urge. I don't know what my statistics were. I suspect that I was never considered to be the most efficient judge, but I really do believe that after all is said and done that's the better approach to take than to do it otherwise. So, that was my philosophy. That's the way I did things.

Mr. Granof: I want to come back and ask you about sentencing. But before I do that, just to get some framework, how many judges were there on the Superior Court?

Judge Kennedy: Even when I was there it changed. I mean the number of judges has grown. Every five years it seems to me that there were more and more judges appointed. As I recall, there were about between 40 and 50. So it was a large bench.

Mr. Granof: So it was hard to know all your colleagues?

Judge Kennedy: Yes, though I must say certainly not well. But each one of the Chief Judge's with whom I served over there -- H. Carl Moultrie, Fred Ugast, Gene Hamilton -- all of them felt it a good thing for there to be kind of a sense of camaraderie. On that court there were various things done from a big lunch table where all the judges kind of sat together, various training conferences, and various conferences, where there was the opportunity to get to know your colleagues on the bench. And I must say that in the Superior Court we really were a very collegial group.

Mr. Granof: You had mentioned that there are different divisions in Superior Court, how was it organized?

Judge Kennedy: When I was there, there was the Criminal Division. And the Criminal Division was divided into Felony I's -- Felony I's were murders and rapes -- Felony II cases, and then Misdemeanors. Then there was the Civil Division. Civil I had the more complex civil cases. A medical malpractice case, for example, would be a Civil I case. Other not so complex cases would be Civil II cases. There was the Probate Division, in which I never served. There was the Family Division, which I mentioned was a challenge. It's one of the most challenging divisions in which to serve for a judge. So, there was Criminal, Civil, Probate, and Family.

Mr. Granof: And Family is divorce and custody?

Mr. Kennedy: Yes. Landlord and Tenant, and Small Claims were also divisions. So those were the divisions. And the Chief Judge of the court would appoint the associate judges to serve in those divisions on a rotating basis for various periods of time.

Mr. Granof: Was there an administrative judge who is head of each division?

Judge Kennedy: Yes, there is what we called a presiding judge. There was a presiding judge at each division and a deputy presiding judge. I was never a presiding judge of any division. I was the deputy presiding judge of the Criminal Division for about five years during the time when Fred Weisberg was the presiding judge.

Mr. Granof: Did the presiding judgeship rotate, or was that sort of a permanent assignment?

Judge Kennedy: It didn't rotate. It was the Chief Judge of the court who would make that assignment.

Mr. Granof: It was clearly within the discretion of the Chief Judge?

Judge Kennedy: Yes.

Mr. Granof: How did he make decisions, and how did you find out about it?

Judge Kennedy: I forgot whether you got a memo or he gave you a call. I'm sure the Chief Judge wanted to keep everybody happy. For example, I mentioned the very challenging Landlord and Tenant Division. You would want to rotate the judges through that division, and not have one person do it all the time. One of the judges might rebel against that notion. With respect to the Probate Division, I think that the Chief Judge really had to kind of go out of his way to try to find someone who had, perhaps, a background in probate work. And there's also a Tax Division. And that division as well required a background in the subject area to be effective. By the way, in the Probate Division there were generally just two judges. And Tax. I think Tax also had two judges. In the other divisions there were many more judges.

Mr. Granof: When you were first appointed is there a particular division that judges are assigned to, like something easier, a break-in period?

Judge Kennedy: Yes, I probably served in the Misdemeanor Trial Section.

Mr. Granof: Did the Superior Court hear traffic cases then?

Judge Kennedy: We did, but I believe that the Commissioners handled most traffic cases, and a judge was assigned to handle the more serious traffic cases. Those

were a part of the Criminal Division. And there was a period of time when I did serve in that section in charge of DWI and reckless driving -- the more serious traffic offenses.

Mr. Granof: So when you get on the Superior Court, do you go through a training program? I think you said you did for being a magistrate.

Judge Kennedy: We had a very, very rigorous training program that was designed by a committee of judges on the court. I remember that for a long time Judge Tim Morrison was the chair of the Training Committee. And this committee would devise training programs that would take place during the course of the year. Sometimes we would go away to study various aspects of our jobs. And so, yes indeed, there was a training program that was created and implemented by the judges themselves.

Mr. Granof: And did you find that helpful?

Judge Kennedy: Yes indeed. Very, very helpful. Also, I previously mentioned the fact that there was a greater collegiality on the Superior Court. Much of that collegiality took place during lunchtime at a big table. It was at that table that if you had a question, many of us wouldn't hesitate to go down there and pose it to our colleagues. And there was a whole lot of learning that took place at that lunch table. Not planned, but that's what happened.

Mr. Granof: Lets talk about sentencing because I think at that time judges had a lot of discretion.

Judge Kennedy: Yes.

Mr. Granof: What do you think of the tightening up of the statutes to take away discretion? Do you think that is a good thing or a bad thing?

Judge Kennedy: What a good question that is. I can't answer that without being a little bit long-winded about it. There are some aspects of it that are good. One of the reasons for sentencing guidelines was to address the problem that many people saw with disparity. It does strike me as not a good thing if the sentence which a person received very much depended upon which judicial officer he appeared before. That doesn't sound right to me. And I believe that there were many studies done that showed this -- to the extent that you can show this because, in fact, every defendant is different. So it's very difficult to draw comparisons to a point. However, that having been said, you can look at certain things -- what a person did, his criminal history, I mean his history. You can draw those comparisons. And if you do have wildly varying sentences, that's a bad thing. And the sentencing guidelines were created to try to do something about that. So, I think that there was some good to come out of sentencing guidelines.

Unfortunately, I think the federal guidelines -- particularly as they were until the Supreme Court addressed the matter recently with respect to the United States sentencing guidelines -- were not guidelines at all but were really mandatory. And judges did, in my view, just too much of computing. You know there was a quantitative number assigned to the offense, and you determined the criminal history category.

Mr. Granof: It's a point system?

Judge Kennedy: It's a point system and where that person fell, you had to sentence that person within this range. The judge could not take into consideration some things that judges traditionally took into consideration, and it seemed to me that that was a bad thing. I mean it just is not the case that the rich man who steals money simply to become richer should be treated the same as the poor man who steals, perhaps, for survival. And so, to the extent that the judge was not able to just bring, how should I say, his --

Mr. Granof: Judgment?

Judge Kennedy: Judgment, that was a bad thing. So, on balance, with respect to the United States sentencing guidelines, until just recently, I think they were bad. They really did result, in my view, in justice not being done.

Mr. Granof: As a Superior Court judge, initially do you have fairly wide discretion?

Judge Kennedy: Yes. And I'm going to tell you, the judges there, we were cognizant of the problem of disparate sentencings, and we tried to do something about it. Judges there, with respect to, particularly, serious crimes, sometimes would convene what are called sentencing councils. Where what judges did they would actually have two or three other judges kind of review the facts, and talk about what is appropriate. I participated in many of them. And in that way judges tried to take into consideration what it is that other judges would do under similar circumstances, but would also be able to bring to bear again, yes, judgment. And that would work pretty well.

Mr. Granof: Were you ever subject, as a Superior Court judge, to sentencing guidelines?

Judge Kennedy: They came in after I left. And so, no.

Mr. Granof: What was your favorite, or did you have a particular favorite, division?

Judge Kennedy: No I didn't. I always felt most comfortable in the Criminal Division. Because I had been an Assistant United States Attorney, I was very, very familiar with both the substantive law, the procedures to be followed. I felt very comfortable. Very knowledgeable and comfortable. I was not as comfortable in the civil area. Though, given my work as United States magistrate judge where I handled a lot of discovery disputes and what have you, I felt more comfortable there than I felt in other divisions and sections except for Criminal. The Family Division was absolutely eye-opening and I found it very, very challenging. And because I found it challenging -- I kind of like challenges -- I came to really like certain aspects of the Family Division where there's very little law that tells the judge what to do with respect to, let's say, in the neglect area. What a judge is to do is basically guided by the principle, "You should do what is in the best interest of the child." Best interest of the child. How many times did I serve in what is called the Abuse and Neglect Division of the Family Division, where you had this scenario: you have a mother who is a drug user, and who because she is a drug user is unable -- and, perhaps, even unwilling -- to care properly for a child. The child is taken away from the mother by the Department of Human Services -- the Child & Family Services Department of the Department of Human Services -- and later the mother's drug addiction problem is successfully addressed, and

now the mother wants to regain the child. But in the meantime the child has been put with a foster parent who has fallen in love with the child. Just fallen in love with the child and, indeed, wants to adopt the child. And the child, by the way, has fallen in love with this family that has provided the type of life which the child had not to that point known.

Mr. Granof: What do you do?

Judge Kennedy: You did your best. You tried your hardest. But the point is those kinds of cases are just very, very difficult to deal with. And that kind of thing didn't come up, you know, often, but it did come up from time to time. Much more often the problem was trying to make the bureaucracy work the way it's supposed to. In a case like this where the mother needed services, each one of these families would have social workers appointed to help. Many of them were overloaded. So your job was to try to make sure that the social workers did their jobs. The point is that was very, very challenging work for a judge.

Mr. Granof: As a judge looking at the social service bureaucracy in the District, was it your sense that they were overloaded, or that they were just inefficient, or some combination of both?

Judge Kennedy: A combination of both. Some of it was inefficient. Some of it was just overloaded. Frankly, I think while there are some social workers who were just absolutely excellent, some of them weren't so good. I suppose they're like every other area of human endeavor. There were some very, very good ones and some who were not so good.

Mr. Granof: Now, in your relationships with your colleagues, judges must have some sense that some judges are better than other judges. How can you tell that? How do you determine that?

Judge Kennedy: I doubt that there are any judges who speak in terms of judges who are better than other judges. When I was in Superior Court you had statistics, but even if you didn't have statistics you kind of knew which judges tried more cases than others. Every time the court of appeals writes an opinion -- over in the Superior Court, in particular -- they put the name of the judge whose decision was being reviewed right there on the opinion itself. The opinion would say, "The Superior Court erred in determining -- ." However, if Judge Kennedy's name was right there, you know who it was who erred. And, you know, we followed these things.

Mr. Granof: There are some high-profile or just complicated cases and the Chief Judge has got to make a decision, I suppose, on the assignment.

Judge Kennedy: Well, no. Generally speaking, that is not the way it works. Generally, what happens is you'd be assigned to a particular division and within that division everything was random. So it's not the situation that there for a particularly complex case or high-profile case the Chief Judge would appoint one judge rather than another.

Mr. Granof: So, in fact, it really was random?

Judge Kennedy: Yes.

Mr. Granof: As a Superior Court judge did you have much time for research? Did you have a clerk?

Judge Kennedy: Yes. Judges on the Superior Court had -- I think they still do -- one clerk.

Mr. Granof: Assigned to you personally?

Judge Kennedy: Yes.

Mr. Granof: Did they also have a pool of clerks?

Judge Kennedy: No. We had one law clerk. My very first law clerk, and I'll just say this. I am very, very proud of this. My very first law clerk was Kaye Christian, who is now a judge on the Superior Court.

Mr. Granof: So you must have trained her very well.

Judge Kennedy: She says that I did. Recently, my law clerks gave me a dinner to celebrate my 10 years on the federal bench, and all of the clerks were invited to come. And she did, and she kind of gave the main address and said some very, very nice things about me, and gave me that clock over there.

Mr. Granof: Very handsome.

Judge Kennedy: For the most part, the judge had the one law clerk handling the case.

Mr. Granof: How did you choose your law clerk?

Judge Kennedy: We would get many applications. We get many more here in this court, by the way. We'd get many applications. I'd go through them. I'd try to figure out who would be able to do the job. You know, bring that certain intellectual firepower. Someone who seems to have good judgment. Basically, someone who has excelled.

Mr. Granof: Some judges have sort of "feeders," such as law school professors who recommend law clerks to them. Did you have that?

Judge Kennedy: No, not in the Superior Court. No, not at all.

Mr. Granof: Now, to what extent did you actually do written opinions in the Superior Court? If you're handling 50 cases a day in Landlord-Tenant you're not going to have a lot of time to write opinions and maybe it's not required.

Judge Kennedy: Well, I must say, I did write opinions. Remember, one of the divisions was the Civil Division. And one division of the Civil Division, in which judges served, was the Motions Division. And when you were in Motions you did a fair amount of writing, and you did it when you could. You know, it's not a nine-to-five job. And so you just simply devoted the time that was needed to write opinions.

Mr. Granof: What do you think of the system in which you have a Motions Division but the judge isn't the one that's going to hear the case? Is that a good system?

Judge Kennedy: I much prefer the system that we have here where the case is assigned to a judge from beginning to end. I think that's good because in every case I read the complaint when I get the case. And I follow the case. I mean I deal with the discovery problems or will often refer the discovery problems to a United States magistrate judge. But I'm on top of the case. And I do believe that that provides a better background for resolving the case both efficiently and also correctly than having different stages of the case handled by different people. I'm not saying that it can't be done, but I much prefer a situation where the judges follow the case from beginning to end.

Mr. Granof: Have you had feedback from lawyers on that at all?

Judge Kennedy: No. In almost every civil case that I know of at some point there's a motion for summary judgment where the movant is indicating that there are no material facts in dispute and the movant is entitled to judgment as a matter of law. Well, now, suppose as a motions judge I disagree and deny the motion, and I don't write anything. Then the trial judge gets the case, and it seems to me that a better system is one where maybe you have decided the motion for summary judgment and you have let everybody know that these are the facts that really are not in dispute and I don't need to hear those, but these are the factual issues right here. And so we can have a trial devoted to what is -- at least I have determined to be -- important, rather than all the other stuff. So I would be surprised if every lawyer wouldn't prefer an individual case assignment system rather than a system where you have different aspects of the case decided by different judges.

