This oral history interview with Magistrate Judge Alan Kay is being conducted in the Judge's chambers in the federal courthouse by Daniel R. Ernst on June 24, 1997, for the Oral History Project of the Historical Society of the District of Columbia Circuit.

Mr. Ernst: Judge, will you please start by telling me what you remember about your birthplace.

Magistrate Judge Kay: Without necessarily giving the date?

Mr. Ernst: July 6, 1934.

Magistrate Judge Kay: Indeed. What do I remember about my birth? I was born in London, England, a London hospital. I went through the war years in London, went to high school in London, was all set to start at the London School of Economics when my parents decided that they wanted to emigrate from England. They decided to immigrate to the United States, where my mother's brother was an attorney with the International Monetary Fund. So we came to the Washington, D.C. area, and I lived in Alexandria, Virginia, applied to George Washington University and began my undergraduate studies shortly after I came to the United States.

Mr. Ernst: What did your parents tell you about their earlier lives, and what did they impress upon you about your ancestors?

Magistrate Judge Kay: My grandfather was one of five children who came over from Russia at the turn of the century. Three of his siblings went to the United States and settled in, I think, Albany, New York. One of his brothers was unable to get into the United States. He had glaucoma and in those days if you had glaucoma you were not admitted in the U.S. He ended up going to Israel, where he started a chain of lawyers. I think his oldest son was Attorney

General of Palestine, during the 1920's. The next youngest son became a trial judge in Tel Aviv. My grandfather elected to stay in London and was a cabinetmaker there. My father and mother were born in London. I think her parents probably came over about the same time, but I don't have much of a recollection because my mother died during the war when I was 8 years old. She contracted pneumonia, and at that time penicillin had only recently been discovered, and it was all destined for military use. My father served in World War II. He was shipped overseas, I guess in 1942 and served with Montgomery in the Eighth Army during the African and Italian campaigns. He returned in 1945. I started high school at the end of the war in 1945 or 1946. I went to what was then known as a guild school. Many of the schools in London were guild schools, and I happened to go to a school which was founded by the grocers guild back in the late Middle Ages. But when I went to school it had been taken over by the London County Council, so it was a council school, what they called a grammar school. It was pre-college, high school education. Graduation in those days was at 15 or 16. You took the first examination, and then if you wanted to pursue a college degree you would stay around for what they called sixth form work, lower sixth and an upper sixth. I went through virtually two years of sixth form when my parents decided to come over to the United States.

Mr. Ernst: Your father remarried?

Magistrate Judge Kay: My father remarried, yes indeed, when he came back from the war.

Mr. Ernst: Who looked after you during the war?

Magistrate Judge Kay: Well during the war after my mother died, an unmarried sister of my father took care of me until he returned from the war.

Mr. Ernst: Did you have other family members that were considering college? You said your grandfather was an cabinetmaker?

Magistrate Judge Kay: My grandfather was a cabinetmaker. My father was trained as a cabinetmaker, and just prior to my birth he opened a small grocery store. He and my mother ran the grocery store until he was sent off to serve in the army. He came back to the store and ran it until we immigrated to the United States. He came over here and resumed his cabinet-making career and was a cabinetmaker until he died about 15 years ago.

Mr. Ernst: Was the move a family decision? Was going to the London School of Economics something that you had just decided you wanted very much to do?

Magistrate Judge Kay: In English grammar schools the sixth form was divided into arts, science and economics. So you could pursue, if you would, postgraduate high school work in the area of liberal arts, sciences or economics. I pursued a 2-year course that emphasized economics and then applied for a scholarship to the London School of Economics and was accepted. I was very anxious to become an economist. I had not run into great conflict at that time with statistics. There came a time when I did run into statistics and did a u-turn when I realized that I was statistics-challenged. After I got a degree from George Washington University, I realized that to pursue postgraduate work in economics my command of statistics would have to be better than it was.

Mr. Ernst: But you were interested in economic issues. What interested you about economics?

Magistrate Judge Kay: What appealed to me about economics? I took a number of economics courses in high school and from Malthus on I became fascinated with the field of

economics. I don't recall at this point what interested me about it.

Mr. Ernst: Were you at all aware of the building of the welfare estate in Great Britain at the time?

Magistrate Judge Kay: Oh, indeed I was very conscious of what was going on because the emphasis in high school was the period of the industrial revolution, the growth of unions and the beginning and involvement of the Labor Party and growth of the Labor Party in the welfare state. After World War II Churchill lost the election, the Labor Party was voted into power, and it dramatically changed the face of the economy in England by initiating the welfare state. It established a health scheme; it nationalized most of the major industries in London. So I was very sensitive and aware of what was going on.

Mr. Ernst: Did your father discuss the move to the United States with you, or was it just presented as a fait accompli?

Magistrate Judge Kay: Well, my father wanted to become a farmer in southern Rhodesia. He always had a hankering to do that. My mother was the one who was interested in coming to the United States. I wanted neither. I wanted to stay in the U.K. and pursue a career. It was presented to me in terms of keeping the family together. As parents will do, they laid a guilt trip on me.

Mr. Ernst: Do you have other siblings?

Magistrate Judge Kay: After my father remarried when he came back from the war he and my stepmother had a child. I have a younger stepsister who was substantially younger. There was a 13-year difference between us.

Mr. Ernst: Does the fact that you didn't end up going to the London School of

Economics have continuing significance for you?

Magistrate Judge Kay: It was a disappointment. That was the school I really wanted to go to. The faculty was a very interesting faculty, an active faculty, and a lot of my friends from high school were going to the London School of Economics. It was a cherished dream, and I was very disappointed that I didn't go. I overcame it. A continuing source of disappointment? No, during the first 2 or 3 years I was in the United States there was a feeling of disappointment, but I think that ended. I pursued an undergraduate study of economics at George Washington University and eventually became Americanized. After an early trip back to England, I recognized that my parents had made the right choice, even though I didn't agree to it.

Mr. Ernst: Do you recall any of your first recollections or impressions of the United States?

