

## THELTON HENDERSON TRANSCRIPT

### “THE JUDGE”

*Recorded: July 6, 2017*

*Edited for clarity and continuity*

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**LOWELL BERGMAN:** You're a federal judge but you get interviewed a lot. You're on TV, you're in documentaries. Why? Most of your colleagues rarely appear or even get quoted unless it's in something they've written or something they've said in court.

**THELTON HENDERSON:** I think that's just a part of my personality. Not to get on the news or being notorious but I like to talk to people and I don't mind talking to reporters. I think most of my colleagues don't trust reporters. They don't trust people like you. They think they're playing gotcha with them. I don't feel that and I'm happy and comfortable talking about what I do, what I believe and those kinds of things.

**LOWELL BERGMAN:** And your colleagues don't complain or say to you, "Why do you talk to the press? What did you talk to them?"

**THELTON HENDERSON:** Not to my face, they don't. But they will tell me that they don't talk to reporters but they seem to leave it up to me as to whether I do it. I haven't had anyone complain or say that I'm grandstanding or that I shouldn't. Of course we all understand that there are certain things we don't talk about. We don't talk about cases and how we're going to decide them or things that we're thinking about in terms of litigation. So, I don't talk about those and I won't talk about that here. But I'll talk about who I am and what I've done and what my beliefs are.

**LOWELL BERGMAN:** And you openly say you're an activist judge.

**THELTON HENDERSON:** Well, I accept that. I've been accused of being an activist judge. But I've come to the conclusion that an activist judge, I believe, started off as a conservative term for a liberal who was doing things they didn't like. But an activist judge, I've come to conclude, is really a judge who does something that no one likes. So there are activist conservative judges and there are activist liberal judges. And I'm active in the sense that I get very involved in the cases. I try to solve the cases, one example of what's called activism is my behavior in some of my institutional cases, my prison case, my Oakland Police case, school desegregation case. I get really involved in it, I visit the prisons. I wanna see how the prisoners are living. If they really are living under the conditions as charged, so if that's what activism is, I guess I'm an activist judge.

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**LOWELL BERGMAN:** To you, if you can be an activist and you can be a conservative or a liberal, what it really means is how deeply you get involved in the case.

**THELTON HENDERSON:** I think that's right. I think that's right. And I think it's intended when it started as a pejorative term though. Oh he's a activist, he's not, and I don't what the opposite is, passive, but, he's a activist meaning he's doing things he ought not do.

**LOWELL BERGMAN:** Isn't the reference really to or they call themselves originalist or they wanna go back to the, "the way the constitution was actually written at the time."?

**THELTON HENDERSON:** That's right.

**LOWELL BERGMAN:** Back in time.

**THELTON HENDERSON:** Yeah.

**LOWELL BERGMAN:** Just sit, as sort of I don't know, a learned scholar and pronounce on a case.

**THELTON HENDERSON:** Yeah, pronounce on a case with some sort of rigid understanding of what the founding fathers determined all of those years ago and I certainly don't believe that. I think it's a living institution and I think we have to... We'd be dead, in my view, a judge would be dead in the water if he was an originalist and had to decide what the founding fathers have thought about Facebook. What did the founding fathers, they couldn't even conceive of Facebook and a lot of the problems we face now. So, you have to be, that's what activism means. You have to think, "What could they possibly have meant? How do I interpret that in today's context?"

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**LOWELL BERGMAN:** Have there ever been other cases, in a sense, where you thought you could have done better or that you were, in a sense, a bad judge rather than a really good judge?

**THELTON HENDERSON:** I've had some cases that I regret that I'm not sure I could have done better. But yeah, there is one that I could have done better on. It wasn't one of my big cases. But I'm not into technology even to this day. It's sort of a joke among my law clerks, for many years, that I couldn't do email, I didn't know how to do email, and I didn't even know how to turn on my computer over there for many years, 'cause I wasn't interested in that newfangled stuff. But early on in my career, I got a case involving computers and technology. It was a small businessman in San Francisco, who was suing a computer company and I think it's significant.

**THELTON HENDERSON:** It was a big one at the time. Again, I don't remember the name of it, but it no longer exists, it went out of business. And I think it was due to the story I'm about to tell. The small businessman, his technology didn't work, he went into hock to get it funded, to get it installed, and he sued. His lawyer wasn't a lawyer that knew this, and you could tell it. And the company got their experts and they had lawyers, this is what they did. And I was swayed by the lawyers' presentation and their expertise, and it's clear to me now that I missed the boat on that. I ruled wrongly. I was swayed by the skill of the lawyers, rather than the facts of the case, and I regret that. I sometimes worry. I'm sure that guy went bankrupt, and went out of business and I think I blew it and I...