Mr. Granof: Pieced out?

Judge Kennedy: Pieced out.

Mr. Granof: So what drives the "pieced out" system, judicial efficiency?

Judge Kennedy: I think at least perceived efficiency. Yes.

Mr. Granof: Although I would think in some way it might be less efficient because if you're the judge in charge of the case, you're likely to move it along.

Judge Kennedy: Yes. Absolutely would. But there must be some reason for the other system. I mean these systems are not devised deliberately to be inefficient. I'm a person who doesn't believe that I have all the answers

and know it all. But my opinion is that the system in which a judge handles a case in its entirety is the better one.

Mr. Granof: As a trial judge I guess some of your cases got appealed to the court of appeals.

Judge Kennedy: Yes. You want to know my record?

Mr. Granof: I wasn't going to ask, but if you want to give it to me.

Judge Kennedy: Well, I must say my record is very, very good. That was one of the things in filling out these questionnaires when I was being considered for this court. That was one of the things that the Senate Judiciary Committee and, perhaps, the American Bar Association as well, wanted to determine. And I'm very pleased to say that my record on review was quite good. I don't know precisely what it was, and it's not the case that I wasn't ever reversed because I certainly was.

Mr. Granof: How do you feel as a trial judge about being reversed.

Judge Kennedy: Don't like it. I've heard some judges say well, you know, that's just a difference of opinion.

Mr. Granof: Well, certainly, if it's a two-to-one decision or something like that you know that you got a split there.

Judge Kennedy: Yes. I'm pleased when I am affirmed and I have to tell you that when I am reversed I read very, very carefully what my brethren -- and sisters -- on the appellate court have to say. And I try to avoid repeating what they said was error.

Mr. Granof: It is a learning process.

Judge Kennedy: Sure. I can say that I don't know of any judge who wants to be reversed. And, again, to answer your question very forthrightly, yes, I would prefer not to be reversed. I'm not so egotistical as to think that I'm always right and so that if I'm reversed somehow somebody has gotten it wrong. Particularly, as you say, when you get three judges looking at the issue and saying you erred. I just got reversed as a matter of fact. It's a really interesting case. I won't explain it, but I must say I read the decision with some interest, and was so glad that the writer of the opinion pointed out that the reversal could be explained a bit because it was reversed on a point that had never been brought to my attention, at least not directly.

Mr. Granof: But apparently enough was in the record?

Judge Kennedy: But enough in the record. Exactly. So, yes, this is one trial judge who doesn't like being reversed.

Mr. Granof: You know anybody who does?

Judge Kennedy: Well, I must say, from time to time I do hear things that suggest otherwise. But you know you have to wonder whether judges really believe that, Well, it doesn't matter to me. It's just a difference of opinion. Well, I don't see it that way.

Mr. Granof: Did you hear any medical malpractice cases?

Judge Kennedy: Oh yes.

Mr. Granof: A fair amount of them?

Judge Kennedy: Yes.

Mr. Granof: In light of the push for tort reform, what do you think as a trial judge?

Judge Kennedy: I didn't see many frivolous suits. I think that there are many proponents of tort reform who posit that there are a whole lot of "frivolous" suits. Now, the ones that I tried, they weren't frivolous. Sometimes -- by the way -- the plaintiff lost, but not frivolous. Perhaps what is being said is that the real frivolous suits do go away and the judge never sees them because they die on the vine for some reason. But the doctor, nevertheless, has to bear the cost of having malpractice insurance which is affected or influenced by having to defend against even a frivolous suit. Now maybe that's the case. But I didn't see it. The fact of the matter is sometimes doctors make mistakes. And guess what, we all do. Now it's unfortunate, but we all do. And when that mistake does result in some real injury, it's like everything else in this life: sometimes there's no perfect answer. But to not permit the person who is the victim of negligence to have some kind of recourse, I'm not wild about that idea. Now I think that some would say, Well, the real problem is not so much the fact of suit but some of the monetary awards. I can say that I have had occasion to reduce awards and so make things right as far as I'm concerned.

Mr. Granof: So there is judicial discretion to reduce awards.

Judge Kennedy: Yes. And, by the way, I have had occasions where, to me, for whatever reason, the jury did not award nearly enough. There was this medical malpractice case, a negligence case that was brought against the city government, and it had to do with city government being on notice of the

malfunctioning of a heating unit in a public housing project. The boiler would heat the water too much, so that the water would come through the pipes and be scalding hot. I'll never forget this case where this little girl fell into this scalding water and was just -- she lived -- but she was disfigured terribly. Terribly. And I tried the case and the jury found for the little girl, but the award was just -- I forgot what it was -- but just too little. I did something which -- very few times does this happen -- I had another trial. And guess what, the award again was very, very low. And I tried again after that. I kind of wondered, well, what's behind this, you know. Was it the case that this was a poor kid? You know you have to wonder what would have happened if the kid had been the child of a wealthier person or maybe a well-known person. Would that person's injuries have been valued higher than this kid who lived in a housing project and wasn't so favored in this society?

Mr. Granof: With respect to medical malpractice, there's an article in *The New Yorker* by a well-known Harvard surgeon who writes that doctors make mistakes. He said, "I've made mistakes; it's inevitable." And he really thought that perhaps the tort system isn't the best way to handle it. What do you think about that?

Judge Kennedy: I think that is probably right. When I was in law school -- Harvard Law School -- there was a professor, Louis Jaffe, who taught me torts. But there was another professor -- I think at one time he probably taught at Harvard but was not teaching there when I was there -- whose last name, I

think, was Keeton. He advocated a type of system that did not depend upon the tort litigation mode. And it seems to me that that is something that is certainly worth considering because I just wonder about these "tort reforms" where you're only addressing part of the problem. Many of my friends are doctors, and they are very heartfelt, feel very, very strongly that they're not being given a fair shake, and that the system, in fact, has driven some of them out of business. And many of these people who have dedicated their lives to learning their craft or learning the science, learning what they do, you know it becomes so burdensome and expensive they leave it. I think it has been shown that we have some great medical care here in the United States if you can afford it. But that's a whole other issue. So, yes indeed, I think that that would be a very good thing to study and devise a system of figuring out how to best deal with the negligence of doctors.

Mr. Granof: Compared with your time on the federal bench, were there many more jury trials in Superior Court?

Judge Kennedy: Yes. I mean when a person was assigned to the Criminal Division -- Felony I's, Felony II's -- or the Civil Division – Civil I, Civil II. In the Civil Division there was the Motions Division where you didn't try cases, you just decided motions. But you could count on being on the bench during that assignment each and every day. Day in and day out. As a matter of fact -- I hope I'm not talking out of school -- but it just happens to be true that the judges on Superior Court, sometimes we would have

little contests to see how many trials you would actually start, how many trials you could kind of juggle at the same time. There have been times when I have been involved in three trials at the same time.

Mr. Granof: Did you have a deliberating jury?

Judge Kennedy: What happened is you'd actually try a case and while the jury is deliberating you'd try another case. Maybe it's a really short one. And then that jury would be deliberating. So you'd have two juries, and the problem would be finding enough jury rooms. And then you'd start another case. And that happened all the time in Superior Court. Much different here. Last year I tried no more than five cases. That's because, first of all, our criminal caseload is very, very low when compared to Superior Court. Second, here there are many, many more pleas. And on the civil side, so many of the cases are just decided on the papers. Or even when you don't decide the cases on the papers, if you write an opinion, say, on a motion for summary judgment and really kind of set out the facts, you know, what's in dispute, what's not. The parties often settle. So there really is absolutely no comparison between the number of cases that are tried in Superior Court versus the ones that are tried here. But let me say this: when we try a case in federal court, sometimes the case is huge and takes months and months to try. I have tried cases in this court that have taken months. One case took six months to try. It was a criminal case. And by the way, I tried it twice. The first time, after six months, the jury deadlocked. Tried it again, six months, the jury

deadlocked. Over in Superior Court you have some criminal cases you can try in one day, one-and-a-half days. Maybe the majority in two or three days. Very seldom a case would take a week to try. I never tried a case that took a month to try over in Superior Court.

Mr. Granof: What's your feeling -- since you've had such extensive experience, particularly in Superior Court -- do jurors get it right?

Judge Kennedy: I think most times. I think most times. Yes, I do. Sometimes jurors are unable to reach verdicts and so there is no resolution. It's a non-decision. So, yes, sometimes there are deadlocked juries, but for the life of me I can't understand why.

Mr. Granof: Well sometimes you just have one ornery person.

Judge Kennedy: That's right. You have one or two people seeing the evidence in a way that is completely different from the way others do. But, that being said, I think that for the most part the jurors do get it right.

Mr. Granof: The noted legal lecturer, Irving Younger --

Judge Kennedy: Ah, Younger on Evidence.

Mr. Granof: Yes. And on one of his tapes he says, "Collectively, the jury is the smartest person in the room." Do you agree with that? Do you think that's true, or is that just Younger having fun?

Judge Kennedy: I think that's Younger being a little hyperbolic. I think that Irving Younger, like many of us, does revere our system. It really is a wonderful, wonderful system that we have here in the United States. Not only do I believe that, but I have talked to judges from other countries

who also marvel at our system. And it is kind of a curious system where you place in the hands of the ordinary citizens the final decision on matters of fact. So when Younger says the smartest person in the courtroom collectively is the jury, I think he might be commenting on just the wonderful system that it is. But the fact of the matter is jurors sometimes do get it wrong. So no, I don't know if I would go as far as Younger.

Mr. Granof: What about the caliber of lawyers practicing in Superior Court. How would you evaluate them, particularly since you've now had experience on the federal bench?

Judge Kennedy: I think there's a wider variety in terms of quality in Superior Court than here. I think that, for the most part, the quality of lawyering here is really quite good and quite high, both in the civil side and the criminal side. Over in the Superior Court there was more variation. Now, I think that makes sense since there were just so many more lawyers that you would come into contact with. And I think that there probably is a certain -- what should I say -- panache, intimidating factor, that comes into play when you go into federal court which is not the same as when you go into the Superior Court. But I do want to just emphasize again there were just some excellent lawyers who appeared before me when I was in Superior Court. People like Ken Mundy.

Mr. Granof: You mentioned that when you were a magistrate he impressed you.

Judge Kennedy: Oh yes. Ken Mundy and Leroy Nesbitt. Jack Olender -- you mentioned medical malpractices cases -- boy was he good. And -- I wish I could remember their names -- on the defense side of medical malpractice, it's just excellent. But there were some lawyers who just didn't seem to me to be as prepared as they should be in bringing the type of -- what should I say -- vigor to the process that one would want to see every lawyer bring when representing a client in a court of justice.

Mr. Granof: Among your colleagues on the bench, whom did you respect the most?

Judge Kennedy: Oh, I must say I really respected all of them. I thought that the judges on Superior Court -- my colleagues -- were really first rate. There were judges who I think were really well known for just their excellence and their knowledge in various areas. I think about Fred Weisberg, who was the Presiding Judge of the Criminal Division of the Superior Court when I was there. He was just an excellent guy. He had been with the Public Defender Service for many years. He was smart and just knew criminal law like the back of his hand. He just was so very, very knowledgeable. The same could be said of Frank Burgess. I have to tell you that when I came on the bench there was a man by the name of Luke Moore. He was, in his way, just a wonderful man in terms of his demeanor, his caring. I always had kind of a soft spot in my heart for Luke Moore because he used to work with my father. My father was very proud of Luke Moore.

Mr. Granof: I've heard of him. You had mentioned he was the U.S. Marshal at one point.

Judge Kennedy: He was the United States Marshal. I think he was the second Black United States Marshal for the District of Columbia, Frederick Douglas being the first one. And he was an Assistant U.S. Attorney. He served on the Superior Court, and he was a person who was just known for his being a wonderful face of the judiciary in terms of his caring. Not only doing justice, but also giving the appearance of doing justice. All of the chief judges -- Fred Ugast and H. Carl Moultrie and Gene Hamilton -- wonderful, wonderful judges. And likewise some of the judges now -- Rufus King, who is now the Chief Judge of the court -- I served with for a period of time. And those are just a few. I was very, very pleased to be associated with the Superior Court because this is the nation's capital after all. We have no dearth of lawyers in this city, so there was a wonderful pool from which to draw judges. I enjoyed my relationship with my colleagues on the Superior Court.

Mr. Granof: Was the arbitration program started during your tenure on the court?

Judge Kennedy: I don't know, but I think so. I think Nancy Stanley ran our Alternative Dispute Resolution program. And I think, yes, it was started after I was appointed.

Mr. Granof: Did you think it was a good thing?

Judge Kennedy: Yes.

Mr. Granof: Useful?

Judge Kennedy: Yes. I think it was useful. I remember looking at the statistics -- not that statistics tell you a whole lot -- but it seems to me that whenever you can

kind of get people together and effect a settlement, often that's the better way to resolve disputes. Each party controls a bit and goes out not being totally satisfied, but not feeling just devastated. Sometimes when you have a trial somebody feels absolutely devastated, sometimes feeling that justice wasn't done at all. And I think that as often as one can to avoid that scenario, the better.

Mr. Granof: What's the hardest thing that you've felt you had to do as a Superior Court judge. You've mentioned real problems with child neglect, and that area.