Magistrate Judge Kay: Well, we came over by boat. I came over with a young uncle of mine, just the two of us. I came ahead of my parents because I wanted to start school. America was a surprise. New York City for a young 17½ -year-old boy coming out of, what was still essentially a war-torn London -- in London rationing was, I think, in its final stages. There were not all the basics that one would like, like meat. It was '52 and rationing had probably ended, but there was still a degree of austerity and recovery. I think the first thing that struck me was the number of automobiles. I was just astounded that there were so many cars in the world. I was struck by the casualness, particularly of dress. We stayed with some friends of a relative who were high school teachers in New York. We stayed with them for a few weeks, and they invited me to go to one or two of their classes, and I was again struck by the informality of dress.

I was used to going to a school where people wore uniforms, particularly the young women. I also went to a non-coeducational school. Grammar schools in England in those days were not coeducational, boys and girls. So that was strange to me. My earliest recollection was the number of vehicles and the informality of the schools. After about 2 weeks in New York we came down to Washington, and I stayed with my mother's brother, my stepmother's brother, who was in the General Counsel's Office at the International Monetary Fund. His wife was an economist with the State Department. I spent a number of weeks there and had my first exposure to baseball, which impressed me no end.

Mr. Ernst: Was this a Senators game?

Magistrate Judge Kay: The old Washington Senators. I used to stay up late and was intrigued by extra innings games, they seemed to go on interminably. I remember . . .

Mr. Ernst: This, after cricket?

Magistrate Judge Kay: Well, I was a great fan of cricket. I enjoyed playing cricket, but it was played during the day, and it was more leisurely. Professional cricket started at 11 o'clock in the morning, and you would break for lunch, and you would break for afternoon tea or morning tea, and it would go on till 5 o'clock in the afternoon, and then you would continue the following day. Baseball, if you went into extra innings, could go to 1 o'clock in the morning. And I remember one game with, I think, Satchel Paige. The Senators were playing a team called the St. Louis Browns. It went on to 1 o'clock, and I was absolutely fascinated. How anyone could stay at a baseball game from 8:00 or 7:30 to 1 o'clock in the morning! But they did. I listened to it on the radio. I wasn't there.

Mr. Ernst: Where did your uncle live?

Magistrate Judge Kay: In Bethesda, Maryland.

Mr. Ernst: I don't know who your stepmother was or her background. Was this relative a recent immigrant to the United States, the uncle?

Magistrate Judge Kay: He was actually a first cousin, so I knew of her. Her husband unfortunately was killed during the war. He was a British soldier who was taken prisoner in Singapore, and the prison camp was bombed shortly after he arrived. So she was a widow, as my father was a widower, but they had known one another, and I knew her brother. So in a way I'm related; we are second or third cousins. Her brother is a very brilliant individual who was actually the youngest man to get his doctorate of law from London University. He was invited by Harvard to come over in 1939. He had studied banking in The Hague, and he studied in Germany. Actually he was studying in Germany just prior to the war.

Mr. Ernst: He was of Russian-Jewish descent as well?

Magistrate Judge Kay: Yes. And so Harvard in 1939 invited him to study there for a year. They then invited him to stay a second year. And he obtained a doctorate of law at Harvard. Then the U.S. initiated the lend-lease program, and the British government asked him to stay over here and become part of the maritime section of the lend-lease program, so he stayed here and essentially worked for the British government. During the war he had met a girl from New York when he went to the London School of Economics, and he ended up marrying her. They settled in Washington. At the end of the war he was part of the British delegation that John Maynard Keynes headed up the Bretton Woods Conference that set up the World Bank and International Monetary Fund.

Mr. Ernst: You know, I don't think we have his name on the tape.

Magistrate Judge Kay: His name is Joseph Gold. Now Sir Joseph Gold. He still lives in Bethesda.

Mr. Ernst: You must have taken the trolley when you came into the city.

Magistrate Judge Kay: I first came to Washington with a young uncle who was 7 or 8 years older than I was. We stayed in McLean Gardens, which was a rental property, but before we moved into that we stayed with my uncle in Bethesda and I would take the #30 trolley car, which ran to Glen Echo. He lived very close to the trolley line, and I would take the street car right down Pennsylvania Avenue, and I did my sightseeing around Washington. I was somewhat disturbed, because Washington, unlike Paris and London, was not well equipped with bathrooms. So I located a bathroom at the Washington Hotel at 11th & Pennsylvania Avenue. That became the focal point of my sightseeing because I would always have to drift back to the Washington Hotel. It was also convenient to pick up the trolley car.

Mr. Ernst: Now I take it this would have been the first time you would have been in a city that had a large number of African Americans. Did you reflect on that?

Magistrate Judge Kay: Yes, interesting you asked that question. My recollection was I had seen one or two African Americans in England during the war. Very few. I had some minimal contact with Africans. There was a fairly well known economics professor, I think from the University of Leeds, who I had occasion to hear. He was a professor of international economics, but other than that my contact with Africans was minimal. Of course at that time the British empire was reasonably intact. My high school education had a heavy emphasis on British involvement in Africa. So I was sort of tangentially familiar with Africa, the African countries and all the Commonwealth countries. My one-on-one contact with them it was negligible. My

first real contact with Africans or African-Americans was when I came to the United States. One interesting aspect is that I really did not bring to my relationship with African-Americans any history or family discussions. Race was never a factor in my upbringing until I came to the United States, so it was all alien to me. Washington in the early '50s was a racially divided city in many respects, including the use of restaurants and bathroom facilities and hotels. That was totally alien to me. Even Glen Echo, which was an amusement park, was closed to African-Americans. That was strange to me. That was something I had not encountered in England at all. I found it very troublesome, but there was very little I could do about it. I was still a foreigner, if you will, in Washington. I was in a position of stepping back and looking at it as someone who was not a part of the current society, which was essentially a racist society.

Mr. Ernst: Here you were trying to figure out what America is about, and race is one of the things that is salient for you, when other people took it as natural.

