

THELTON HENDERSON TRANSCRIPT

“THE SOUTH/CIVIL RIGHTS”

Recorded July 6, 2017

Edited for clarity and continuity

LOWELL BERGMAN: ... When you announced that you are going to go into, retirement.

THELTON HENDERSON: Yeah.

LOWELL BERGMAN: The Associated Press story that ran in Birmingham, Alabama, the headline was "Judge Thelton Henderson, lawyer fired for loaning MLK a car, retiring."

THELTON HENDERSON: Right.

LOWELL BERGMAN: That's what you're remembered for.

THELTON HENDERSON: That's what I'm remembered for by many.

LOWELL BERGMAN: So tell us what happened. What's your version of the events that took place?

THELTON HENDERSON: That led up to my being fired?

LOWELL BERGMAN: Yeah.

THELTON HENDERSON: Yeah. Well, let's start with the lending of the car. When I worked for the Justice Department and when I was in Birmingham, there was only one place I could live and that was the AG Gaston Motel. And that was where Martin Luther King and Andy Young and James Bevel and the member of his staff also lived. So that's how we got to know each other. We would eat there very often, certainly see each other every day passing around, sometimes our rooms were next door to each other. So, uh, with that background, I had been in Birmingham working on a voting rights case. I was out in the field all day ringing doorbells, route one, box number so and so, interviewing black voters or would-be voters who had been turned down, getting ready for a case.

THELTON HENDERSON: And at the end of the day, I headed back to the motel and as I was coming into the motel, driving in, Doctor King was being driven out of the parking lot by a Reverend Bennett Smith and we stopped, he's driving out and I'm driving in, we stopped and I talked out the window to Doctor King. I can no longer remember what we talked about that particular day but, as we finished he said, "Thelton, are you going in for the night? Are you going to use your car again tonight?" And I said, "Nope. I'm finished for the day. I'm going in and I'm going to eat and go to my room." And he said, "Well, would you mind if we use your car? Reverend Smith has a bad tire." And I said, "Yes, you can use my car." So, we drove back in together to the parking lot and they got in my car.

THELTON HENDERSON: I turned the keys over to them, and they drove out and heading to Selma. If you saw the movie, "Selma" there's a church scene, they were going regularly to Selma for those kinds of thing. Getting Selma ready for his next crusade that was going to be in Selma. Well, they were being followed. We were naïve in those days. I think Doctor King also was, didn't realize his phone was tapped and that he was being followed. I certainly didn't realize that I was being followed by Wallace's people, Governor Wallace. And so anyway, they struck gold when they took the license plate and they found out that the car was rented by a government attorney for the Justice Department. And the next day there was a big article in the paper that I had driven Doctor King to Selma.

LOWELL BERGMAN: So, let me just stop you for a second. When you say "Governor Wallace," you mean George Wallace?

THELTON HENDERSON: George Wallace, yeah.

LOWELL BERGMAN: And his people means what? His police or his...

THELTON HENDERSON: His police, there was... I forget what they called them after, but there was a special police force that, you know, they weren't just the cops that walked the beat, but it was a special probably related to civil rights activity group that he had and they were keeping their eye on Martin Luther King.

LOWELL BERGMAN: And the FBI was tapping your phone?

THELTON HENDERSON: Yeah, exactly.

LOWELL BERGMAN: And so, you were under surveillance but you say you really... You, Doctor King, everyone else, you didn't realize you were?

THELTON HENDERSON: I didn't. I didn't at that time. There was one time I came to realize it and that was later on. I was again at the AG Gaston Motel and I got a call. No, I was told to call Burke Marshall, who was the head of the Civil Rights Division. And I called him from my room and we started talking about an important subject. Again, I don't remember what the subject matter was and a couple of minutes into the talk, he said, "Where are you?" And I said, "I'm in my room." And it really threw me. I said, "Uh, oh, uh. Okay, yeah, we better talk some other time." And I realized, that's when I put it together that he knew that phones were tapped and that mine was probably tapped. That's the only... Up until then, I'd never even thought about that.

LOWELL BERGMAN: So, you were under surveillance, the story appears, someone was watching. Someone saw that Martin Luther King was in a car that apparently had been rented by a Justice Department official.