Judge Kennedy: Yes. I want to tell you that the Family Division really posed a problem. I mentioned child neglect. When you tried these divorce cases and you had to make a decision as to which parent should get custody, it was very, very difficult. Sometimes the property division in divorce cases also posed a problem. Here you have these people who have been married for a long time and they're going to get divorced. The question is who gets what. The man, perhaps, has amassed a nice pension, and the wife feels that, "I believe that part of that pension I should have." "Oh, really?" "And how much?" I can tell you I found that very, very challenging.

The sentencings -- some of the sentencings -- you just had to hold your head because what to do? I'll never forget one sentencing that got me into a lot of hot water when I sentenced a young man who had killed a baby. The sentence that I imposed -- now that I look back upon it -- probably was too lenient. I sentenced that young man to, I believe, 18 months in prison. And, certainly at the time, I felt that was appropriate

under the circumstances. The circumstances were that this young man had had exactly one prior contact with the law. He had smoked marijuana. He had been convicted of possession of marijuana. He and his girlfriend were raising his girlfriend's daughter. I was convinced -- I had evidence -- that this man in fact was very supportive of the girlfriend and the daughter, and that on this particular occasion he was left at home with the daughter -- entrusted with the care of the daughter -- while the girlfriend was going out for a job interview. He had bathed the daughter and the child started to cry. And, by the way, this is not an overly educated person, and he is a young kid. I think he was about 19 years old. And, again, I have evidence the child was bathed by the boy. The boy tried to feed the kid. In any event, he ends up hitting the kid. The child goes into convulsions. The child died either on the way to the hospital or very shortly after arriving. The man tried to commit suicide. And it was not just a suicidal gesture, but he tried to commit suicide. I had to sentence this man. He pled guilty, by the way, to involuntary manslaughter. And I think the maximum sentence -- I've forgotten what it was. I think the papers assumed that it was much more than what a person might receive. That was a very, very difficult sentencing, and there were others. There were others.

[This concludes Interview No. 5]

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

Sixth Interview
16 April 2008

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

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

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

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

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

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

Mr. Granof: Is that *Daubert*?

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

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

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

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

Mr. Granof: Of more than 100 pages?

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

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

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

Judge Kennedy: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Granof: It's reading it at the end?

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

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

Judge Kennedy: Yes.

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

Judge Kennedy: Yes, that's exactly right.

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

Judge Kennedy: That's right.

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

Judge Kennedy: That's correct.

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

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

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

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

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

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

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

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

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

Judge Kennedy: I could have.

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

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

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

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

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

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

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

Mr. Granof: That the collection was improper?

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

Mr. Granof: And it went up on appeal.

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

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

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

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

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

recommend to her. She would receive three recommendations, and from that number she would recommend some person to President Clinton. Well, that's what happened.

Mr. Granof: Do you have to apply?

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Granof: Judicial philosophy?

Judge Kennedy: Judicial philosophy and subjects like that.

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

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

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

Mr. Granof: That was nice of her.

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

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

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

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

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

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

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

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

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

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

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

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

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

Judge Kennedy: Yes.

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

Judge Kennedy: Absolutely.

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

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

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

Mr. Granof: Did you meet with Senator Thurmond?

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

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

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

Mr. Granof: That's interesting.

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

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

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

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

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

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

Mr. Granof: What did you say?

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

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

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

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

Mr. Granof: Body language?

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

Mr. Granof: Really? Why?

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

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

Mr. Granof: Did anybody vote against you?

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

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

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

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

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

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

[This concludes Interview No. 6]

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

Seventh Interview
21 May 2008

This is the seventh interview of the Oral History of Judge Henry H. Kennedy, Jr.as part of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Wednesday, May 21, 2008, at 2:00 p.m.

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

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

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

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

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

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

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

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

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

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

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

Mr. Granof: It's a different experience?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Granof: Jury trials?

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

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

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

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

Mr. Granof: And some of them paid?

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

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

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

Mr. Granof: In the District?

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Granof: And managing cases?

Judge Kennedy: And managing cases.

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

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

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

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

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

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

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

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

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

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

Judge Kennedy: Exactly.

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

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

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

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

Mr. Granof: Sort of a balancing act?

Judge Kennedy: A real balancing act.

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

Judge Kennedy: How does it compare?

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

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

Mr. Granof: The challenge?

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

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

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

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

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

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

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

Mr. Granof: For instance? The terrorist cases?

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

Mr. Granof: Have you had any?

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

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

Judge Kennedy: Yes. Yes, they do.

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

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

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

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

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

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

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

Judge Kennedy: Right.

Mr. Granof: Because they're?

Judge Kennedy: They're matters of law.

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

Judge Kennedy: Exactly.

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

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

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

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

Mr. Granof: Because you find it helpful?

Judge Kennedy: Absolutely. Because I find it helpful.

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

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

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

Judge Kennedy: I have three law clerks.

Mr. Granof: Three law clerks?

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

Mr. Granof: Do you type your long decisions?

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

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

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

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

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

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

Judge Kennedy: Well, that's true.

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

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

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

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

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

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

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

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

[This concludes Interview No. 7]

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

Eighth Interview
19 June 2008

This is the eighth interview of the Oral History of Judge Henry H. Kennedy, Jr.as part of the Oral History Project of The Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Thursday, June 19, 2008, at 2:00 p.m.

Mr. Granof: Judge, last time we talked I know we talked about the *Boumediene* case, and at that point it was before the Supreme Court. But I guess last week the Supreme Court created a lot more work for you.

Judge Kennedy: Yes it did. The Supreme Court -- Justice Kennedy writing for the majority -- determined that the U.S. Court of Appeals for this circuit erred when it determined that the detainees at Guantanamo Bay did not have a right to have their petitions for habeas corpus heard in this court. Most of the judges on this court had been waiting with bated breath for this decision to come down. We knew that it would be coming down soon. But you're absolutely right. We are bracing for the huge number of cases that we will now have to adjudicate if things stay as they are. I understand that there is some consideration being given to establishing -- that is, the Congress establishing -- a new court, a National Security Court, which the Congress, from what I can tell, does have the jurisdiction to do, that will handle these cases. But, of course, no one can tell whether that actually will happen or not. But, frankly, I don't think that there's much that can get through the Congress at this point.

Mr. Granof: Because it's so close to the election?

Judge Kennedy: So close to the election. Yes, exactly. And, you know, with this issue there are very ardently held views on both sides. And so for the Congress to get together and pass some legislation like this I think is probably asking much. But this court -- I'm very proud to say -- has handled all kinds of cases in the past. Obviously, this presents a new challenge and, frankly, I think that we are up to it, and so I look forward to it.

Mr. Granof: This raises a question. I think last time you said you, personally -- I mean on your docket -- you had 14 of these petitions for habeas corpus, which involved more than 14 individuals.

Judge Kennedy: Exactly.

Mr. Granof: There were 14 petitions, and other judges, likewise, had petitions.

Judge Kennedy: Right.

Mr. Granof: Does the court -- as a court -- are the judges going to try and get any kind of uniform approach to it?

Judge Kennedy: Very good question. The answer is, I don't know. But the new Chief Judge of the court, who is Judge Royce Lamberth -- he just succeeded Judge Thomas Hogan -- just recently met with several of the lawyers for the detainees and the Department of Justice lawyers. And I wasn't privy to what went on, but I'm pretty confident that what was discussed was how to establish some system of efficiently and fairly doing what we are supposed to do, of course consistent with governing principles. And there will be, I am sure, some effort to make it so that there are not 14 different

people ruling on the myriad of procedural issues that will come up, such as where do you actually adjudicate these hearings, here in the United States or in Guantanamo Bay, or by using technology, a video conference? This is the kind of case that we haven't been called upon to handle in the past, and so we will have to just decide that. So, to me, I doubt very seriously if we want to be in a position where 14 different judges are ruling on, say, that one legal issue: what is the proper forum for hearing these things? And I've just given you three possibilities. I can't think of another one. But, as I said, I have every confidence that something will be done to address the issue. The last time we had to kind of make these decisions one of our senior judges handled the initial motion to dismiss. It was Judge Joyce Green.

Mr. Granof: Which raises a broader question about perhaps how -- I hesitate to say all district courts, but at least in this district -- how do you deal with issues that are common that arise before more than one district judge, and when do the judges, as a body, basically say we need some commonality, instead of saying let each judge write his own decision, let it go up to the court of appeals to straighten it out?

Judge Kennedy: It's really interesting that you should ask that question. Just this morning I handled a case where the issue had to do with whether this court had jurisdiction to entertain an action where the plaintiff alleges that the government had unreasonably delayed consideration of his application to be changed from one immigration status -- the status in my case of

someone granted asylum -- to permanent resident status. The application to change the status had been filed in 2003, and here five years later no decision had been made. And so the question was whether or not the court had jurisdiction -- it was a motion to dismiss -- and both parties pointed out that while there had been many district judges who ruled on the issue, the issue hadn't been addressed by the Supreme Court or any court of appeals. And even in this jurisdiction the courts had come down on different sides. That's not unusual. So, in answer to your question, 90 percent of the time, there is no effort made to do anything other than for each judge to decide the matter as he or she believes it should be decided. And oftentimes there is just disagreement. And that's why we have a court of appeals and a Supreme Court. However, in cases like this -- and this is a very unusual case where we are considering something that we've never considered before, and where, in my view, the circumstances simply call out for some kind of coordination -- then we sometimes will see if there is a way of having just one of us address the issue to more efficiently just get on with it.

Mr. Granof: Well, I know that you did this in the Superior Court in the DNA decision.

Judge Kennedy: Right. Yes. So the answer is, it doesn't often happen, but in this circumstance it probably will happen. Otherwise, I can tell you it would just destroy our calendars. Actually, I don't think we would be able to do anything other than handle these cases because, again, we are writing on a clean slate. And if each of us has got to figure that out, I tell you again it

would just take up all of our time because there will be -- I can assure you -- a huge number of procedural issues separate and apart from the substantive issue of whether these persons should be detained or not, whether they are being legally detained or not. Now, that's one thing. And, frankly, I think each one of us will have to make that decision.

Mr. Granof: Because it's fact specific to each individual?

Judge Kennedy: Exactly.

Mr. Granof: Which raises another question, not necessarily with respect to this particular issue, but to what extent do you feel, or what weight do you give, to decisions by your colleagues on a similar issue?

Judge Kennedy: Well, I consider some holding my colleagues have made with respect to an issue is deserving of consideration, and I will give it due consideration. I mean, it just so happens that it's not binding on me, and that's that. Sometimes I agree, sometimes I don't.

Mr. Granof: Would you give it any more consideration than say a district court opinion on the same issue from another district?

Judge Kennedy: From another district? I probably would because I know my colleagues. In all seriousness, if I'm going to be very, very forthcoming, I will tell you that I have just immense respect for each one of my colleagues. I know what the judicial culture is here in the District of Columbia, and it's one, frankly, where we take just immense pride in what we do. Not that judges in other judicial districts don't, but I just don't know what it is to be a judge in other jurisdictions. I know what it's like to be one here. And so I

suppose, yes, when I see that a judge from this judicial district has addressed an issue it carries a great deal of weight. If it's a judge in another jurisdiction, it carries weight as well. But, again, yes, I have to say that the ones here carry more.

Mr. Granof: Senator McCain has said that the *Boumediene* decision is the worst decision since *Dred Scott* and *Plessy v. Ferguson*. You don't have to comment on it, but I thought I'd give you the opportunity to indicate whether you agree with him or not.

Judge Kennedy: Well, the answer to that question is very easy for me, and I will give an answer. I certainly don't agree with him. What I am now wrestling with is whether I should say more. And I'm still wrestling. And since I really don't see any reason not to, I don't think it's a good thing for a politician who represents one branch of government to be disrespectful of the work of another branch of government. And that, it seems to me, is what happened here when Senator McCain says that this was the worst decision since *Dred Scott*. I appreciate that he is running for president of the United States and so he made that statement in that context, and I suppose that it's within his right and he certainly has power to do so. But, again, I see it as less than respectful to make that kind of statement. And I don't think that's a good thing. When I had my hearing before the Senate Judiciary Committee I remember one of the senators asking me -- I was going to say it was Senator Ashcroft, but I don't know if it was Senator Ashcroft. One of the senators asked me what articulates the highest law of

the land. And I said, "Well, the Supreme Court." And the senator made the point that, no it's not the Supreme Court, it's the Constitution of the United States that sets forth the highest law of the land. My response was, "Well, that is of course the case, but the question only becomes significant when there is a disagreement as to what the Constitution provides." If there was never a disagreement, I wonder what the point of the question is. And I said that ever since *Marbury versus Madison* this country has operated under the assumption, operated under the proposition, that when there is a disagreement, it is the Supreme Court that decides what the law is. The Supreme Court did its job in ruling on this issue in *Boumediene*. A 5-4 decision, but the majority was as it is. I think that I was talking about what happened in my hearing. And then someone said, "Well, doesn't the Supreme Court sometimes make a mistake?" And I must say I was kind of taken aback, and I didn't have a good answer. Because I really didn't have a real good answer I said something like, "Well, I really don't think about it that way. I really don't think about the Supreme Court making a mistake. It's just not in my frame of reference. It's not on my radar screen." And so I did not answer the question. And one of the senators said, "Well, you know, Judge Kennedy, I would like to just point out that yes, indeed, the Supreme Court does make a mistake from time to time. I think you would agree, would you not, that *Brown versus Board of Education* was a right decision and the *Dred Scott* decision wasn't." And I wanted to say, "Touché." So, yes, indeed, the justices of the Supreme

Court can, I suppose, make a mistake. But at any one point in time, it seems to me, political leaders really must champion the rule of law as interpreted by the Supreme Court. And when you say that this is the worst decision ever made, then that is something less than championing the rule of law. And I don't think that's a very good thing because after all is said and done, that which separates this great society -- and it is a great society, this is a great country -- from many others is the way that we honor the rule of law. We honor it. And so we should honor also the process and not take these -- what I consider to be -- political shots. And I won't use any other modifiers. Political shots at the Supreme Court. I think that answers your question.