Magistrate Judge Kay: I had come in contact with that even prior to leaving London through my high school friends. We had a small circle of friends that were very close, and they felt very strongly that in going to the United States I was going to a racist country. They were high school students who were 16 and 17, and they were very disappointed that I was going to the United States, because as far as they were concerned it was a very racist country, and I shouldn't be going there. I should be staying with them in England. It wasn't until several years later that I recognized that they were seeing America from the vantage point of a country that had very few people of color. Their feeling of superiority perhaps was not based on what subsequently happened in England when there was a large influx of people of color from the Caribbean, India, Pakistan and Africa. When that occurred there were racial tensions -- primarily

arising out of the economics of immigrants coming in from Commonwealth countries and taking jobs or seemed to be taking jobs from native English people. But it was an interesting perspective.

Mr. Ernst: You came over ahead of your family so you could start school. You would have started college education at that point?

Magistrate Judge Kay: That's correct.

Mr. Ernst: And how in London did you figure out that you would be enrolling in George Washington University?

Magistrate Judge Kay: I went for an interview at the American consulate, part of the American Embassy in London, and I was interviewed by a very nice young person there. I mentioned to him that I was going to be living in the Washington area, and that I knew very little of Washington. I asked whether there were any universities in the Washington area that I could attend. He gave me a list of universities on a piece of paper, and I think he mentioned that he liked George Washington University. It was not a strong or weak recommendation; he just said he was familiar with George Washington University, and he knew they had an economics program. On the basis of that I wrote to George Washington University, and they indicated that they would accept me and that they would waive my language requirement. I had had 5 years of French and 4 years of German, and I didn't want to take additional language requirements so I didn't have to. But I knew that one of the prerequisites was 2 years of a foreign language and that they would waive that if I could establish that I had had French and German in high school. So that was the basis of my decision to go there. My family was not wealthy, but during the early '50s there were restrictions on the export of sterling so that my family could only bring out very

limited funds. I literally came over with the equivalent of about £25 when I think the exchange rate was about $5.00 a pound. That was the extent of the money that we could bring out. So going to a school that was not overly expensive was important, and it was also important that I be able to work to make up any lack of money for tuition, because my father was going to come over here and look for a job.

Mr. Ernst: So when you were staying at McLean Gardens –

Magistrate Judge Kay: That was with my uncle. I think our rent was probably being subsidized by his older brother who was living in Bethesda, so I think our rent was being paid for us for the few months that we were there.

Mr. Ernst: How did you find employment?

Magistrate Judge Kay: Well, I had probably just turned 18 and finding a job very difficult since I had never worked before. Someone had indicated to me that I should think about going to the British Embassy. Before that I went over to Woodward and Lothrop, and I managed to get a job at Woodward and Lothrop during the summer of 1952. I think the pay was around $35 a week, and I worked in the men's department there for a while, but that was not going to stand me in good stead. Then I got another job at American Security Trust Company in their check-sorting department. They would bring in a group of people around 6 o'clock in the evening, and we would work until 9 or 10 o'clock, sorting checks by hand.

Mr. Ernst: I had a somewhat later version of that job when I was growing up. I would encode the numbers on the checks.

Magistrate Judge Kay: I met someone at that job that became a good friend later on, and we subsequently met again in the U.S. Attorney's Office years later. I then managed to

get a job which paid better money at the Washington Gas Light Company, but that was a full-time job. I deferred starting GW until February of 1953 in effect to accumulate enough money to pay tuition and books. I worked those three jobs but then I realized that I needed to find employment that would also permit me to go to school during the day. In frustration I went to the British Embassy and was told very pointedly but very nicely by someone in the personnel department that they were not an employment agency for expatriate Brits, but she must have felt sorry for me and said that there was an opening in the security division of the British Embassy. If I was interested in working there I could work a 4:00 p.m. to midnight shift. I think it was $245 a month, tax free, and that sounded like a royal amount of money to me. So I worked at the British Embassy throughout undergraduate school and part of law school.

Mr. Ernst: We won't tell your former employer, but could you study on the job?

Magistrate Judge Kay: Indeed I could study on the job. It was not busy work all the time. Basically I was a security officer. I would have certain responsibilities during the evening to check the building. At that time the British Embassy had a number of buildings located in Washington. There was a science building; there was a building devoted to the military staff, air force, army, navy people on K Street; there was a building which housed the Commonwealth scientific delegation, also on K Street. And there was the Embassy itself; the security would rotate. Actually, I worked in the division where I think it was Mr. McLean or Mr. Burgess, the two individuals who ultimately defected to Russia prior to my coming here.

Mr. Ernst: You used the word "expatriate." At the time did you think you were going to go back or did you realize you were going to stay in the States? When did you apply for citizenship, for example?

Magistrate Judge Kay: Well you could apply up to 5 years. I was not convinced that I would necessarily stay in the United States. I had no real desire to apply for citizenship during undergraduate school. By the time I was getting ready to graduate from law school, I started to give some thought to the matter. Neither of my parents had expressed any interest at that time in becoming citizens. Unbeknownst to me, because I had never given it any thought, when I applied to take the Virginia bar I was interviewed. (Virginia required that you be interviewed prior to taking the bar exam.) I interviewed with a lawyer down in Alexandria who, when I told him I wasn't a U.S. citizen, expressed some concern as to whether or not I could be eligible to take the Virginia bar or be a member of the bar. (I had a much stronger accent then.) You were interviewed, and then you were escorted by the interviewer to the local circuit court, where you were sworn in officially in open court as being eligible to take the Virginia bar exam. He notified the judge, Judge Backus as a matter of fact, down in Alexandria, who expressed great concern as to whether or not I should be permitted to take the Virginia bar. After the interviewer had raised the issue with me, I had looked at the code, and I didn't see anything written in the Virginia Code that would restrict noncitizens. He again checked the code -- and I remember this vividly -- he looked and looked and finally said, "Well, I don't see any restriction for noncitizens, I guess I'll just have to swear you in." I subsequently learned that Virginia was the only jurisdiction in the United States that permitted noncitizens to become members of the bar, mainly because there was nothing in the code that prohibited it. I assume it was an oversight on Virginia's part, and that the Supreme Court later remedied that situation.

Mr. Ernst: Identity is a tricky thing. Did you think of yourself as an Englishman at that point?