THELTON HENDERSON: Right. And the story reported that I had driven Doctor King to Selma, and using my legal training at that moment, I misled. And the reason I got fired is I also misled Burke Marshall, my boss, because I said, it's a term called "negative pregnant" in law. It's a negative, "No, I didn't drive him." But it's also pregnant with implications that something else went wrong. So, I said...

LOWELL BERGMAN: Meaning?

THELTON HENDERSON: Well, let me give an example of the negative pregnant. The lawsuit says that Thelton Henderson was driving a 2010 Chevy automobile down Maple Street at 45 miles an hour and went through a yellow light at Maple and Main Street and hit someone at certain number, amount of time. Certain time of day. And you say, "I wasn't driving a 19 da, da, da, da, da, da." So, the whole thing, something's wrong in there, but most of that is true. So, I did a negative pregnant, and uh, which was very misleading and caused the department some embarrassment. They denied that it was my car or that I had loaned the car. I had loaned the car, but it was true that I hadn't driven Doctor King and it caused a lot of problems for the department and that was the basis for my firing.

LOWELL BERGMAN: That you misled them.

THELTON HENDERSON: Hmm?

LOWELL BERGMAN: You misled them.

THELTON HENDERSON: I misled them. I misled them. Right.

LOWELL BERGMAN: Were you confronted by Burke Marshall or you were confronted by someone from the Justice...

THELTON HENDERSON: No. John Doar, John Doar. I never actually spoke to Burke Marshall about this. He had others in the department. And John who was a lifetime friend and a mentor after that, very sympathetic and he initially suggested that maybe I could just not go in the field anymore and have a desk job back in Washington which had no appeal whatsoever to me. And it became very hard for me to say what I'm about to say to you now. For years, I had trouble saying I was fired. I said, "Oh, I resigned," or something but that wasn't true. I was fired and let go and it was a low part, low time in my life.

LOWELL BERGMAN: At the time, you were, let's say I've read, frustrated or a little angry with the department at the same time.

THELTON HENDERSON: Not angry, but I was very frustrated. I was frustrated because one of the things I found myself doing and the reason I ended up not working in the Louisiana Division of the Civil Rights but working every place, was that they found very early on that I could communicate with the Civil Rights leaders in a way that my white colleagues couldn't. They trusted me in certain ways and used me for information. And what was frustrating was that I began to feel that I would report things. And I would report what I viewed as violations of civil rights and things of that nature. And nothing was done about it. And I'd like to give another example of that frustration. I had a colleague when I was in Selma. Dick Wasserstrom, who was a very bright guy, he's been a UCLA law professor, very bright man who had resigned from there to join the Civil Rights Division. He was very involved in civil rights. And he ended up leaving the department in frustration because... He was way ahead of me. I was just out of law school but Dick would write up complaints and things and things weren't done about it and he was frustrated with the commitment of the department.

THELTON HENDERSON: So in that same kind of frustrated way, I would report things and nothing was done unless there was a report that the blacks are uprising or they're getting guns

and there's going to be violence. And then they would get concerned about it. And I found that very frustrating ...

LOWELL BERGMAN: So your frustration and as I understand it, in those days the Kennedys were not speaking out.

THELTON HENDERSON: Yeah. They were not...

LOWELL BERGMAN: There weren't publicly, they didn't want to alienate the Southern Democrats.

THELTON HENDERSON: Southern Democrats. Exactly. That was a very fragile balance they had. They didn't wanna lose the South.

LOWELL BERGMAN: So out there in the field, you felt like you were all alone.

THELTON HENDERSON: A bit. A bit. Yeah, I felt that, uh, I felt that, uh, one, my job instead of helping the movement was to sort of keep the balance and then make sure nothing bad happened that would hurt the politics of the situation and I thought my job ought to be to better things for the blacks whose rights were being violated. So it was very, very frustrating.

LOWELL BERGMAN: And they wouldn't pay attention unless there was a threat of violence.

THELTON HENDERSON: Unless there was a threat of violence. Yes. That was my experience.

LOWELL BERGMAN: As you say, the Kennedys weren't speaking up.