Mr. Granof: I assume that you wouldn't object to someone saying, "I disagree with that decision."

Judge Kennedy: No. That's what the president of the United States said, and that was fine. He said, "I disagree with that position." And I think it's all well and good to say the truth. Well, there were four justices on the Supreme Court who disagreed. It was a very, very close decision. It was 5-4. That's fine to state what is true. "I disagree. I do know that there's another way of looking at things," is exactly right. But to say this is the worst decision since, and then compare it to a decision that is so significant for some of us --

Mr. Granof: And regarded as historically wrong.

Judge Kennedy: Yes. Again, it was not respectful. It was not respectful, and I don't think that was his finest hour.

Mr. Granof: Judge, let me switch to another topic which we've talked about in sort of broad form. And that is, we've talked about management, but let me put it this way, what's your day like. What do you do? How do you manage it? What are the components of your job, and how do you juggle them?

Judge Kennedy: I have to tell you that, contrary to what I think most people think -- that a judge's day-to-day activity is pretty much the same -- it really is not.

Mr. Granof: Is there such a thing as a typical day?

Judge Kennedy: No, there isn't. There really isn't. I can tell you, you know, on those days when I have a trial to conduct -- which by the way, that does not happen most weeks on this court. I wouldn't say the rare week, but it's infrequent that I'm actually in trial. When I'm in trial my day generally starts in court at 9:45. I try a case. We generally sit until 12:30 with a 10 minute break sometime during the morning hour. We will resume at 1:30, 1:45 and then we proceed until 4:45 or 5:00 with a 10 minute break in between. That's what happens when I'm in trial. But, again, I'm not often in trial. I do other things. Every day, I can tell you -- and this is every day including Saturdays and Sundays -- I work. But that's the way I do things. I happen to be, I suppose, cursed -- I think it's a curse -- with not being able to sleep very well. So I get up very early in the morning -- 4:30, 5:00 -- and the first thing that I do is go down, even before I eat breakfast, is go down, turn on my computer. I do have the ability to

access from home my files here, the court electronic filing system, my e-mail account, and I start work. I typically, before I get to work, will put in at least an hour-and-a-half, two hours, sometimes even three hours of reading e-mails. Every case that is filed, I read the complaint. I generally get almost a case a day, so I read the complaint just to see what it is like. Every motion that comes in, I'll take a look at.

Mr. Granof: Are all motions filed electronically now?

Judge Kennedy: All motions are filed electronically. So I will click on the motions, see what's being asked. Determine whether it's a consent motion or not. If it's a consent motion what I'll do, basically, unless there is something really unreasonable being asked and that's very seldom the case, I'll tell my judicial assistant, Nicole, to grant it. She knows what to do. She'll enter a Minute Order. If there is a motion and it's not a consent motion, then I will tell her to bring it to my attention when a briefing has been concluded.

Mr. Granof: How do you do this physically? Do you e-mail it?

Judge Kennedy: E-mail. I just forward e-mail, "Nicole, grant this." "Nicole, bring this to my attention July 5th." When she brings this to my attention on July 5th I'll make a decision as to how I'm going to handle the matter. Whether I'm going to handle the case myself, whether I'm going to have my law clerk work on it, or perhaps I'll refer it to a magistrate judge to work on. With respect to criminal cases, I normally handle them myself. A civil case, if it's something that I feel completely comfortable with, if I can really

digest the issues by reading the papers and doing little, if no, research, I'll handle that myself. The vast majority of the cases I will ask the law clerks to handle. Sometimes I make the judgment immediately that this is a motion that requires a hearing. In that circumstance, I will tell the courtroom clerk to schedule a hearing when the business of the court permits, and will instruct the law clerk to provide a bench memo three or four days before the hearing. Then I get to work. There are things in my in-box I handle. I try to set aside some time when I can actually have two hours or more where I can actually think about some issue that presents itself. Since I'm an early riser, I generally will leave here no later than 6:30, 6:00 p.m. Sometimes, of course, depending upon if there's something to do, I'll stay much later. But as a general matter, because I get up 4:30, 5:00 in the morning, by the time 5:00 or 6:00 p.m. rolls around, I've had it.

Mr. Granof: Do you take work home at night?

Judge Kennedy: I do. I have dinner. I used to play tennis. I guess you know I don't play tennis anymore. But after looking at the news -- I love looking at the news -- and during this election season I must tell you I'm glued to CNN and will listen to the pundits and what they have to say about the upcoming election. But after looking at that I will go back to my computer and do some work at night. I find often that actually doing work settles me. I like that. I like what I do, so I'll do it and then go to bed and start over the next day.

Mr. Granof: So reading is a huge component of the job?

Judge Kennedy: It really is.

Mr. Granof: But the other component is writing?

Judge Kennedy: Yes.

Mr. Granof: And that takes time. How do you find time to do that? Do you need a block of time?

Judge Kennedy: Well, first of all, you're right on both scores. Writing does take time, and let me just say this. There are some people who write quickly and I think love the process of writing. They love it and they do it well. People always ask me about what I do, and sometimes they say, "Do you like to write?" And when I answer forthrightly, because sometimes, frankly, I don't feel compelled to answer questions like those, but when I choose to answer I always answer forthrightly. And I say, "No, I don't love to write, but I love to have written." And that might give you some idea about how I approach this. I find it to be a challenge to write, particularly on the subject matters on which we write, which is not history. Not that historical writing is easy, but this is an analysis, really parsing concept. So it does take time.

Mr. Granof: Is the writing process where you do your analysis and thought, and so when you finally have a written product, you've sort of resolved the problem?

Judge Kennedy: There are some people, I suspect, for whom the actual crafting of the memorandum is an aid to their analysis of the issue and an aid to their

arriving at the right answer. That happens with me sometimes, but far more often I know what the answer is. The challenge is to explain the analysis using the proper words, the proper structure, that makes the reading of the memorandum as easy as can be done. So, that is what the challenge is. And I've been doing this for a while now. I don't know that I'm being clear here, but I'm thinking about my brother, who's a writer, and our feelings about the process. He loves to write. I mean he actually loves the process of writing. It's very much the way I love to play tennis. Regardless of the outcome, really, regardless of the outcome, I just love the process of hitting. Writing is not the same with me. The actual figuring out the word to use to express the concept, the words that I have up here somewhere in my noggin, but to find that word -- to find the exact word, the exact symbol, and to get it on paper with the structure that's just right -- it doesn't come easy to me like it does to him. My brother Randy told me -- I'll never forget -- he was on his honeymoon in the Caribbean, and after five days he said he was just going stir crazy. He wanted to get back to his office so badly. I looked at him like he was out of his mind. And he says, "Henry, I just miss the writing so much." As I just said, I thought he was out of his mind. To me, you know, again, I like the product and I love to have done it well, and I must say, I work hard at doing it well, but I wouldn't be just dying to get back to my office to do the process of writing because it gives me such pleasure.

Mr. Granof: Have you every had the experience of starting out with a particular outcome, saying it's going to come out this way, and then in the process of writing deciding maybe either the result is wrong or perhaps there should be different arguments?

Judge Kennedy: Not often, but yes it does happen. From time to time. Again, not often, but from time to time that happens, which is one of the great things about writing. As I said, I really respect the art of writing for that reason. Because when you have to put on paper word after word, express concepts, and it doesn't go anywhere. See, when you're talking, when we're talking, it's ephemeral. The words get lost in the air. You might hear it, but nobody knows what you heard other than you, except when you have a tape recorder like you have before you now. Writing is there, and you start a sentence. And all of a sudden you read that sentence over, "Umm." At the end of the sentence that concept doesn't flow precisely from what it was that went before it. And you say, "Well, if that's not right, and I'm trying to say it another way and that's not right, maybe the premise is not right then." And that does happen from time to time.

Mr. Granof: So writing does at least provide you with a check?

Judge Kennedy: Oh, absolutely. It's an ample check. You asked me if I give any more weight to the judicial opinions written by judges of this district as compared to the weight that I give to judges who write in other jurisdictions, and I said that, frankly, yes I do. I think that the record will reflect that the judges of this district write more opinions than judges in

any other district. I don't know that to be sure, but I bet that there's a way of checking that out and I'd be willing to bet that I'm right that we do a lot of writing here. And I think that writing acts as a check. It acts as a check.

Mr. Granof: And so when do you find the time to do it? How do you do it?

Judge Kennedy: You know, I raised my hand to do this job. I think that at the very beginning I told you how privileged I was and continue to feel at being asked to do this. And so it's not a matter of finding the time, it's what I do.

Mr. Granof: But just mechanically, how do you do it? Do you isolate yourself? Can you do that? Do you do it late at night? Do you do it early in the morning? Can you do it during the day?

Judge Kennedy: Actually, I do more of it early in the morning. I find that when I first awaken -- 4:30, 5:00 -- between 5:00 and 8:30 are probably my most productive times of the day. Though I can tell you, you know, I work out. I'll be on the elliptical machine. I happen to think about my work -- I can't say all the time -- but I think about it a lot. I'll be on my elliptical machine and the right analysis, the words to use will pop into my head. I can tell, I'll take a shower real quick and I'd go home, and jump on that computer and get it down. I used to keep with me at all times a tape recording machine. At all times. And I would be out and actually dictate. For whatever reason, I stopped doing that. And so, when do I find time to write? Well, I find time in the morning. Some time in the evening,

although not as much in the evening. And sometimes in the middle of the day. And that's it. This might sound like I have a terrible existence because I'm working all the time. Well, I'm not working all the time.

Mr. Granof: It's not a 40-hour job.

Judge Kennedy: Yes. It's not a 40-hour job. That's right.

Mr. Granof: I mean it's not a 9-to-5, 40 hours.

Judge Kennedy: No. I must say that I love what I do, and so I do it all the time.

Mr. Granof: In that sense, you're typical of district judges -- at least in this district -- who put in a lot of time because the workload is heavy?

Judge Kennedy: Yes. Yes. The workload is very, very heavy. Frankly, maybe there would be somebody else who could do this more efficiently and do it and take less time. But it takes me as much time as I give it in order to stay as current as I can.

Mr. Granof: Of course, although efficiency is a goal, you want to get it right?

Judge Kennedy: I want to get it right.

Mr. Granof: You're selected for judgment here?

Judge Kennedy: Yes, that's right. But it's necessary for judges to make a decision. It just doesn't do to have these terrible backlogs.

Mr. Granof: Do you find that you have much of your day taken up with, say, pretrial conferences or phone conferences?

Judge Kennedy: Not me. I don't. I think that there are some judges who really prefer to handle, for example, discovery disputes over the phone. I do not.

Mr. Granof: But you would hold pretrial conferences in cases with the attorneys?

Judge Kennedy: Oh, yes. Before every trial I have a pretrial conference and I participate in it.

Mr. Granof: Do you have a pretrial conference after you get the complaint in to set a discovery schedule, the pace of the case, and a trial date and that sort of thing?

Judge Kennedy: Yes. I have a standard practice. A complaint is filed and then there has been a responsive pleading filed, an answer. Every case is one where the decision is going to be made on the basis other than an administrative record because there are special provisions for those types of cases. But in the kind of cases that you were talking about I'll have an initial scheduling conference. We have a rule that requires the lawyers to meet -- it's Rule 16.3 of our local rules -- before an initial scheduling conference and to prepare a report that addresses all kinds of things, such as whether or not the case should be referred for mediation, and whether or not the parties will consent to have the entire case handled by a magistrate judge. And there are various things that the lawyers are supposed to address in their report. And when they come to court, we'll discuss it. After the "initial scheduling conference" -- which is what we call it -- with the lawyers, I would issue a scheduling order that also sets forth the deadlines for the completion of discovery, for the filing of expert reports, for doing those things which are customarily done in processing a case. And my pretrial order also gives some directives regarding what is expected of a lawyer during depositions, because I have come to appreciate that in a litigation

process it is what happens at the deposition that can just make everybody's life miserable. And I try to nip in the bud any bad conduct. And so I send out to the lawyers in every one of my cases -- "Listen, this is what is expected at a deposition" -- so that hopefully there will be less bad conduct than there otherwise might be.

Mr. Granof: And without going through all the detail, it might be useful to know what you instruct lawyers to try and ensure better conduct.

Judge Kennedy: Okay, just some background. It's been my experience, as I mentioned, that of all the things that -- for lawyers -- that just makes for day-to-day practice that is not as it should be and that can be just very aggravating, it's the taking of depositions during litigation. And so I, again, try to just remind lawyers of what is expected to avoid conduct that is not in keeping with the rules. There's an appendix to my standard scheduling order -- it's Appendix B -- that's labeled Deposition Guidelines, and they read, first:

> "Counsel for the deponent shall refrain from gratuitous comments and directing the deponent in regards to times, dates, documents, testimony, and the like."

I would hear complaints about a question being asked and the lawyer for the other side chiming in and assisting the witness in answering the question. That's not right. It's not the way things are supposed to be. So, I indicate that that should not be done.

Second:

> "Counsel shall refrain from cueing the deponent by objecting in any manner other than stating objection for the record, followed by a word or two describing the legal basis for the objection."

That is, a lawyer is representing a client who is being deposed, a question is asked, and the lawyer doesn't like the question that's asked and is going to basically inform the witness what the answer should be. "I object because that asks an irrelevant question. That question is not relevant because -- " And then, cues the witness.