Magistrate Judge Kay: I thought of myself as an English person. In law school I still thought of myself as English. I took the Virginia bar my last year of law school. My last semester of law school I was in effect eligible for admission to become a member of the Virginia bar as soon as I graduated. Following graduation, I went into the military, which was an interesting experience for me. I had become a member of the D.C. National Guard, so I served on active duty for a short period of time. When I came out of the military I was a member of the bar. I actually served in a JAG office down in Fort Knox, but was also looking for a job. And I went to GW and ran into a dean and a friend, an associate dean, who told me that one of the district judges here, Judge Alexander Holtzoff, was interviewing potential law clerks. Would I be interested in interviewing with him? I said yes, because I literally didn't have much money. I had a friend, Eddie LeBaron, who was a former quarterback for the Washington Redskins and was in my law school class. He tried to persuade me to take the California bar and practice law in California, but I had I think about $10 to my name, and I needed one, to get to California, and two, to have enough money to take a bar-review course. In the absence of sufficient funds, I decided I had better earn some money locally before I made that decision. So when I was advised that I could go down and interview with a district judge for a clerkship, I set up an appointment and met with the judge and he hired me. But he strongly suggested that as an employee of the U.S. government I should become a U.S. citizen. So I at that point applied for citizenship.

Mr. Ernst: Holtzoff was of German background, I take it.

Magistrate Judge Kay: German/Jewish background.

Mr. Ernst: German/Jewish background. Well that's a whole issue we'll have to

discuss. Maybe as a preliminary to that, when did your parents come to Washington?

Magistrate Judge Kay: My father came I think in late 1952. I was here in May of 1952; he may have come in November of 1952. And my stepmother came over in the spring of 1953.

Mr. Ernst: Where did they live?

Magistrate Judge Kay: My father stayed with us in McLean Gardens prior to my stepmother's coming over here. He had obtained a job and rented a small house in Alexandria, so by the time my mother came over we were living in a house in Alexandria.

Mr. Ernst: And at that point you were no longer on your own?

Magistrate Judge Kay: I moved in with them. It was cheaper. I needed free room and board, otherwise I wouldn't be able to pay my tuition and survive. I continued working and paid my tuition but lived at home rent free.

Mr. Ernst: There is one thing we haven't discussed at all. Was your religion a large part of your identity at any point in London and in the United States?

Magistrate Judge Kay: No. I was very conscious of being Jewish, because of the intervention of the war years. My father grew up in a poor but Orthodox Jewish home, and my father was fairly well-schooled in religion, but if you're familiar with Orthodox Judaism, it could be a rigid religion. And certainly in England the Orthodox were the most prevalent in the Jewish religion. There was a small Reform Jewish community, but it was frowned upon by the bulk of the Jews in England. My father, after he married my mother, worked very hard, and religion did not play a very dominating role in his life, so that my first real contact with religion was through my grandfather, who would take me to temple. I went and studied Hebrew. Of course my father

left the family when I was six to go off to Africa. During the war years I was with my mother.

Mr. Ernst: Did you observe the sabbath?

Magistrate Judge Kay: No, because we worked. You know she ran the store, and it was open on Saturday. We lived in a non-Jewish community so I was always very conscious of being Jewish. My friends and the people where I lived made it very apparent that we were Jews and were somebody different. But in terms of strict religious upbringing I didn't have that, although I was sensitive to being a Jew. My mother's death had a somewhat traumatic effect on me in terms of religion. I felt let down, and that really shook the underpinnings of whatever religious upbringing I had. And I had no one really to turn to, to talk to, so I kept it within myself. As a result, from the age of nine, I never picked up on religion and it never played a really strong role in my life. I view myself as being a religious person, but I don't engage in the formal practice of religion. I've always been very conscious of the fact of being a Jew and very proud of being a Jew and very aware of it.

Mr. Ernst: You almost had an opportunity to reinvent yourself when you came to the United States. In a town like Washington it might have been a way of connecting with people to join a synagogue.

Magistrate Judge Kay: Between the time I came here in May of 1952 and started George Washington University in February of 1953 I knew very few, if any, people of my own age, so that whatever social activities I enjoyed really involved family. I literally could not remember meeting anyone my own age, other than perhaps in the different places I worked, but I didn't have any social relationship with those people. When I started at GW, of course, I was in with a group of people who were all freshmen, so there was an opportunity there to meet people.

I had an accent, so I was somewhat different, which could be a problem but was also a means of introducing and connecting with people. The undergraduate body at GW had a fairly active fraternity life. Fraternities and sororities were totally alien to me. I had no idea what they were, but as a means of connecting I was rushed by a fraternity. It was a nice easy way of meeting people and acquiring friends, and I took advantage of that, and benefitted from that.

Mr. Ernst: So you have close friends from your college days?

Magistrate Judge Kay: Certainly from law school and some from undergraduate school. My friendship with my dearest and oldest friend, Judge Bruce Mencher, actually goes back to undergraduate days. We were in different fraternities, but we were good friends. We go back to 1953-54.

Mr. Ernst: Were most of the students like you working?

Magistrate Judge Kay: I think the night school probably was a bigger component of the university in those days. A lot of the people I knew and associated with in the undergraduate school were youngsters who came down from New York or New Jersey. There was also a group of people from the Washington area. Most of my social activity during undergraduate school was centered around the fraternity. My social life was restricted, in that I was working at the British Embassy from 4:00 in the afternoon to 12:00 at night. In terms of social activity in the evening, I had one Saturday and one Sunday off a month. Dating was not as convenient as it might otherwise have been. Two years into undergraduate school I bought a 1949 Plymouth for $300 from another student, so at least I was mobile. I would drop by the fraternity house after I got off work at 12 o'clock and socialize as kids do until 1:00 and go home. My stepmother was a wonderful person and kept dinner heated for me, and I would eat dinner

when I got home. You're really bringing back memories.

Mr. Ernst: Now, I'm sorry, I forget his first name. Sir Gold?

Magistrate Judge Kay: Sir Joseph Gold.