THELTON HENDERSON: No. They weren't.

LOWELL BERGMAN: People were being beaten.

THELTON HENDERSON: Yeah. People were being beaten.

LOWELL BERGMAN: Shot.

THELTON HENDERSON: Shot, lynched. Voting rights were being denied. And they weren't speaking up and I think during that period, their sole priority was keeping that delicate balance and not losing the South. It's my belief that both of them got better as time progressed and certainly Bobby Kennedy who lived longer than his brother, I think, had almost gone full circle by the time he was assassinated. He was a very different man than the one that I was working under in 1962.

LOWELL BERGMAN: We made this little jump here from you be Department, them only taking it of an interest if they heard that black people had guns or violence might be taking place. And in fact in the years in between '63 and '68 there were riots.

THELTON HENDERSON: There were riots, yes.

LOWELL BERGMAN: There was civil unrest.

THELTON HENDERSON: Yeah.

LOWELL BERGMAN: There were Black Panthers with guns. There were all kinds of, that changed. Is that what made your success possible at Stanford? That people were willing to pay attention now?

THELTON HENDERSON: I think so. I believe it certainly was a part of it, because I think that what King did and what made him finally successful, and I think that success really began in Birmingham, when he showed the country what the Bull Connors were like. And, you know, the brutalization of blacks using fire hoses to sweep them down the street, using police dogs to attack them and all of these kinds of things, it struck a chord with the country. And that's what exactly what Martin Luther King wanted, and that's why he was such an advocate of non-violence, because blacks fighting in the street wasn't going to get to strike the chord that he wanted with the people in the country that he thought would support civil rights if they understood what was really going on. Yeah, I think that was an important part of it.

LOWELL BERGMAN: And then you became a beneficiary, if you will, of affirmative action.

THELTON HENDERSON: Oh, I have no doubt about it. I think it wouldn't be inaccurate to say that I'm an affirmative action baby. I think, I think I'm sitting here talking to you as a federal judge because of affirmative action. Yeah, I believe that.

LOWELL BERGMAN: You entered a world where Stanford University hadn't graduated a black person? And of this law school?

THELTON HENDERSON: I did. I had a job as a leading, the head of the legal aid office in East Palo Alto, which is right across the freeway from Stanford, and I had a lot of Stanford students working for me, and we're in 1966 at this point. And one day, one of them said, "Gee, you know, it's really great, Sally Ann Payton is graduating this year," 1968. "Sally Ann Payton is graduating this year and she'll be the first black in the history of the law school to graduate." And I was astounded. I mean, I know a lot of blacks hadn't graduated from my alma mater Boalt Hall, but certainly they had had a number of them but probably, I think a friend did a survey there and I think I was about the 15th or so to graduate. That was in 1962. And here it's 1968, and Stanford is graduating its first. So, in those days I did things like this. I went over to the law school and asked to speak to the dean about the problem and make a long story short, he ended up hiring me on a half-time basis to set up a minority program for the school to attract minorities that could compete at a school like Stanford.

LOWELL BERGMAN: And so, that was successful, right?

THELTON HENDERSON: That was quite successful, yes.

LOWELL BERGMAN: How, I mean, give me an idea, what happened?

THELTON HENDERSON: Well, that was very successful. The conditions I demanded to take the job were met and one was to give me sufficient money to recruit and recruit back East and around the country with the cream of the crop. And there weren't that many blacks you have to remember, coming down the, coming down the pike in 1968 from our undergraduate schools, who could qualify for schools like Stanford, and most of the blacks who were doing it were going to Harvard and Yale and eastern schools. And so, I wanted to compete for that group. And two Stanford alums, Miles Rubin, and... I'm failing to recall the other fellow's name, gave a substantial sum of money. And I was able to fly around the country, recruit blacks and get them to campus. And I knew I was succeeding when a couple of years into the program, a couple of faculty members came by and said, "Boy, you're doing great Thelton. We've got 28% of the entering class who are in school now. Don't you think that's enough?" Essentially saying, "Slow down now." So, I knew it was a success. It was a great success, and I think, I'm not trying to brag, but I think that the way we did it became a model for other schools who were interested in diversity.