Third:

> "Counsel shall refrain from directing the deponent not to answer any questions submitted unless the question calls for privileged information."

And that is what the Federal Rules of Civil Procedure call for. Now obviously if a question called for privileged information, then a lawyer has the right -- responsibility -- to instruct the witness not to answer that question. But short of that, the lawyer just doesn't have the right to tell a witness, "Well, you don't have to answer that question."

Fourth:

> "Counsel shall refrain from dialogue on the record during the course of the deposition."

That is, lawyers carrying on a conversation between themselves while they're supposed to be involved in a deposition which involves a witness being asked a question and the witness answering the question.

Fifth:

> "If counsel for any party or person given notice of the deposition believes that these conditions are not being adhered to, that counsel may call for the suspension of the deposition and then immediately apply to the court for an immediate ruling and remedy. Where appropriate, sanctions will be imposed."

Which is to say I authorize the lawyers, during the deposition, to call me.

Mr. Granof: Do they do that?

Judge Kennedy: Not often, but from time to time. I think this really has a good effect because it doesn't happen often. But sometimes they do. And then, sixth, and this is the final directive:

> "All counsel will conduct themselves in a civil, polite, and professional manner. The court will not countenance incivility or other behavior during the deposition demonstrating that the examination had been conducted in bad faith or just simply to annoy, embarrass or oppress the deponent."

Mr. Granof: All sounds pretty common sense.

Judge Kennedy: All pretty common sense.

Mr. Granof: And consistent with the Federal Rules?

Judge Kennedy: And consistent with the Federal Rules. And I think that some people would say, "Well, you know, there's no need for a judge to set forth that directive. We all know it." But I came to the conclusion and judgment that while you might know it, there's certainly no harm, nothing bad about reading it in black and white, so that when you have to make judgment calls, you go ahead and err on the side of making sure you don't do that which is prohibited. I can tell you it is the rare, rare case that I have complaints about lawyers not behaving as they are expected to do at a deposition. Now, I just don't get those types of problems. And I must tell you that there was a time in Superior Court where I got a fair amount. So, maybe this has had the desired effect.

Mr. Granof: Let me ask you about mediation. I may have asked you about this in connection with the Superior Court. But now that you've had 10 years of experience as a federal judge, how do you regard the mediation program? Do you regard it as useful?

Judge Kennedy: Yes.

Mr. Granof: And why?

Judge Kennedy: Well, I think it's very useful even though I don't know what the exact success rate is of our mediation program. The judges on the United States District Court do mediation in one of three ways. Sometimes the judge will conduct the mediation. I never do, but I suppose that there are some judges who conduct mediation themselves. I know I don't, but I just assume that there's somebody who does. We have a program that is operated out of the Office of the Circuit Executive. It was run by a woman by the name of Nancy Stanley. She retired about two years ago. Michael Terry is, I think, the acting head of the program now. This is a program where the mediation session is actually conducted by lawyers who volunteer their time to provide this pro bono service to the court. Or the mediation is done by the magistrate judges. As you know, I used to be a magistrate judge and that's one of the things that I did a lot of. And the magistrate judges now -- Judge Kay, Judge Facciola, and Judge Robinson -- do quite a bit of mediation. I can speak with some certainty regarding the success rate of the mediations done by the magistrate judges, and I can tell you that they have a pretty good record. I don't know exactly what it

is. I'm just saying that there are a lot of cases that have been referred to them for mediation where the parties eventually settled. I don't know what the rate of success of the mediators that do their work under the auspices of the Circuit Executive, but I would be surprised if they didn't have some success. I don't know how much, but some success. So, I think that the mediation programs are good.

Although I previously said I never do mediation, now that I think more about it, the fact of the matter is I do some mediation. Just last week I had a case on my calendar that was going to go to trial next week. I had a pretrial conference, and I had a motions hearing. And in that case I decided to give one last shot at mediation -- this was last Friday. And, in fact, I was successful. The parties reached a settlement right here in chambers. I mean, right here. Because I just had the feeling that if perhaps I said something to the parties, the principals, that they would come to agreement. This was a case, by the way, that had been tried twice before. I had tried it twice before. The first time the jury wasn't able to reach a verdict. The second time the jury reached a verdict, the case went up on appeal, and because of an inconsistency between an answer to a special interrogatory and the overall verdict, the court of appeals reversed it. And it came back before me for a third go-round. I was intimately familiar with the case, and so I decided to try to talk with the parties and the case settled. I think that's a very good thing. I tell lawyers and parties all the time that if there is an opportunity to settle a case, one should really

seize upon it. Obviously, all cases can't settle. But once a case gets before a jury there's one thing we do know, and that is it's out of your hands. It's out of each party's hands. And with a settlement there is at least the opportunity to control some part of the case, which often is better than being completely out of control. I mean I've been faced with litigants who say, "Well, I'd rather lose than do such and such." That can be said, but it's very seldom correct; in the end, it's simply not true. It's just not true. And so I think it's a good thing when the parties reach a settlement. And I think the record will reflect that probably most cases settle, and that's not a bad thing.

Mr. Granof: What would you say is the hardest part of your job?

Judge Kennedy: I must say that it's still arriving at an appropriate sentence when a person has broken the law. Determining the punishment -- the extent of the punishment -- is the most difficult thing to do. One, because of what is at stake. It was the Declaration of Independence that talked about the reason for the founding of the country. There comes a point in time when one has to recognize that all people have the inalienable right to life, liberty, and the pursuit of happiness. While all life -- that very first thing -- is the opportunity to spend one's time at certain pursuits. And what does a judge do when a judge takes away a part of a person's life. When you take away the opportunity to engage in the pursuits that one would want to engage in: to show affection to family members; to eat what you want; to play tennis if you want to. It's a very, very weighty thing, and to decide

the amount of punishment when a person has done something bad--broken the law, and when you break the law you do do something bad -- I find that to be a real challenging thing to do. I take it very, very seriously, as I'm sure all judges do. So I find that to be a very challenging thing to do. I find myself, often, explaining why it is that I have arrived at a certain decision when in truth any reasonable person, and certainly any lawyer or judge, could see that there are arguments for coming out a different way. And, frankly, that's often what we do. You know the easy cases take care of themselves, generally. What we do is decide the hard cases. Today I had a motions hearing. I think I may have mentioned it. The plaintiff was a person born in Iraq who came to this country in 1997, and was given asylum here. He's legally here in the country. He has a right under the law to apply for permanent residence status. He did that. He filed his application in 2003. The application hasn't been ruled upon in 2008. The governing statute says that the court does not have jurisdiction to consider the decision to grant the application or not; we don't have the jurisdiction to review that. But what happens when there's no decision on the application at all in five years? Does the court have the jurisdiction to consider the complaint that they're not doing anything?

Mr. Granof: What's the government's argument on that?

Judge Kennedy: Their argument -- made in a motion to dismiss -- is that the court does not have jurisdiction to consider the pace of the consideration of the application.

Mr. Granof: Five years on its face seems unreasonable. Do they advance any kind of explanation?

Judge Kennedy: They do give an explanation, but does that explanation go to the issue of the court's jurisdiction to even look into the explanation? And, frankly, there are good arguments on both sides. I can tell you that. As a matter of fact, judges in courts all around the country have looked at this issue and have come out on both sides.

Mr. Granof: On the jurisdictional issue?

Judge Kennedy: On the jurisdictional issue. And, so, that's what I'm going to have to make a decision on.

Mr. Granof: Independent of the jurisdictional issue, is this an instance where the government comes in and says, "Well, there are real reasons for the delay"?

Judge Kennedy: Yes. And they have. I can tell you it's a very sophisticated argument, and it's not, in my view, a frivolous argument. But, of course, the plaintiff has a different argument to make, and I'm going to have to think about this and explain why it is that I decided one way or the other. And I just told you that there are judges who have looked at this issue and have come out on, you know, come out different ways. I can tell you that that's not such an easy thing to do to arrive at that decision. And equally challenging as coming to a decision is then to explain, to posit, you know, all the principles of law that govern because there are all kinds of principles of

law that do come into play here. From a layperson's point of view, it might not seem so complicated, but I can assure you that it is.

Mr. Granof: Let me turn to memorable and difficult cases you've faced as a federal district judge. I know we talked about one case involving a major drug conspiracy with five defendants. That was a difficult case. The trial, I think you said, took five or six months to complete.

Judge Kennedy: Yes.

Mr. Granof: Are there any other memorable or difficult ones that you've faced. I'm sure you've faced a lot of difficult cases.

Judge Kennedy: Oh, yes. The case that I just mentioned. I still have it under advisement. I haven't made a decision yet.

Mr. Granof: And you've got these FOIA cases that we talked about and the terrorist cases.

Judge Kennedy: The FOIA cases are ones in which the American Civil Liberties Union and the Electronic Privacy Information Center have asked for information regarding what has been characterized as the president's Domestic Spying Program that was done without court approval. The issue presented is whether certain exemptions to the Freedom of Information Act apply to permit the government from withholding those documents. In that case, there have been certain declarations that have been filed which are themselves classified, and classified at a level that even my law clerks can't look at them. That is a very, very difficult case

I'll never forget the case where the Environmental Protection Agency had brought a lawsuit against, basically, the trucking industry -- well, not the entire trucking industry, but certainly the six or seven largest manufacturers of trucks in the world, for example Ford and Renault. The issue had to do with the use by these companies of a device that at least the government said violated the law which requires that trucks not use such devices when they were being tested to determine the amount of carbon dioxide emitted from the truck's exhaust system during operation. The trucking industry and the government came to an agreement as to what would be done. Then during the course of the consent decree the trucking industry tried to have me vacate the consent decree on the grounds that it was going to cause them to go out of business, and that international commerce was going to come to a standstill were I not to relieve them of the requirement of this consent decree. I remember dealing with that issue over the course of a summer, and it was very, very difficult because there were all kinds of principles of law. The government was saying, "No, you shouldn't modify the consent decree," the Congress was having hearings about this issue, the trucking industry was well represented, and here I had to make the decision. Very, very difficult decision. Very interesting issues of law that came into play, and certainly the ultimate outcome was very momentous. I can tell you that I ended up not allowing the consent decree to be changed, and the trucking industry didn't just die.

One of the most interesting decisions I had to make had to do with an environmental case. I remember it very well. I was in chambers when my law clerk came in and says, "Judge, we just received an application for a temporary restraining order." And I said, "Well, first of all, could you please ask the lawyer who's bringing this whether we really have to handle this application for a temporary restraining order. It's now 4:30." I've already told you that I'm not at my best at that time of the day.

Mr. Granof: Now, why did they bring it to you? Or you just were assigned it?

Judge Kennedy: It just came to me on the wheel. My law clerk made the inquiry of the lawyer, and reported back, "Judge, this lawyer says it has to be done today." Well, the lawyer represented a scientist. This particular scientist was a woman who actually had discovered -- or if she hadn't discovered, she had done a lot of research into -- an organism that was called a one-cell bryozoan. The problem that she saw, and that her suit addressed, was this. This one-cell bryozoan was known to exist in only one place in the world, and there was evidence that she could present that this was so. And that one place was a particular area off the East Coast of Florida -- not the entire East Coast -- but it was an area off the coast of St. Lucie County. About two years before this suit was filed there had been a hurricane that had destroyed the beaches of St. Lucie County. And St. Lucie County had entered into some agreement with the Army Corps of Engineers to replenish the beaches. The Army Corps of Engineers was getting the sand to replenish the beaches from guess where? The one place in the world

where this one-cell bryozoan was known to exist. So, the question becomes, "So what?" I mean, give me a break. The plaintiff says, however, "Judge, one might understand how someone says that this is not such a big thing, but guess what. This one-cell bryozoan is known in scientific circles to be the first cousin of some other organism that produced some protein that we know has provided the cure for certain types of cancers. And Judge, if the habitat for this one-cell bryozoan is destroyed we'll wipe out this species and, perhaps, this will be the one species that provides the cure for cancer." And believe me, sometimes real life is stranger than fiction. These things were being said, and there was support for them. The government says, "Judge, you don't understand. First of all, we had scientists who studied these things and this scientist, although she is a well-respected scientist -- everyone knows her -- but she's just wrong. There's reason to believe that this one-cell bryozoan might exist some place off of the coast of Australia. And, Judge, there can't be any delay in this. Why? Because, see, the sea turtles are an endangered species, and we have timed this project to coincide with when the sea turtles won't be blocked from going out to sea spawning and coming back to their nesting place on the shores off of Saint Luce County." "Oh, and by the way, Judge, for every day that there is delay -- just in case you're thinking about delaying this," I think it was about $50,000 a day.

Mr. Granof: All I can say is I'm glad I didn't have to make the decision. What did you do?

Judge Kennedy: I issued the temporary restraining order. I said that I appreciated that this is a very important decision. I understood everything, but applying the principle of law that I have to apply having to do with irreparable injury and balancing and all of this, that I should at least issue a temporary restraining order until such time as I can have a full hearing. You want to know the outcome?

Mr. Granof: Yes.

Judge Kennedy: This was on a Thursday. I scheduled a hearing for the next Monday. I'll never forget how glad I was on Saturday night about 11:00 in the evening when I get a call that the parties wanted to talk with me. They had reached an agreement. They settled the case. It just so happened that the Army Corps of Engineers found another place not so far from the place they had planned to get the sand to replenish the beaches and left the scientist's one-call bryozoan habitat alone. And, so, by the next Monday, the case is settled.

Mr. Granof: I think that's just a wonderful example of the kinds of cases that federal judges get, particularly in this district.