Mr. Ernst: With his background in economics and law, as you were an undergraduate trying to figure out what you wanted to do with your life, he must have been a useful role model.

Magistrate Judge Kay: He was a role model. I was an admirer and I respected him. He was and is a very interesting person and great reader and a great fan of Ezra Pound and Dylan Thomas. He has great collections of both Pound and Dylan Thomas. My stepmother and Joe always were very close. So I had a lot of contact with him, and he was certainly a role model. Of course his wife was a well-established economist with the government, so they had a great influence on my thinking. I think certainly he was instrumental in shaping my thinking about becoming a lawyer.

Mr. Ernst: How did it happen that you chose law? I don't want to have the President of GW send me hate mail or anything, but you had this vision of LSE, and while I'm sure GW was a fine school, it wouldn't have that same cachet.

Magistrate Judge Kay: It was not the London School of Economics, and I was aware of that. By the time I got to the senior year at GW I was becoming aware that I would need a doctorate in economics and that a good grasp of statistics was a prerequisite for the field. I would automatically go on for the Masters, but I looked at the market and saw that, outside of academic life, the demand for economists in business didn't appear that great. I was very close to many of my profs, but I didn't see economics as an easy route for a career outside of teaching.

So I decided to rethink whether or not I really wanted to go that route. By that time I had really come under the influence of Joe and the law and the type of law that he was in. He had spent all his life in public international law and that was intriguing.

Mr. Ernst: Did you see his office at the Fund?

Magistrate Judge Kay: Oh yes. I was very impressed by the accuterments of his office. If you've been to the International Monetary Fund, you know they give the Ritz Carlton a run for its money, and if you go to their offices in Paris you really become captivated by the style in which they live.

Mr. Ernst: So you didn't really feel you had to give that much up with the choice of being a lawyer?

Magistrate Judge Kay: No, by that time I had grown out of my strong desire to become an economist.

Mr. Ernst: I'm about ready to move on to law school, but do you think we're missing in years up to this point? Should we discuss your college professors?

Magistrate Judge Kay: I enjoyed my undergraduate years at GW. I was very conscious of the fact that it had afforded me an opportunity to integrate myself into American life. I was different. I spoke with an accent, which was both a negative and a plus. You stood out, I guess, and when you are a young man, you don't like to be different. I think the acquisition of knowledge of baseball and football and basketball was important, although they played basketball in England before I left, it was not a popular sport. Learning the intricacies of baseball and football was very interesting. In those days GW had a good basketball team and played baseball in inter-fraternity leagues, but it had a fairly good football team, and that was a new

experience for me. At the first few games I went to my friends would tell me when to stand up and yell and when not to stand up and yell.

Mr. Ernst: So sport was a vehicle for your Americanization. Was politics at all interesting?

Magistrate Judge Kay: Oh politics was fascinating! I recall two things. One was that I was absolutely fascinated with the Eisenhower-Stevenson election. Adlai Stevenson appealed to me. He was a wonderful orator. I never had the opportunity to listen to him speak in person, but he was magnificent. His theme during that first election was "Let's Talk Sense to the American People." He was exceedingly articulate. Eisenhower, of course, was a hero figure who was not exceedingly articulate but a very nice gentleman. So American politics was fascinating. What also impressed me was the lack of interest of my compatriots in college in the political scene. There was really a lack of interest.

Mr. Ernst: This was a big contrast with England?

Magistrate Judge Kay: Certainly at the high school I went to where there was a great emphasis on and interest in politics. I remember my own economics professors in England saying that all students are expected to have socialist thinking until they are 21 or 22, because you can't study the industrial revolution and the period between 1860 and 1920 without feeling great sympathy and compassion for the working class. But then you have to enter the period of enlightenment and become good true blue conservatives. I remember my professor telling us that. So we were very politically sensitive as a group of high school students. When I came over here and went to the student union I noticed that the big topic of conversation in the morning over coffee was the funnies. English newspapers didn't have the array of comic strips that they

had in America. I was somewhat troubled that the front page of the paper was rarely discussed but that the back page of *The Washington Post* or *The Times Herald* was the hot topic of conversation. I hadn't grown up with the funny papers. It was all alien to me.

Mr. Ernst: Did you go to Congress at all?

Magistrate Judge Kay: Yes, I went to Congress. I also went down to Williamsburg, which I found somewhat hostile to the British, as one would expect, so I really felt out of place. I went down with a group of undergraduate friends and all the people who were speaking at the various houses were very negative to the British, which made me feel even more isolated. But the election of 1952 was fascinating period. I was also struck by the somewhat intemperate language that politicians would use on the campaign trail. That had not yet infected British politics, which were still, on the surface anyway, more gentlemanly.

Mr. Ernst: Clement Atlee, a sheep in sheep's clothing.

Magistrate Judge Kay: Or, as Mr. Churchill said, a humble man and deservedly so.

Mr. Ernst: Did you have classmates that went on with you to law school?

Magistrate Judge Kay: Yes. Bruce Mencher, and there may have one or two others.

Mr. Ernst: Did you think of every going anywhere else? I know GW was the best law school in Washington at the time.

Magistrate Judge Kay: I don't know if it was. No, I didn't. When I came over here I was not as conscious of the differences in the schools. Now I'm very sensitive. If you speak to someone from Harvard of course they say there is Harvard and then there are all the

other schools. But when I came over here I wasn't aware of those distinctions. I later did learn that the Ivy League schools were in a class of their own. Initially, I was not aware of any great differences in the Washington area. You look at the campus of Georgetown and at the campus of GW, and the difference is day and night.

Mr. Ernst: Although if you compared the law schools in 1952 or 1953 the contrast would have not necessarily been to Georgetown's advantage.

Magistrate Judge Kay: GW had a very poor physical plant. The law school was atrocious. But by the same token Georgetown Law was not the facility it is today. GW had Stockton Hall but throughout the last two or three years of my undergraduate education there was a lot of gossip that the university was going to build a new law school. I'm sure that was held out as a carrot to alum and prospective law students. So I was under impression at the time I graduated that there was going to be a new law school in place or shortly thereafter.