**LOWELL BERGMAN:** Was there a rape case on a military base?

**THELTON HENDERSON:** Yeah, there was another case that was really impacted me. There was a rape case at Fort Ord which is no longer in existence, down in the Monterey Peninsula. A woman in the military went AWOL, and the military police finally found her and brought her back to the base, and as she was awaiting her court martial, they had her in a barracks under arrest, and soldiers went in that room, and I think must have been allowed to go in the room by the military police who were guarding the room, and repeatedly raped her. And she finally got out and filed a lawsuit in this court which I drew as my case, and I really felt for. The conditions in the complaint really were horrible.

**THELTON HENDERSON:** But I did my research, and the defendants made a motion saying I didn't have jurisdiction and started reviewing it, looking at the research, and the cases they cited. And it turned out to be right that this case happened on a military base and therefore the military had jurisdiction of it. And so I had to withdraw from the case saying that I didn't have jurisdiction. And that bothered me because there was a real wrong there. I wasn't able to find out how that case was resolved but I wasn't optimistic that the right thing was going to happen for her.

**LOWELL BERGMAN:** So that was the limits of your power.

**THELTON HENDERSON:** That was the limits of my power. Right.

**LOWELL BERGMAN:** When did you realize the extent of your power?

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**THELTON HENDERSON:** I'd learned it as I grew more familiar with the job and what judges can do but initially, I thought we had very limited powers. And this one example, my very first year as a judge, I had a law clerk do some research and come back with a memo telling me that we needed to enjoin the Navy from doing a certain action and I remember saying, "Can we enjoin the Navy? I had no idea you could do that." But later on, I learned that we have powers although you'll hear me say anytime that the judiciary is the weakest branch of government but we can, we have some powers, and injunctive powers, and other powers. But I came to realize, I think, the full limit of the powers in my prison hospital case when I appointed a receiver to take over the medical part of the California State Prison system. And I think that's about the maximum kind of power that a federal judge can really use to really, right now, there is a receiver running the medical portion of the California Prison system.

**LOWELL BERGMAN:** You say that you have the least amount of power of any branch of government. You've taken over the health system of California Prison system which is the largest prison system of any state in the country.

**THELTON HENDERSON:** Right.

**LOWELL BERGMAN:** I mean, larger than most countries' systems. You've taken over police departments.

**THELTON HENDERSON:** Well, I administer a consent decree for the police. I haven't taken it over. They still run it but I'm empowered to have them do the things that they've agreed to do under a consent decree that they entered in to.

**LOWELL BERGMAN:** But you've also been able to sit on a criminal case against the largest public utility in the state.

**THELTON HENDERSON:** Right.

**LOWELL BERGMAN:** And that you're saying you don't have as much power as another branch of government?

**THELTON HENDERSON:** I think not. And let me tell you what I mean by that. In terms of enforcing some things, and I mean the contempt power now. One reason these cases you've talked on that I've sat on, keep in mind that the police case has gone on for 14 years and the prison case has gone on longer than that. And one of the reasons is that... And this is where the weakness of our enforcement powers are, is that we have, it's very hard to find people in contempt. Even when they don't do what you order them to do. They can make a little half-way effort at it and you cannot find them in contempt or it's very difficult to find them in contempt.

**THELTON HENDERSON:** And I think that's the reason that you see things like Governor Wallace standing in the school house door, obviously obstructing a court order to admit these two students. And the government doesn't even try to find that kind of person in contempt. And I think attorneys on the other side don't really go after them. And you try to, I tried to appeal to mayors and others, the governors of California, about the waste of money. Oakland, for example, spends millions of dollars because the police won't follow my orders and they'll still, despite the many orders I have given, they'll still do a racial profile all over town every night. And that's not power, that's... I don't... If you can't enforce it in that way. So that's what I mean by being the weakest branch...

**LOWELL BERGMAN:** You're perceived as this judge who has grabbed all this power. You went after the first maximum security, if you will, isolation penitentiary in the state and the most modern one as soon as it opened really, or soon after it opened. Then you went after the healthcare system. And you've had police departments that you monitored due to a consent decree. I mean, there are just a long list of things that you've gotten yourself involved in. You seem like one of the most powerful judges anyway in the country, in terms of what you've gotten your fingers into.