Judge Kennedy: Yes. So that's another one. But I can just tell you that there's not a year or even six months that go by where you don't get these cases that are just mind-boggling in their complexity. Now I have just summarized the dispute, but within that summary I can assure you there were principles of

law -- considerations, procedural and substantive -- that I haven't even touched upon, but that I had to address and consider when coming to a decision.

Mr. Granof: So it's not exactly a judge simply being an umpire calling balls and strikes?

Judge Kennedy: No, it really isn't. It really isn't, even though I think that's how many people see it -- all you do is say "yea" or "nay."

Mr. Granof: Look at the law, look at the facts. It's "easy."

Judge Kennedy: That's right. Well, I think anyone reading the *Boumediene* opinion -- I haven't read all of it myself yet. I have it right here. I have gotten through 46 pages, but I've got to go to page 65.

Mr. Granof: And that's just the majority?

Judge Kennedy: No, this is the entire opinion. But because its 5-4, I want to see what everybody says. I mean, I'm bound, of course -- we're all bound -- by the majority decision, but for my own information I want to know what's said, what all the justices said. It's not easy. You have nine justices of the Supreme Court. I think we can all agree upon a couple of things. One, are these people intelligent people? I think we can all agree that they're intelligent people. Two, are these people who want to do the right thing from their perspective? Do they want to do their jobs; do that which they swore under oath? They put a hand on the Bible, but did they want to do it? Yes, they wanted to do it. Do they all have a fealty to the Constitution of the United States? Yes. But they don't agree. It couldn't be easy then,

could it? I mean, it seems to me if it was easy, and you have nine people with intelligence wanting to do the right thing, come on, it wouldn't take 64 pages. But it's not easy. It's just not. It requires examining the law -- the governing principles -- being absolutely conscientious in determining what the facts are from a trial judge's point of view, and then doing your job and coming out with an answer. And, again, not only coming out with the decision. It would be great if I said, "Oh, you win, you lose." Explaining. You bring a lawsuit. You're defending a lawsuit. Don't you have a right to know the rationale that led the decision-maker to make the decision that he or she made? Now, frankly, when you have a jury making that decision, I like that. And I can tell you that conducting a jury trial is not as difficult as what I spend most of my time doing. Getting a jury in the box. Putting them in the box. Calling the balls and strikes with respect to evidentiary matters at trial. But as I'm sure I've said during the course of this interview, at least in this judicial district, we don't have that many jury trials, and I'm the decision-maker. And it's not as easy as one would think.

[This concludes Interview No. 8]

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

Ninth Interview
5 August 2008

This is the ninth interview of the Oral History of Judge Henry H. Kennedy, Jr. as part of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewer is Gene Granof. The interview took place in the chambers of U.S. District Judge Kennedy in the Federal Courthouse in the District of Columbia on Tuesday, August 5, 2008.

Mr. Granof: Judge, we were talking last time about your experience on the federal district court, and this time I'd like to ask you about a case that you gave me, *Vann v. Kempthorne*. I'm curious why you singled it out.

Judge Kennedy: Well, you should know first of all that the U.S. Court of Appeals for the D.C. Circuit just made a decision in that case. My ruling in the case was remanded to me. And so I still have some work to do in that case. To answer your question, I found it very interesting for two reasons. One, just historically. This case inspired me -- if inspired can be the word -- and required that I learn some history that I did not know about. Most people, of course, know about Native Americans and something about their existence, what they did throughout history, but I did not know that Native Americans owned slaves. I did not know about this Trail of Tears that I mentioned in the opinion, which was the moniker -- the name given to what must have been a horrific experience for Native Americans -- being forced out of their lands on the East Coast of the United States and made to march to Oklahoma. And so it's interesting just from the perspective of a person who's interested in history, particularly history of

the Civil War. I may have mentioned at some point during our talk that my favorite professor in college was Professor James McPherson, who is an authority on the history of the Civil War. And I remember taking his course -- he was my thesis adviser -- but I don't recall any discussion during his lectures regarding Native Americans and African slaves. And so that interested me. Frankly, it also interested me just because, from my perspective, this case was an example of the continuing legacy of the stain on this country's history, the stain being slavery. I use that term now because that's the term that the court of appeals used in talking about this case. The opinion came down last week. And it seems to me that, even today, this very day -- here we are in 2008 -- we're still dealing with the race problem in a most dramatic way. This case was brought against, initially, the Department of the Interior, and the case is premised upon the assertion that the Department of the Interior simply is not doing its job in, basically, supervising the Cherokee Nation. And putting a stop to what the plaintiffs in this case say is just a blatant, just blatant, violation of the treaty that this country entered into with the Cherokee Nation at the end of the Civil War wherein it was promised that the slaves of the Cherokee Nation would become members of the Cherokee Nation. Just like what has happened here in the United States, of course, in that the former Black slaves -- African slaves -- were made citizens of the United States. And that is clearly what was intended by this treaty. By the way, the Cherokee Nation fought on the side of and supported the Confederacy.

Mr. Granof: Yes, I thought that was interesting.

Judge Kennedy: Yes, I didn't know that. So this treaty, the Treaty of 1865, basically said, "the Cherokee Nation will take on its African slaves and their descendants as members of the Nation." Well, you know, fast forward over the years and there have been attempts by the Cherokee Nation to turn back the clock with respect to that promise, clearly. Just clearly. And this case was brought by plaintiffs trying to do something about it. Trying to basically force the Interior Department -- the Bureau of Indian Affairs, which is a division of the Interior Department -- to do something about it. But, of course, I ran into this very interesting legal issue as to whether or not the case could go forward in the absence of the Cherokee Nation, which said, "Well, we have a right to be a part of this suit, and we are an indispensable party. However, we cannot be sued because of the doctrine of sovereign immunity. So, while we should be a part of the suit, we can't be sued, and therefore the suit should be dismissed." I ruled otherwise. The court of appeals ruled that I was wrong in my ruling that, for various reasons, there had been an abrogation of sovereign immunity, the doctrine of sovereign immunity as it might apply to the Cherokee Nation under these circumstances. However, that doctrine of sovereign immunity does not apply to the officers of the Cherokee Nation. Now the case has been remanded to me to determine whether the suit can go forward in the absence of the Nation on the ground that the officers of the Nation, who also were sued, in fact can be sued.

Mr. Granof: So the court of appeals thought the Nation couldn't be?

Judge Kennedy: Oh, that's what they ruled. They ruled that sovereign immunity operated to prevent a suit from being brought against the Nation. However, that doctrine does not prevent suit against the head of the Nation -- the Chief of the Nation -- and other high officials. Now the question is whether, given those two rulings, the case can go on. And I can assure you that there will probably be some very interesting litigation on that issue.

Mr. Granof: I was not aware that the court of appeals had ruled on the case, but I thought your opinion on that point was very persuasive.

Judge Kennedy: Well, the opinion of the court of appeals was a very substantial opinion that was penned by Judge Thomas Griffith. Judge Merrick Garland was on the panel, and Judge David Tatel was the third judge. I was actually gratified that they did such a thorough job in parsing my opinion. And, you know, they have the final word, and frankly I see it as somewhat of a victory. I really do. When I wrote the opinion, I knew that I was swimming upstream. There had been several opinions that had said that the Cherokee Nation enjoys sovereign immunity that would prevent it from being sued except to the extent that it consented to being sued. It certainly hadn't consented to be sued in this case. But, for the reasons that I indicated, I thought there had been an abrogation of the doctrine.

Mr. Granof: That point that you made really rested on the purposes of the Thirteenth Amendment?

Judge Kennedy: Yes.

Mr. Granof: And saying as well that it was the treaty that passed just about the same time or shortly afterwards, and that you really couldn't, consistent with the purposes of the Thirteenth Amendment and the treaty, say that sovereign immunity pertained, at least in this context.

Judge Kennedy: Yes, that's what I said. And the court of appeals in its decision wrestled with my analysis and came out differently. But, again, they obviously wrestled with it and the suit remains. As we speak, it remains and we'll see how things go. To me, this suit should be unnecessary. Absolutely should be unnecessary. Under the law, any changes in the way elections are conducted by the Cherokee Nation are subject to the approval of the Secretary of the Interior. The Secretary of the Interior, if he wanted to, could stop this, but for some reason has not. I do not understand it

Mr. Granof: I guess one of your colleagues has had trouble with the Bureau of Indian Affairs and the Department of the Interior, and it doesn't seem to make any difference whether you have a Republican administration or Democratic administration. But certainly the judges in this court who looked at it have been extraordinarily critical of the relationship.

Judge Kennedy: Yes, they have. I think you're talking now about the case that Judge Robertson has which, as I understand it -- and I haven't followed it very closely -- has to do with the calculation and monitoring of the royalties to which certain Indian nations are due for certain lands that they are sovereign over. And that case was at one time before Judge Lamberth, and he was very, very critical of the Department of Interior and the Bureau

of Indian Affairs, given their performance with respect to that case. This shouldn't be a hard call. It really shouldn't be a hard call. Now, again, I don't know the details about the case that was before Judge Lamberth and that's now before Judge Robertson. And it might have to do simply with the difficulty of determining royalties, which, I suppose, could be a difficult thing to determine. But the basic issue of Interior Department responsibility is not a difficult issue at all.

Mr. Granof: I was fascinated by the history you set forth in your *Kempthorne* opinion. On a broader scale it indicates what federal judges do and the problems that they face, and how they go about their work. But, in the end, I sort of reflected on it and said, "What is this case really about? It's about the Thirteenth Amendment and this treaty." And then it seemed perfectly clear.

Judge Kennedy: Perfectly clear. Perfectly clear. And I don't know what's going on there, what motivates the Department of the Interior. I'm just a judge and I handle the cases that come before me.

Mr. Granof: Well, as I said, it indicates how federal judges go about doing their business. I mean the legal principles involved -- sovereign immunity, and whether individual officers can be sued, and whether the Nation and the officers are independent principal parties, and whether there was a final decision by the Secretary of the Interior -- those principles, you know, they are fairly established principles of law. But everything is context. And to develop that context, you had to really go through the history.

How did you do it? If you had to start from scratch, it would be a thesis. You could write it for your graduate thesis. So did you have help from the briefs, and to what extent?

Judge Kennedy: The lawyering was quite good, so I did have help from the briefs. But then I went to texts which were not cited in the briefs. There is an authority -- Cohen's *Handbook on Federal Indian Law* -- which is the kind of treatise that I consulted, and then I did some basic research in the history books.

Mr. Granof: And how did you do this? I mean, did you go to the Library of Congress? Did you have your clerks do this?

Judge Kennedy: Actually, I went to our library here, and did a search for Indian law. I forget exactly what my search topics were. I got some periodicals from our library, and I posted some things off of the internet.

Mr. Granof: And did you personally do this?

Judge Kennedy: Oh yes. The historical stuff I did myself. My law clerk did what she always does, which is to do the legal research and take a first crack at the writing. I'll tell you that my law clerk had recommended that I dismiss the case because of this sovereign immunity.

Mr. Granof: And were there precedents in other district courts?

Judge Kennedy: Yes. There were precedents in other district courts and other circuit courts. The Ninth Circuit, as a matter of fact, had written an opinion -- I forget the name of the opinion now -- but it was pretty clear that if this case had been brought in the Ninth Circuit the circuit precedent would

have been binding and would have resulted in my dismissing it. But we did not have any precedent from the Supreme Court, we did not have any precedent from this circuit, and my legal analysis brought me to the place that I was. But the law clerk saw it otherwise, and so -- because I always come to my own, independent decision -- I did more of the basic research into the history than I would ordinarily do. And I was much more proactive in directing my law clerk as to where we should go with the law.

Mr. Granof: So who says a good liberal arts education isn't valuable?

Judge Kennedy: Oh, absolutely. I mean, it's absolutely valuable. What you said is absolutely true. Certainly in this case, but in actually so many, many cases that come before me. Once they get here, context makes a huge difference, a huge difference. It is virtually impossible to articulate a principle of law that regardless of the context should hold sway. One of the guarantees of the First Amendment is free speech. Don't you have the right to speak freely? Well, "no," is the answer. It depends. There's a concept embodied in that principle, but the words taken out of context only get you so far. It's the principle that is important. But when it comes time to apply the principle, context makes all the difference. The standard example that is given to show that all speech is not free is you can't shout "Fire" in a crowded theater. So, yes, I think judges need to be educated, need to know about how the world works.

Mr. Granof: From everything we've said, not only today but in prior conversations, this notion that judges are simply umpires calling balls and strikes, or that

it's just a matter of applying the law, that's not what federal judges -- or any judges -- really do.

Judge Kennedy: No. Well, first of all you'd be surprised at the number of times that judges are called upon to rule within the interstices of the law. So many times there is no principle that directly applies to a particular circumstance. What you have to do is determine, again, what concept applies and then you do the best you can. I don't want to overstate the case because there are times when it is very clear as to what the law is that applies to particular factual circumstances. But oftentimes it's not, and certainly not often in the federal district court here in the District of Columbia.

A perfect example is that the judges on the United States District Court for the District of Columbia will now have to adjudicate the merits of the petitions for writs of habeas corpus that have been brought by persons who have been designated as enemy combatants who are now in Guantanamo Bay, Cuba. We will have to determine what process to use, what standard to use, in determining whether the person is an enemy combatant. We've never done that before, but we're called upon to do it now. There are principles of law that we will have to consider, but I defy anyone to say, "Well, it's very easy to determine what the law is that should apply." It isn't. But that's what we are required to do. Which is why some people say that the best thing with respect to this whole issue now is for the Congress to perhaps create a separate court and to step in

and to do what it can do regarding certain procedures, which would be within the legislative realm.