[END OF SIDE ONE OF TAPE]

Mr. Ernst: Where were we when the tape went off? We were thinking about law schools . . .

Magistrate Judge Kay: And the different qualities of law schools. I was led to believe, as were a lot of other people, that GW was contemplating building a new law school. So it appealed to me that perhaps not when I started but by the time I graduated I would have a new facility. But I didn't. It was many years after I left that GW finally built a new law school. You had to love the study of law if you went to GW. They had a building called Stockton Hall. There were no elevators. I think it was four or five floors high with stairs as the only means of egress and ingress and the library was on the top floor. There was no air conditioning, and I went

through the summer program. So to wend your way up to the library you really had to love the law.

Mr. Ernst: You said the summer program. Did GW have a program similar to Georgetown, an "accelerated" program? You could start at any point and take a certain number of semesters and graduate in less than three years?

Magistrate Judge Kay: Yes. It wasn't an accelerated program. It's just that they offered courses during the summer. And a heavy component of night classes, mainly because in the professional school such as the law school and maybe even the engineering school, they catered to Washingtonians who worked. There were a lot of government employees obtaining graduate degrees during nights. During the summer I went to night school as well as day school. In my last semester I was not working at the British Embassy, and I could attend night school. During the summer I went to day school and made up a semester, so I graduated in 2 ½ years of law school. I had an interesting group of fellow students. Patricia Roberts Harris was not in my class, but I started in February of 1957, and we co-mingled with the class that started the semester before us and the semester after us. Pat Harris was in the class that started the semester after I started. I also knew Eddie LeBaron, who while he was attending law school, was the quarterback for the Washington Redskins. It was an interesting group of people. Of course in those days there were very few women law students. We may have had a half dozen, as opposed to, what, 43 percent or 41 percent now. By the way GW really was a non-integrated undergraduate school. There were very few African-Americans in the undergraduate school. Towards the end of my undergraduate education a few African-Americans came into GW. Was it a conscious decision? I don't know, but looking back I would assume it was. And I don't

recall more than one or two, if any, African American law students at GW.

Mr. Ernst: Georgetown's first at about this time were carefully selected. They included Bryant Gumbel's father. You had, as you said, one quite exalted model of what a career in the law could be. Did you have a sense of other models at any time? You were sitting there in the heyday of the Washington lawyer?

Magistrate Judge Kay: Prior to going to law school? After law school?

Mr. Ernst: During those years; in the mid to late fifties.

Magistrate Judge Kay: I can't think of any particular individual who struck me. Some of my law professors were impressive. Some were not. I enjoyed studying law. I thought it was fascinating, so I really enjoyed law school. The law school was somewhat smaller than it is today. I started in the off-semester so that the initial group was only sixteen, and it was a fairly tight-knit group of people. We were close. I don't think I had a role model as such, but lawyers and the legal profession were held in much higher esteem then. It was a very respected profession, and I certainly was conscious of that. That certainly played a role. After I got out of law school and started my career right here in the U.S. District Court, I had a lot of role models, but I can't think of anyone particularly during law school. Everyone runs into a couple of professors who you really admire. And there was my uncle.

Mr. Ernst: If this was a European capital, law schools would be training lawyers for government service. But my sense is that when Washington-area law schools taught administrative law or regulated industries they were not necessarily training people to go into the bureaucracy. Some of your classmates must have been clerks who were getting degrees. Did you have a sense of . . .

Magistrate Judge Kay: Of where I was going? No.

Mr. Ernst: Or even that you were being trained for an independent profession that was distinct from politics and the bureaucracy.

Magistrate Judge Kay: No, I don't recall having any sense of that. I didn't have any strong feeling that I would end up in a government agency or doing government administrative law. Administrative law was not one of my favorite areas.

Mr. Ernst: Was James Forrester Davison still teaching that?

Magistrate Judge Kay: My goodness, what a memory you have! Professor Davison was indeed teaching.

Mr. Ernst: He taught Bernard Nordlinger too. That's why I remember that.

Magistrate Judge Kay: Yes, J. Forrester Davison was a wonderful professor and extremely knowledgeable in the area of administrative law and wrote a treatise on the subject. He certainly brought life to administrative law. It did not particularly excite me nor, for that matter, did litigation. The commercial end was appealing. I was taught criminal law very young, and as a new law student I felt for the human aspects of the subject. Tax did not appeal to me and never has and I have retained that great lack of interest in tax law. I went through law school as I say, enjoying it but not really having a sense of where I would end up in the legal profession. This became somewhat disquieting as I left the security of the school. Clerking was critical for me, because it was my entrée into the profession. I happened to work for an individual who was viewed as a giant certainly in this community. He was a great legal scholar and writer, a fine judge, a martinet, and that exposed me to litigation. While I, just because of my own personality and reticence, if you will, did not see myself as a litigator. Clerking was an entrée that afforded

me an opportunity to get into litigation. Your first job sometimes sets the direction of your whole career. It really is like going up a tree, you know. Once you go on a particular branch, you go on a route with no reversing direction. The clerkship set the course, and I think everything flowed from that. I was very fortunate in a way. From that first job I don't recall ever applying for a legal position up to where I am today. So from that extent my life was made easier, and I'm very grateful to Dean Potts at GW who happened in passing to mention the availability of the clerkship, and very grateful to Judge Holtzoff for hiring me.

Mr. Ernst: The time in the JAG was so brief that we shouldn't worry about it?

Magistrate Judge Kay: It was brief. It was interesting. I was one of three young lawyers working in the JAG office at Fort Knox. The office was run by a first lieutenant. We were all privates. The first lieutenant was much more interested in spending the afternoons at Churchill Downs in Louisville, so for all intents and purposes we were three young, new lawyers on our own. I was the only one who was a member of the bar, because I had taken the Virginia bar earlier and been admitted. The other two young people were a Georgetown grad and a Fordham grad. So the three of us ran the office for a period of time. We had a lot "domestic relations" cases where a lot of the young soldiers would get young ladies into trouble. Sometimes the senior officers would have legal problems and come to us. It was just a delightful period because we in effect were our own bosses and were left to our own to manage the office and divide up the cases. That was my first exposure to the practice of law.