**THELTON HENDERSON:** Yeah. I guess when I am talking about power, let me give you an example. As I said, these cases go on and on for years. Now, power, in my sense, right down the street is Hastings Law school. And they were expanding a few years ago and taking over some space and building another building in some space. And they got into a dispute with the legislator about it, who had an interest in that. And the school sort of fought back for about one week until the legislator took the money from them for the whole project and boom, they were gone, and it was all over. That's power. That's what I am talking about. I've done all of these things, but it takes years to do and you can't say, "Improve the medical care in the hospital system." Now, I've consulted with some of the top medical people in the country about this case to see what the standard is. And they tell you that a willing, a willing people can do this in six months and a year easily. Here we're going for 14-15 years. That's what I mean by power. I don't have the power to make it happen like this legislator made it. Had the power to just withhold the money and that got their attention.

**LOWELL BERGMAN:** Yup. But you have the power to embarrass, to shame, to hold up an individual and say, "You have been in contempt of court. And I'm sentencing you to, you know,

criminal contempt of court, and I'm sentencing you to jail time." Now, it may not hold up. You may get overturned, but you'll make headlines.

**THELTON HENDERSON:** Yeah. Oh, yeah. It will make.

**LOWELL BERGMAN:** And it will make people think twice before they do it. You have a reputation in a way of being able, of sort of skirting the edge. Not using all the power you actually have, when you could.

**THELTON HENDERSON:** Yeah. No, that's true. And I have a reputation and it's intended to threaten to do things, and hoping that I will get it done. And I have also have been hopeful that people know that I care about these things, and that I really will follow up. And I constantly say to them in court, "Look, I'm not going away, you know. So you might as well do it now. I'm not going away. We're gonna get this done sooner or later."

**LOWELL BERGMAN:** But you're frustrated. You say you don't have enough power.

**THELTON HENDERSON:** I don't have the power to make it happen as fast as I think it ought to happen. Again, and I use the example of the power over the budget. Now, that's power. People do all kinds of things when you have the power over whether you're gonna have enough money to operate your branch of government, or your agency or your law school. That's, that's greater power, I believe, and it gets done faster.

**LOWELL BERGMAN:** I know you've had personal meetings with governors of California. Have they just basically looked at you and say, "Okay, you're gonna do this and so what? We aren't going along with it."

**THELTON HENDERSON:** No, they haven't. They haven't said that. No, but they don't make it happen. You know, again, I can't tell you how many times. Let me use another case, the Oakland Police case. I've had three different police chiefs come on. New to the job. Look at the consent decree that I'm enforcing and tell me in open court, "Your honor, I've looked at this. I've talked to the troops and we can have this done." This was one that was in May. "We can have this case closed by the end of the year." And could have if the troops would have done what they should have done. There's no question about it, so.

**LOWELL BERGMAN:** And they didn't do it.

**THELTON HENDERSON:** And they didn't do it. And there's nothing, no power I have.

**LOWELL BERGMAN:** Can't you bring 'em into court and say, "Why didn't you do it?"

**THELTON HENDERSON:** It won't get a... Yeah, you can do that and say, "Why don't you do it? Why don't you do it?" And they'll say, "I'm trying my best."

**LOWELL BERGMAN:** Can't you hold them in contempt?

**THELTON HENDERSON:** Not for trying your best, no. And then, I don't know a way that you can prove they're not trying their best. I know they're not trying their best, but that's why, that's what I call weakness. Just that very question. That very process.

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**LOWELL BERGMAN:** ... why haven't you put the Oakland Police Department in receivership?

**THELTON HENDERSON:** A number of reasons. I have threatened to do it, as you know, and indeed I just received some papers. I'm holding a case management conference on that case next week. And pursuant to my order, the parties have filed preliminary papers telling me what the issues are that they want me to look at. And one is a suggestion by the plaintiffs that I still ought to put the department in receivership. I haven't, because I think that an organization, a paramilitary organization like the police that is involved in public safety and is so intrinsic to the safety of a community is a much different situation and a much less certain situation than a receivership for a medical program, that I wasn't sure that I had the authority to do it. I researched it, I've talked to several professors around the country, and they say, "That's a little more problematical if they appeal it. It's not clear what the court's gonna say, no, that's too intrinsic,"

**LOWELL BERGMAN:** So it requires what, a prosecutor getting involved?

**THELTON HENDERSON:** I'm not sure a prosecutor would do it because you're talking about states of mind. For example, if you say, if I say, "Take that sign down! You, take that sign down within seven days of today." That's contempt. You can say, "You didn't. The sign is still there. You're in contempt." But to say, "Go find a way to improve the medical system of the hospitals, and take better care of these." That's, that's so amorphous that it's almost impossible to find someone in contempt for that. And that's what I'm talking about, about weakness of the job.