Mr. Granof: *Kempthorne* seems to be a case in which, even with good lawyering, apparently not all the arguments were made. Does that happen often?

Judge Kennedy: I can't say it happens often, but it happens more than I think you would expect.

Mr. Granof: So, now in *Kempthorne* you'll have to determine whether the case can proceed with just these individual who are Cherokee officials?

Judge Kennedy: Yes, that's right. And, by the way, the rule in the Federal Rules of Civil Procedure that is applicable here, which has to do with joinder of parties, has been changed since the time that I ruled in the case. There's a linguistic change in the rule that I'll have to deal with. But, yes indeed, I'll have to decide whether, although the Indian Nation cannot be sued because it is protected by the doctrine of sovereign immunity, this suit that was brought originally against the Department of the Interior -- but then the plaintiffs amended their complaint to name the Nation and the high-up government officials of the Nation -- can go forward with the defendants being the officials and not the Nation itself. And, as I recall, the question is would it be in the interest of justice for the suit to go forward in the absence of the Indian Nation? And so now I'll have to decide just that,

Mr. Granof: I know we've talked about the two cases that you've given me. One was the *Porter* case that you did as a Superior Court judge, in which you became a biology expert. Second was *Vann v. Kempthorne*, which we've

just talked about. Both of those were interesting. I know that you've had a lot of cases that don't particularly come to mind. But I thought I'd give you the opportunity to talk about any other cases.

Judge Kennedy: Well, I must tell you, again, I still feel so privileged, just so privileged to have been appointed to this court to be called upon to handle cases. You know the majority of them are not of great public interest, but many of them have enormous public interest, are enormously challenging, and I'm called upon to handle them. You know this case that I handled at the end of last year -- end of 2007, beginning of 2008 -- where certain petitioners for writs of habeas corpus who were being held in Guantanamo Bay, Cuba, asked me to conduct a judicial inquiry into the destruction of tapes. That is, to conduct a judicial inquiry given the fact that the now-Director of the CIA had disclosed that certain taping of persons suspected to be members of Al Qaeda had been destroyed. And the petitioners asked me to conduct a judicial inquiry for the purpose of determining whether my protective order in their case perhaps had been violated because my order had instructed the Department of Defense not to destroy any evidence of mistreatment of the people being held in Guantanamo Bay, Cuba. Well, that was a very, very interesting issue. I remember getting the papers. I had never been presented with anything like this before. It raised all kinds of issues, and I finally did what I did. I made the ruling. So, the point is over the time that I have been a judge on this court, and before, I have had

some very, very interesting and significant cases. And I feel very, very privileged to be called upon to handle them.

Mr. Granof: What was the name of the case that you just talked about? Was it against the head of the CIA?

Judge Kennedy: No, it's *Abdah versus George Bush*. It's Mahmoad Abdah, A–b–d–a–h, versus George W. Bush, because he was the president of the United States and the head of the executive branch that has detained these people. So, it was a very short order but it pretty much explains exactly what happened.

Mr. Granof: What would you say is the hardest part of your job?

Judge Kennedy: I can't pick out one thing that is the absolute hardest. There are several aspects of the job which are very, very challenging and difficult. One of the most challenging and difficult is to impose sentences on persons who have broken the law.

Mr. Granof: You talked about this in the context of the Superior Court as well.

Judge Kennedy: Yes. Just today I had before me a man who is 66 years old. A 66 year old who was convicted of stealing money from a program that was funded by the government. This man was the chief financial officer of an organization in the Pan American Development Corporation that had a contract with the government to do good things in Panama and some other Central American countries. He actually lived in Panama. He was given money for rent, but instead of using the money for rent he actually used the money to buy property, something that he was not supposed to do. It was a part of the contract that while he could be reimbursed to pay rent, he

could not use the money to buy property. Well, he did, and he lied about it. Also, he had a furniture allowance. Well, he spent more money than he was supposed to in order to provide furnishings for this apartment where he and his family lived. Now let me just tell you some other things about this man. I received so many letters from people who told me about the great things he had done down in Panama. That he was really interested in helping the people in Panama. Got letters from Panamanians. This man has four daughters, two are physicians, one is a lawyer, I think, and another does something else. But, obviously, he and his wife had been good parents. He had never done anything like this before. Nothing on his record. The question becomes, what sentence do you impose upon this man?

Mr. Granof: You are bound by sentencing guidelines?

Judge Kennedy: Well, there are these advisory sentencing guidelines which, by the way, called for a sentence of 18 to 24 months in prison. And that's what the prosecutor asked for. He said, 18 months in prison. The defense attorney made an eloquent plea that to put this man in prison was just not warranted under the circumstances. And there I was. So, what did I do? Well, one, I ordered that he make restitution. That is, he pay back all that he stole.

Mr. Granof: How much was involved?

Judge Kennedy: Almost $200,000. Two, I placed him on probation. However, as a condition of probation, I required that he spend 15 consecutive weekends

in jail. Basically, Saturday and Sunday in jail. And for six months I ordered that he be on what is called home confinement. After he was arrested and charged with this, this man -- and he's not a wealthy man -- could not find work. He and his wife now run a bed and breakfast in Virginia. And he actually does the heavy lifting and changing the bedding for the guests. Does that kind of thing. And so, in any event, that was my sentence. Fifteen consecutive weekends in prison, he had to pay the money back, and he was basically not jailed but he was on home confinement for six months. And I placed him on three years' probation, so after the home confinement he still has to report to a probation officer.

Mr. Granof: Sort of a Solomon-like decision.

Judge Kennedy: As I said in that sentencing, I defy anyone to tell me the one sentence that this requires. By the way, it's a wonderful thing that we do have these advisory guidelines to give judges some idea of what other judges have done in the past, given roughly similar circumstances. But, yes, I thought long and hard about that. I really did. It wasn't lost on me that the man was over 60. You know, these ages now really don't seem that old anymore to me, but he certainly was much older than most of the people who come before me.

You say, well, what's the most difficult thing to do? Sentencing, that's difficult. This Cherokee Indian case, to go through and to put it together, and to explain my reasoning, which was convincing to you but not to the court of appeals. Although you'd have to read the opinion --

and it's not so clear that they disagreed with everything that I said; as a matter of fact, they didn't -- but on the core issue of the sovereign immunity, they held for the Nation. To really, really understand what sovereign immunity means in a particular context is not such an easy thing. Nor was it easy to reject its application in a situation where, in my view -- as I wrote -- it should not be applied. That took, I can assure you, some real hard thinking which I'm very satisfied with. I'm satisfied that that's what it required, and I'm satisfied that I did it. That was challenging.

Mr. Granof: At the end, I suspect rewarding?

Judge Kennedy: Oh, absolutely.

Mr. Granof: I mean you had the finished piece of work at the end. Something you could really take pride in.

Judge Kennedy: Absolutely. In this judicial district we have a kind of judicial culture that results in the judges on this court doing more writing than judges anywhere else in the country. I think we take pride in that. For us the bottom-line decision is important, but it's equally important that the public -- the litigants -- know why we got there, and how we got there. To do that much writing is very challenging. Is very, very challenging. Perhaps there are others who write very, very quickly, and words just flow off their pen and they can do it easily. That's not the case for me. It takes time. I take great pride in it, and after it's done, it's very, very gratifying. I think

I may have said before that people have asked me whether I like to write and I said, "No, I don't like to write, but I love to have written."

Mr. Granof: I know exactly what you mean.

Judge Kennedy: We were talking about the most difficult things about my job. The writing is very, very challenging and very, very important. But, as I was saying, to find the very best word to express what's in your head. You know, to manipulate language adequate to the task of expressing what's in your head -- sometimes what's in your heart; not so much what's in your heart, but what's in your head -- is not such an easy thing to do. And also, developing the structure of the memorandum. Now I have a certain way that I prefer, but sometimes the structure that is commonly used is not the best structure to use, given the particular issue that we're dealing with. So, that's a very challenging and difficult part of the job as well.

Mr. Granof: If Congress came to you and said, "Judge, what would you change? What would you like us to change if you could get your way?"

Judge Kennedy: About this job?

Mr. Granof: About anything. About any of the laws that you have to administer. I know we have talked about sentencing, and I guess that's one area that most judges would like to have more discretion.

Judge Kennedy: Well, we have a pretty good amount of discretion now. The Supreme Court in its *Booker* ruling said that the sentencing guidelines could only be constitutional if they were advisory rather than mandatory. That was a very, very important decision. So, because the United States sentencing

guidelines are advisory they don't suffer what I consider to be the very unfortunate consequences of the mandatory guidelines.

Mr. Granof: I guess I hadn't realized that.

Judge Kennedy: Yes, they're advisory now, but there are still many mandatory minimum sentences, you know, that I think are very unfortunate. Again, it's just very difficult to legislate, to say that anyone who does this, anyone who sells a certain amount of cocaine must be put in prison for ten years. And that's what the law is. People's involvement in these crimes is just different. The person who is the courier, who is addicted out of his or her head but who is, in fact, involved, say, in a conspiracy to distribute drugs, is it right that that person should be sentenced to no less than ten years in prison? And ten years is the amount of time that you can go to college twice and law school. Without any regard as to why that person was doing what he or she did? Without any regard as to whether he or she had done it before? Without any regard for the potential for rehabilitation? It doesn't seem right to me. But we have a lot of mandatory minimum sentences on the books. I won't get into the death penalty. To me, how can it be right that a person might be put to death for something that he did not do? And it has happened. We know that. Just consider the number of people who have been on death row who are no longer on death row because of forensic scientific techniques.

Mr. Granof: DNA evidence?

Judge Kennedy: DNA evidence has shown that they're innocent. My goodness. How can that be right? It's not right in my view. Now, you know, I believe in this country and I respect it, and so I do understand that there are others who have a different view. But you know you asked me what I think might be changed.

Mr. Granof: I think your brother has an interesting view of that. I think he said that in working for Justice Marshall he saw the records of some of these death penalty cases, and he said he could understand why a death sentence was imposed because the people had just done horrific crimes.

Judge Kennedy: And some of them have done horrific crimes. Some of them have done horrific crimes.

Mr. Granof: But he still came out and said he felt it was wrong.

Judge Kennedy: Yes, so those are two things that immediately come to mind. I really don't know that there are many others. I can tell you I really am a respecter of how the system works. So I don't spend a whole lot of my time thinking about what laws Congress should make. That is the responsibility of the lawmakers. That's why they're elected, to do what they do. So I certainly hope that they do a good job, but I don't spend a whole lot of time thinking about it.

Mr. Granof: Is there any particular problem facing this court that seems to stand out. From what you indicate, the court runs pretty smoothly, pretty collegially.

Judge Kennedy: It does, indeed, and I think that particularly over the last, say, five or six years, there has been just a wonderful collegiality in this court. Our last

Chief Judge, Judge Thomas Hogan, really can take a lot of credit. He's due a lot of credit for bringing that about. He really is a person who likes the court to operate on the basis of consensus. So even when there are things that are probably within his bailiwick, so that he could do them without anyone saying anything, he tended to try to bring everybody on board. I know I appreciated it, and I know that my colleagues did as well.

Mr. Granof: You've been on the federal bench for ten years now?

Judge Kennedy: Ten and a half years.

Mr. Granof: Has the court changed in any way? Have things changed?

Judge Kennedy: Well I think that the collegiality has improved frankly.

Mr. Granof: So that's all to the good?

Judge Kennedy: Yes, it certainly is all to the good. Other than that, I really don't know that I know of anything else that is really remarkable. I think that this court continues to be just a standout court. I think we're called upon to handle some very, very significant cases. I think every judge on this court appreciates the importance of the role that we play. We understand that, as the judiciary, we don't have the power of the purse so we don't control the money. Many people say that if you control the money, you control a lot. We don't control the army or the armed forces. What we depend upon is our credibility. Our credibility. Being forthright. Just having integrity. Being intellectually honest. So it is our credibility that is our coinage, that's our currency in government. So we take pride in making sure that we exhibit all those characteristics that I mentioned.

Mr. Granof: It seems to me that since I came to Washington in the mid-1960s this court has grown more and more important, making more and more critical decisions. That is, more focused and concentrated litigation of major national significance seems to come through the District of Columbia. And it's just been a steady increase.

Judge Kennedy: Well, your observation is absolutely true. Some of it has to do with the way the law works. And there are certain federal statutes that say certain kinds of cases are brought here in the United States District Court for the District of Columbia. There are certain states that cannot change their voting laws without the, basically, approval of this court or the Attorney General. These are called covered jurisdictions. I think this is by virtue of the Civil Rights Act of 1965. And so, we have exclusive jurisdiction. There are some crimes that are brought here if they're not committed in the United States. Then there are the cases brought by the petitioners in Guantanamo Bay, Cuba, which the Supreme Court has said are to be brought here. This being the seat of government, when a person wants information about a government agency -- whatever government agency program -- under the Freedom of Information Act, the case more likely than not will be filed here in the United States District Court for the District of Columbia. I don't know what the latest statistics show, but at one time they showed that 20 percent of all FOIA cases filed in federal court -- one-fifth -- were filed in the United States District Court for the District of Columbia, where we have an allotment of 15 active judges.

That's 20 percent of all FOIA cases filed in the country. I don't know for certain, but I am fairly sure that that percentage has gone up. And let me just tell you, the FOIA cases. You talk about challenging cases, wow. Very, very challenging cases. And the principle of the Freedom of Information Act is that the citizenry has a right to know what its government is up to.

Mr. Granof: You've been a judge for so many years now, have you found being a judge interferes with your personal life, your social life? Obviously you have a strong family life.