Mr. Ernst: How did you find out about the job, the JAG job?

Magistrate Judge Kay: Oh no, no. I was assigned to JAG as part of my . . .

Mr. Ernst: Oh, National Guard.

Magistrate Judge Kay: Well, I went on to active duty. I went through basic training and then went into secretarial school at Fort Knox, where I met John Wyatt Brown, who later became governor of Kentucky. Thereafter I was assigned to the JAG office on the base.

Mr. Ernst: Well, let's go to Judge Holtzoff. I don't know if we'll finish with him today. I am interested in your clerkship experience not for gossip's sake but because you really had the unusual circumstance of clerking first for a quite eminent and well-established judge and then a little bit later on for a new boy, and to do this at a important time in the history of the district court, so I think you have an unusual perspective on the institution.

Magistrate Judge Kay: I started working for Alexander Holtzoff, I think, in November 1959. He was a very diminutive man in stature. He must have been in his sixties, I guess, when I started working for him. To describe the man himself, he was not a gregarious individual. He was somewhat reclusive, although he liked to think of himself as being social. He had a very stern manner to him, he ran a very tight courtroom, he would often talk about a well-disciplined courtroom. He would be viewed, I think, by the lawyers who practiced before him as a martinet in the courtroom. He demanded that the lawyers who appeared before him be precise. It was a common practice for him to handle motions without taking them under advisement. In other words, the most complicated dispositive motion would be argued before him. The lawyer would start off and say, "Your honor, I have three points that I want to make." He would respond, "Counsel start with your most important or persuasive point. Unless you can convince me on that, there will no point in my listening to the others." So he would focus the lawyers right up front. He would not brief himself on the nature of the motion so if there were pleadings filed and a motion in opposition he would not read them prior to coming on the bench.

He might read them during the argument. He had a steel-trap mind, and he would grasp the issue very rapidly and direct the lawyer right to the point that troubled him. Once he knew where the lawyer was going, if he had heard enough, he would stop argument and just rule. It was an interesting experience to watch him engage in that dialogue.

Mr. Ernst: What work did he have you do?

Magistrate Judge Kay: I would do research for him, basically. He would outline what his arguments in an opinion were going to be, and he would want me to research it. He would sometimes remember cases or sometimes just a particular statement. He once said to me that Justice Brandeis in an opinion said something and that he would like me to find the case. Sometimes that would be all he gave me to go on. I wouldn't necessarily know the nature of the case. He really didn't need a law clerk. He read every case that came down. Periodically, we would sit and discuss issues and his opinion. He kept his own counsel. I don't recall him ever discussing a case with another judge.

Mr. Ernst: This is a point I want to pursue. I know you had a limited view on these things but did it seem like the district court was a conglomeration of independent judges?

Magistrate Judge Kay: Fiefdoms?

Mr. Ernst: That's the traditional story about what the federal courts were.

Magistrate Judge Kay: The answer to your question is yes, particularly during that period and in comparison with today's court, where you still have that independence, but I think there is more collegiality. Now there was a coterie of judges -- Judge Holtzoff, Judge Curran, and Judge McGuire -- who came out of Justice,and they had a relationship that pre-dated their appointment to the bench. Then there were some judges who were viewed as political

appointees. Judge McGarraghy, I think, came out of Congress, and perhaps Judge McLaughlin as well. I'm not sure. Judge Youngdahl was governor of Minnesota; Judge Schweinhaut was a local person; Judge Hart was a local practitioner. McGuire, Curran and Holtzoff were not, I think, natives, I'm not sure about Judge Curran, but McGuire came out of Boston. Judge Holtzoff had a limited private practice in New York and then was invited down to Washington, I think, by Harlan Stone. Was it Harlan Stone? He was at the Justice Department

Mr. Ernst: It could have been during Stone's time.

Magistrate Judge Kay: They all worked at Justice in a very exciting period, as you could well imagine. It was the New Deal, the Roosevelt years, so all the new alphabet agencies were growing up. Holtzoff was heavily involved in the development of the Federal Rules of Civil Procedure. Prior to that time the dominant code was the Field Code, out of New York, and of course each state had their own hybrid, procedural rules. So Holtzoff was involved in crafting the Federal Rules of Civil Procedure and then, of course, was instrumental in writing the landmark text which was the dominant text for many years Barron and Holtzoff.[1]

Mr. Ernst: Charles Clark, the Yale law professor who was a reporter to the committee that drafted the rules, and went on to the Second Circuit where the Hands found him insufferable. They referred to him as the "Greatest Living Authority on Practice and Procedure" because he felt that since he was involved in the drafting of the rules no other judge really understood them.[2]

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[1] William W. Barron and Alexander Holtzoff, *Federal Practice and Procedure* (St. Paul: West Publishing Co., 1950-1968).

[2] See Gerald Gunther, *Learned Hand: The Man and the Judge* (1994), 521-23.

Magistrate Judge Kay: Clark? Are you talking about Holtzoff?

Mr. Ernst: Clark. Well, that's what I'd like to know. You feel Holtzoff was that way, too. That's what the Hands thought about Clark, but I wonder if that was how Holtzoff was too?

Magistrate Judge Kay: Holtzoff, I think, felt to some degree that his interpretation of the rules was the definitive interpretation of the rules. Holtzoff was not an overtly arrogant individual. He was an intimidating individual. He perhaps believed his interpretation of any point of law was the correct interpretation, and he did not defer to anyone, including many of the members of the Supreme Court. So he was supremely confident in his own judgment, which at times and in certain areas of the law, was very narrowly focused.

Mr. Ernst: Do any particularly instances come to mind that can you can share?