**LOWELL BERGMAN:** So haven't you caused the state of California to spend more money on the health of inmates?

**THELTON HENDERSON:** Well, that's one way to put it. Or I've caused the state of California to improve the medical health of prisoners in the state so that they no longer are dying. One is dying every six days for lack of medical care and that's cost money. So in that sense, I have cost them money, yes.

**LOWELL BERGMAN:** And that wouldn't have happened unless you did that.

**THELTON HENDERSON:** That's right. I don't think it would've happened.

**LOWELL BERGMAN:** And that's not power?

**THELTON HENDERSON:** Yeah. No, it's power. It's power. I'm not arguing that I don't have power, and that I don't use to the maximum the power that I have. But I'm saying there's still a weakness. I think real power is getting things done in a timely fashion. Don't forget, this has taken over 14 years. That's wheedling, that's almost, "Come on guys, please!" You know? And having other things. I've had a few legislators, California legislators who I won't name, come to me and meet with me and say, "This is really costing, this is affecting the budget. How can we close this case?" You know, so.

**THELTON HENDERSON:** They want it done but you're saying, "Come on gang." And you're, for example reducing the prison population is catching on now but I don't think it's because people have a newfound sympathy for prisoners. I think I've always been amazed at the

contempt that the CDCR and people in general have for prisoners. It's because they're finding out that housing a prisoner is so expensive. Housing a prisoner, it costs about the same thing a year as sending your kid to Stanford. And they're worried about that, that's getting people to move in a direction that I've been trying to get the rule four for justice's sake.

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**LOWELL BERGMAN:** Let me challenge you for minute, then, because maybe it's because you like the idea that you are liked and you are sort of an even-tempered, mellow guy, that for example, the state of California openly announced that they would stop complying with your reduction orders.

**THELTON HENDERSON:** With?

**LOWELL BERGMAN:** Your reduction orders, right?

**THELTON HENDERSON:** Right. Mm-hmm.

**LOWELL BERGMAN:** Jerry Brown ended the state of emergency and said overcrowding is no longer a problem. Special masters and receivers have recommended contempt charges multiple times, right?

**THELTON HENDERSON:** Right.

**LOWELL BERGMAN:** I mean, uh, why not hold them in contempt? You're the nice guy, you don't want to butt heads with them?

**THELTON HENDERSON:** No, I'm... Oh, no, no. I'm not a nice guy in that sense. I think I'm a nice guy, but not in the sense of doing my job as a judge. I like to think that I do my maximum to get the job done. But what he did, what the Governor did was appeal my ruling. He spoke publicly, but he never did anything to not comply with the order. He appealed it, and what really brought him around in my view, and by that I mean he no longer is fighting that order, is that he got reversed by the Supreme Court a couple of times. And the second time, I thought quite emphatically.

**LOWELL BERGMAN:** So, how is that different than George Wallace refusing to take signs down that said "This facility is segregated, it's for blacks, it's for whites." You would want him held in contempt, wouldn't you? You want him forced to act?

**THELTON HENDERSON:** Well, I want him forced to act and admit Vivian Malone and the other fellow to the school, that's what you want him to do. And what I want the Governor of California to do is allow the California Department of Corrections and Rehabilitation to reduce the overall prison population to 137.5% of the designed capacity, so that was the goal. And he didn't ever not do that or try to stop that, but he did fight it tooth and nail. He was against it and, in this regard, with all due respect to the Governor, he did say in a prison context, and it's in the papers or someplace in here, I have the article, that the federal government doesn't have a right to tell us how to run our prisons. "The federal government doesn't have a right," said George Wallace, "To tell us how to run our schools." So, he was of that mentality about the power of the federal government and he was resisting in every way he could. But it never occurred to me. I wouldn't have been successful in finding him in contempt.