Judge Kennedy: There are certain constraints. Some of them are great constraints. One of the things I cannot do is participate in political activity. I cannot even give money to candidates for political office. Some would consider that to be great. But some would say it's a real constraint not to be able to be involved as fully or as much as one might like to be involved in politics. Some might say, "Well, that's a constraint." And to a certain extent it is a constraint, but I don't consider it that much of a constraint. Now, one of the things that being a judge does constrain, we cannot do fundraising for the most part. And from time to time that really is constraining. I was at one time the president of the Washington Tennis and Education Foundation. What I did, I resigned early -- before my term of office or second term of office expired -- because I found myself in the situation of not being able to attend certain fundraising events and, like most nonprofits, the Washington Tennis and Education Foundation has to raise

money. And I couldn't be a part of that because of the proscription against fundraising.

Mr. Granof: So you couldn't go to a fundraiser?

Judge Kennedy: I can go to a fundraiser.

Mr. Granof: You can't contribute?

Judge Kennedy: I can contribute, but I can't be involved in the fundraiser. I can't call people up and ask, "Listen, the Washington Tennis and Education Foundation is a very good organization. I would be very appreciative if you were to give money to the organization."

Mr. Granof: So, for example, if he or she belonged to a church here or synagogue, a federal judge could give but couldn't solicit?

Judge Kennedy: That's right. Exactly. There is a code of conduct for federal judges and it's very explicit about what we can and cannot do, and that's one of those things. In social intercourse, when you go to parties, sometimes there's information that you have. Because, you know, here in the District of Columbia and the surrounding area, you know, politics and the law and what happens in court are very much a part of the talk. When I participate in social events, I'm very closed mouth about anything that might be seen as my expressing an opinion about something that I might have to consider.

Mr. Granof: But it also seems like, in terms of a social life, that over the years you've acquired both from college days and family a lot of friends and relatives, and that you've kept up with them.

Judge Kennedy: Yes. Well, you know I am a very wealthy individual. And I'm not wealthy in terms of money, but I have a kind of wealth that really is more valuable than money. And that is just relationships with people. And my job, my profession, does not get in the way of maintaining those relationships. Just this past weekend, I went to an event given by my high school reunion, the class of '66 from Calvin Coolidge High School. And my wife and I went to the event and we had a great time. I love the idea of staying in touch with people whom I've known for a long time. Frankly, sometimes I didn't even know them that well. But now I get to know them better. My college. And yes, indeed, my family. And that's because I have taken stock of what's really important. I've taken stock of what's important. And for me, much more important than title, much more important than position, much more important than money, are the relationships that you have with people -- the people who are very, very close to you, and also your neighbors. That's how I feel, and I've lived my life that way, and I'm very pleased with that.

Mr. Granof: Doesn't sound like you have any regrets at all.

Judge Kennedy: No, I don't. I don't have any regrets about anything that I can control. I really regret not being able to play competitive tennis any more because of an injury.

Mr. Granof: Yes, but you had a pretty good run at it.

Judge Kennedy: Listen, I had a wonderful run. And I have to tell you. Even this is a good thing. Even this. This, being not able to do something that I really love.

It has actually forced me to put into practice those things which I have preached -- if you want to put it that way -- that I have thought about. How many times have I told my daughters that they should put things in perspective? How many times have I told myself and my daughters, and people that I know, it is somewhat unseemly to be regretful about things you can't have? You have all these regrets about things you can't have, when you have so much. So I get to put that into practice. Just be disciplined about this. I mean I really do appreciate that I have a body that needs to be exercised in order to have good health. So, at one time that was pretty easy because I loved to play tennis. Now, I don't play tennis so much, so what am I going to do? You do something else. You find some other way to exercise. To do what you know is the right thing to do. My wife and I were just saying yesterday, you know, "We're all mortal. We'll all die. We all will." There are some people, unfortunately, who want to die, but most people don't. So, what do you do? What you do is you live the time that you have here. You do it right. You make these relatively few days count, each and every one of them. And then also you do what you can do to, I suppose, prolong your life. So you eat right, you exercise, you don't have bad habits. I don't understand people who smoke, frankly. We know that it causes diseases, so why smoke?

Mr. Granof: Your daughter is, I guess, entering her second year of law school. What advice would you give to her, or maybe you would give to young people going into the law? People like your daughter.

Judge Kennedy: Now, I don't know that I'd give much advice. I mean I really don't. What I told her is that so many times students go to law school not knowing what they want to do. And some of them actually do say, "I'm going to law school to keep my options open." My experience is that so many students go into law school wanting to keep their options open and then when they get to law school -- particularly if they get to one of the prestigious law schools like Harvard, Yale, and some others -- they let the expectations and desires of others start to restrict those options. So that, at least when I was at Harvard, so many of the people there really considered only a few types of jobs. Many, many of them considered the work at a Wall Street law firm to be just the thing to do. And that's fine if that's what you want to do, if that's where your heart and head leads you. That's fine. And I told my daughter that's fine. She's working for a very fine law firm this summer, Paul Weiss. She just reported yesterday that she had a great summer. But my advice to her is don't let the expectations of others start to operate on you. Try to figure out what it is that you want to do. She asked me, she said, "Dad, you know, would you be disappointed if after I graduated from law school I decided not to be a lawyer?" And I looked at her and I told her the truth. I said, "No, I wouldn't be disappointed. I understand right now you think that that's what you might want to do. And that's fine, and that's why you're in law school. But if after law school you decided that you did not want to be a lawyer, that you wanted to do something else, that you wanted to be a

teacher, that would be just fine. That would be just fine." So my advice to my daughter is, as best you can, uninfluenced by others, determine what it is that you want to do, that the doing of it will bring you gratification. I put it that way because I know that there are some people who will do something, not because the doing of it brings gratification, but because of the rewards, the financial rewards. And I am telling you, to me that's just not enough. That's just not enough. It's great if you can do both. And they're not always mutually exclusive, but what I told her is that shouldn't be the goal. You find out what you want to do and, believe me, you'll be rewarded enough to be able to take care of yourself and your family. Regardless of what you do -- if you do it well -- and that's what's certainly the expectation. You know, whatever you do, you do it to the very best of your ability. And my daughter happens to have a lot of ability.

Mr. Granof: Both of your daughters do.

Judge Kennedy: Yes, both of them do. I always tell her I understand what she's going through. I mean this is not an original thought: do what you want to do. The fact is many of us don't really know what we want to do. What I tell her is this. I say, "Approach this just the way you approach taking the LSATs." Good test taking technique is not to look for the answer. You have a multiple choice question, a question followed by possible answers. It's not a good idea to try to find the answer. What you do is you find the wrong answer, and then you whittle it down. So, one way to go about

finding out what you want to do is to determine what you don't want to do. What is it that you don't want to do? If working with a lot of people around is something that doesn't appeal to you, then you know there are some jobs you just don't want to do. If you don't really like the idea of standing up and speaking before juries or a judge, then perhaps litigation is not for you. There are other kinds of law, such as transactional law where that's not required. So that's a technique to use in trying to get to that place where you know what it is that you likely want to do because you know what you don't want to do. And then I also tell her this, "Always remember, you know, the Thirteenth Amendment was passed a long time ago. And guess what, if you're doing something and you don't like it, you can always change. You can always change. And do have the courage to change if that's what is called for." So these are some of the things that I tell her.

Mr. Granof: It's all great advice. Well, one last question. Is there anything else that I haven't asked that you think should be part of your oral history? I know that we've covered an awful lot of ground and it's been extraordinarily interesting and educational for me, but I wouldn't feel it was complete without giving you the opportunity to add anything you want to.

Judge Kennedy: Let me just say this. First of all, I really have enjoyed talking with you, and I feel a little defensive about enjoying talking about myself so much.

Mr. Granof: That's the purpose.

Judge Kennedy: But I don't know that there's anything to add. I suppose I do want to underscore something that I think I have said. And that is that my father, Henry H. Kennedy, Sr., is responsible in large part for any good thing that I do. He's the man who had such love for me, such love for me, and who had such confidence that I would be able to be somebody. To be a contributor to this society is what he conveyed to me. Because I must tell you, I certainly didn't think that I was all that smart. But my dad, he just did. And he conveyed it to me, and there's never a day that goes by that I don't think about him, and I want any recounting of my life, anything that I've done as a judge or anything else, it simply wouldn't be complete were that not to be a part of the record.

Mr. Granof: He must have been remarkable, because it's not just you, but your brother and sister. You've all been successful and had wonderful lives. And, clearly, he must have had an extraordinary influence in a very positive way.

Judge Kennedy: He did, and he's a very complex man. A very, very complex man. He was a Black man born in Chamberlain, Louisiana. Those facts are important because they are certainly part of his life, but they just should tell anyone who just hears them that this is a man who, you know, he wasn't wealthy. He didn't come from a wealthy family. He had certain challenges to face. His mother died within a year of his birth. He was raised by aunts for a significant period of his life. And I think I told you he went to three colleges, didn't graduate from any. But for some reason

-- and maybe it's because of his own broken family -- he met my mother and just was desirous and willing to fight to have a family life. And he did. And he did some things which influenced the way we turned out, including moving from Columbia, South Carolina.

Mr. Granof: Giving you your first tennis racket.

Judge Kennedy: Giving me my first tennis racket. I don't know how he did it. I don't know why he did it, but I certainly agree that he was a phenomenal man. I should mention my mother too. She was a good mother. And so they were a team. And, boy, did he love her. So, that's it.

Mr. Granof: Well, thank you very much. This has been just a wonderful journey.

[End of ninth and final interview.]

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RESUME OF THE
HONORABLE HENRY H. KENNEDY, JR,
UNITED STATES DISTRICT JUDGE, DISTRICT OF COLUMBIA

Nominated by President Clinton, Judge Kennedy has served as a U.S. District Judge in Washington, D.C. since October of 1997. He came to the federal bench directly from the Superior Court of the District of Columbia, where he was a judge for the previous 17 years. Judge Kennedy's first judicial post was as a United States Magistrate for the District of Columbia from 1976 to 1979. Prior to that, he was an Assistant United States Attorney for the District of Columbia, which is where he began his legal career after being admitted to the bar in December 1973.

Judge Kennedy received his J.D. from Harvard Law School in 1973 and his undergraduate degree in 1970 from Princeton University. He has since served on the University's Board of Trustees. While at Princeton, he studied at the Woodrow Wilson School of Public and International Affairs. He was also a founder of Community House, an extracurricular program that gives Princeton students the opportunity to be of assistance to the broader Princeton community.

An avid competitive tennis player, Judge Kennedy was a nationally ranked amateur and won four American Tennis Association championships. He has been a member of the boards of organizations that encourage young people to participate in tennis, including the Washington Tennis and Education Foundation and the Junior Tennis Champions Center.

Judge Kennedy was born in Columbia, South Carolina in 1948. He moved with his family to the District of Columbia when he was nine years old, and subsequently attended Coolidge High School.

Judge Kennedy is married to Altomease Rucker Kennedy, an attorney in private practice in Washington and a published novelist. They have two children, Morgan and Alexandra, both of whom are Princeton graduates. Morgan is also a graduate of Harvard Law School. Judge Kennedy's younger brother, Randall, likewise a Princeton graduate, is a professor at Harvard Law School and respected legal scholar and author.

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1984-2006 Air Line Pilots Association
Managing Attorney, Legal Department
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1977-1984 Vedder, Price, Kaufman, Kammholz & Day
Partner, resident in Washington, D.C. office

1972-1977 U.S. Postal Service
Assistant General Counsel, Labor Law

1964-1972 National Labor Relations Board
Supervisory Attorney, Appellate Court Branch

1959-1964 U.S. Navy
Lieutenant (JAG)

Member of the Bar of the District of Columbia and the Bar of New York (currently inactive)

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VOICES

Henry Kennedy

When I began playing tennis at the age of twelve at the Takoma (CQ) Recreation Center, some instructors took an interest in me and gave me tips. But when I started playing competitively, I got to the point where I needed to play in national tournaments. My parents couldn't afford to send me to these tournaments without some help.

My dad contacted someone at the Washington Area Tennis Patrons Foundation and asked for some support to send me to these tournaments, because I was pretty good. Lo and behold, the foundation, over the course of two summers, basically gave me a tennis scholarship, or stipend, and my father and mother were able to send me to play in these tournaments.

One of the great things about this organization—and about the game of tennis—is that in learning to play tennis well, one develops the traits that are transferable to all aspects of life: persistence, focus, and discipline.

We always hear about how the great athletes or great people in whatever arena have to have the desire to win or succeed. But tennis and this organization instill the sense that there's something even more important than the desire to win—it's the desire to prepare to win. I did not make that connection at all, but the people at the Foundation did, and they passed it on to me.

When I was at Princeton University and needed a summer job, the Foundation hired me to go around to recreation centers and teach tennis. One of them was a place called Forest Haven, which was a facility for people with developmental disabilities. It was a wonderful, wonderful experience having contact with people who faced challenges.

"..in learning to play tennis well, one develops the traits that are transferable to all aspects of life." —Henry Kennedy

After I finished college and Harvard Law School, I returned to the Foundation, but this time as a member of the board of directors. And, in 1983-4, I served as president.

I think we've been so successful because we've got some very, very selfish people in this organization. I mean that, as we get older, we want to feel that we're doing something significant. And, frankly, being successful is a rather low bar, when you think about it. A higher bar is the commitment the people at this organization make by devoting their talents, their resources, and their interest to helping the kids. That's what I think accounts for our success rate.

Henry Kennedy is a district court judge in the **District of Columbia.**