Magistrate Judge Kay: I'm going to be a little circumspect. He was enamored of the British system of law. He preferred the bifurcation of the British system of the law where there was the barrister and the solicitor, which disassociated barrister from the client. I will share with you an anecdote where his ideal didn't translate into practice. I am sure you are aware that lawyers in the area of criminal law are viewed as somewhat tainted. Criminal practice in the district court in those days included general jurisdiction for street crimes. The municipal court was a court of very limited jurisdiction, so your standard violations of the D.C. Code were tried here; robberies, burglaries, rapes, unauthorized use of a vehicle. The jurisdiction was not limited to federal violations. There were many very fine lawyers who practiced exclusively in the criminal field. Many of them were categorized as the Fifth Street bar because their offices were located on Fifth Street (although many of them had their offices in their back pocket, in a little

black book). The uptown bar looked down its noses at some of these practitioners even though many of them were very, very capable, very fine and entertaining litigators. Whether it came by osmosis or guilt by association, criminal practitioners were not as esteemed in the profession. I think Holtzoff felt that some of these lawyers, while good lawyers, very capable lawyers, were somehow or other tarnished in the American system by the clients they kept. He would tell me on many occasions that barristers were never tarnished like that because the solicitor would be the buffer, if you will, and the brief carrier. The barrister was in the exalted ranks of litigation, and no one looked down on the barrister for taking a larceny or robbery or burglary case. When I was with him there was a Smith Act case. It was a three-judge court. I think there were two district judges and a circuit court judge on the panel. A lawyer came down from New York, a woman lawyer representing one of the defendants in the Smith Act case.

Mr. Ernst: It wasn't Carol Weiss King was it? Was it a radical lawyer?

Magistrate Judge Kay: She was a radical lawyer, and she was utterly brutal. She was an extremely able lawyer and a wonderful appellate advocate. At the end of the argument the three judges convened very briefly and Judge Holtzoff was designated the opinion writer. He came back to chambers, and we started chatting about the case. I went on and on as a young lawyer will, making myself obnoxious and telling him how wonderfully impressed I was with this lawyer. He got a little tired of me going on and said, "Oh yes, she was very good. I admit she was very good. Isn't it a shame that she has to represent people like that, Communists." I couldn't resist and said, "Judge, haven't you told me on many occasions you don't tie in the advocate with the client?" A lot of hemming and hawing ensued. Even Judge Holtzoff did not always practice what he preached. But he did have, as I say, a strong sense of his own, correct

interpretation of the law. He would find himself many times at odds with the court of appeals. This is the point I was leading up to before I got carried away with that anecdote. He felt that the trial bench or nisi prius bench was not a lower court vis-a-vis the court of appeals. They were just two different aspects. The court of appeals was a reviewing court, but it was not a superior court. He felt this very strongly. When he was reversed, while he never overtly, certainly in my presence, showed any outward anger or disappointment, I'm sure he felt very sincerely that they had made a mistake. In the *Naples* case he resented severe criticism by a court of appeals judge in an opinion reversing him.[3] I happened to be in the Public Defender's office and was tangentially involved in that case, which was a particularly brutal homicide. One of the counts in indictment was a simple assault, but of course the dominant count was homicide. The judge found the defendant guilty and, I think, sentenced him to death. The reversing opinion was somewhat critical. Judge Holtzoff had not sentenced the individual on the simple assault and this left him a way to respond. During the sentencing phase of the simple assault count he took it upon himself to write an opinion and pointed out, in no uncertain terms, that the court of appeals was not a superior court to the trial bench. They were equal arms of a continuum of the law, if you will.[4] He was at times criticized by the court of appeals for being an active participant in assessing the evidence. Again, this was a carryover of his feeling of common-law responsibility for the trial.

Mr. Ernst: He sounds like such a British judge!

Magistrate Judge Kay: Yes. So he would not infrequently -- perhaps more often

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[3] *Naples v. United States*, 307 F.2d 618 (D.C. Cir.1962).

[4] *United States v. Naples*, 205 F. Supp. 944 (D.D.C.1962).

than not -- comment on the evidence in his instructions to the jury, something that you rarely find in trial court today. He would make observations which got him reversed. Members of the bar could tell you a legion of these stories. He once commented to the effect that anyone who would be out in the streets in Washington at 2:00 a.m. could not be a responsible individual and must be up to no good. He would review and comment on the testimony of a defendant who testified and the contrary position taken by a police officer and look with an expression of incredulity when he made reference to the testimony of the defendant. The defense counsel would run to the court of appeals and say, "There were facial expressions made by the trial court which unduly influenced the jury." Needless to say, this was always difficult to capture on a record. He had an interesting relationship with the court of appeals.

Mr. Ernst: Well I don't think we're finished with him yet, but I wonder, as a final question for today, if you would consider his influence on you. In Holtzoff we have a strong judge, a judge who has a notion of what an Article III court should be. I wouldn't expect he would be in all respects a model for you as you do your work as a magistrate judge, but does he figure in your judging today?

Magistrate Judge Kay: In some respects he is a model. He is a model in the sense that he really believed in, to use perhaps what is now hackneyed perhaps even arcane phrase, the dignity and majesty of the law. He ran a courtroom that I thought was overly rigid, but by the same token he insisted on a degree of formality which I think is necessary. So what I learned, I think, from him and what I have tried to bring to my own courtroom, in the limited role that I have in the district court is that sense of dignity, the strong belief that the judge has to be fair and impartial. Many times, in criminal cases in particular, I thought he went beyond where a judge

should go in commenting on the evidence. Someone sitting in the defendant's chair might perhaps feel that the judge had made up his mind and was attempting to make up the mind of the jury. But the positive aspects of Holtzoff's judging -- the dignity, the respect, the formality -- are very important. He went too far at times. He would intimidate and embarrass lawyers, but not intentionally, not intentionally. I would not like to do that. And if I do it unconsciously at times, it's certainly not intended. If he became impatient with a lawyer, he would show it. If I become impatient with a lawyer, I try to control it. So there were a lot of very positive things I learned from him about how to run a courtroom, but perhaps equally significant was what I learned about how not to run a courtroom. At a later part of our discussion that might make a basis of comparison with Judge Jones, who was an entirely different person and in many respects ran a different courtroom. But, as I said, I learned many positive things from Holtzoff and I learned some negative things. I also learned that being a good individual is not necessarily a prerequisite to being a very good judge.

Mr. Ernst: Well, Judge, I think that is a good place to stop for now. Thank you very much.