LOWELL BERGMAN: And then ironically, maybe irony isn't the right word, but to fast-forward again from the time that you're appointed to the bench, you get Proposition 209, a repeal, if you will, of affirmative action laid in your lap. What kind of irony is there to that?

THELTON HENDERSON: Well very ironic, very ironic. That when I got the case, I was sort of surprised to get it, and it was noteworthy to know that it was a significant player in Prop 209 was a classmate of mine, Pete Wilson, who was quite a surprise because we got along very well. I thought he was a good guy in law school. I was surprised at this, I didn't understand it. But anyway, when I got the case, I looked at it and just as I do all my cases, and did my research and concluded that it was unconstitutional. And I so ruled, and as you know and as everyone knows I was reversed by the Ninth Circuit, but as I sit here today, I still feel that my ruling was correct. That the case I cited, which is a Washington state case, I don't remember the citings after all of the, citation of the case, was the right case, it set the standard for it. And my expectation for my ruling was that I will eventually get reversed but not because I made the wrong ruling. I think that the Supreme... I figured that the Ninth Circuit would probably uphold my ruling and that the Supreme Court would get it and what they would say is not that I was wrong, but that the case I was relying on is no longer the law and change that ruling.

LOWELL BERGMAN: So, you were surprised initially that Pete Wilson, someone you knew in law school, someone you thought of as a pleasant almost...

THELTON HENDERSON: Pleasant, a good guy yeah.

LOWELL BERGMAN: Good guy.

THELTON HENDERSON: Good guy. Yeah.

LOWELL BERGMAN: Would back the repeal of affirmative action.

THELTON HENDERSON: Would back the appeal. But also that he was as conservative as he turned out to be. I don't know what I expect conservative people to be, but Pete Wilson didn't strike me in law school as that kind of a person.

LOWELL BERGMAN: And when you got the case, you expected that the Ninth Circuit would uphold?

THELTON HENDERSON: I thought it would, uh, 'cause I worked as hard on that case as I worked on any case in my 37 years and I really thought as a matter of research that I had nailed it. Really, I had all my clerks working on it harder than any of us that ever worked.

LOWELL BERGMAN: And you pride yourself on being able to read what might work in the system.

THELTON HENDERSON: I do, yeah.

LOWELL BERGMAN: Right. And the judges who are going to hear it, I know you've done it with judge Kennedy in the Supreme Court, and that you've figured out a way to make the system work for the ideals that you hold.

THELTON HENDERSON: Yeah. Well, on this one I think I just figured out what the lead case was that spoke to the law that I had to interpret. That this was a case that said that legislation like Prop 209 was unconstitutional because it unfairly impacts minority people. And I thought I'd found that case and narrowed the whole research.

LOWELL BERGMAN: And what happened was you, in a sense, got outsmarted by some lawyers on the other side, who I would imagine were saying, "We've got this affirmative action judge sitting on our case, on our proposition." Couldn't have drawn a worse judge from their point of view.

THELTON HENDERSON: I'm sure that's what they thought, yeah.

LOWELL BERGMAN: Right. And they decided to take this to, basically a three, a judge, a panel at the Ninth Circuit that normally just rules on procedure.

THELTON HENDERSON: Right, exactly. And they did. And I've always said over the years that if I... Well I was fairly new then, and I didn't know all of these machinations. I expected the case to be appealed certainly, and that it would be drawn. A three judge court panel on the Ninth Circuit would hear it. But what I didn't know was that you could also make a motion on this, and that analogizing it to my own court. If I wasn't at work one day and somebody on one of my cases had an emergency, we have a judge, a general duty judge that they can go to, that would rule on that motion in my stead. Well, they have the equivalent there. It was a panel but it was a, sort of a general duty panel. And the defendants in the Prop 209 case went to this panel, which happened to be a decidedly conservative panel and they reversed me, right then and there. It never really got to the rest of the court.

LOWELL BERGMAN: So you got checkmated basically?

THELTON HENDERSON: Yeah, absolutely. And if I were to do it again, I would look and see, "Well, who's serving there now?" And that the irony of it all, was that one of my law clerks had to... We filed this case on December 23rd, and we were trying to get the case out fast, because one of my law clerks had to go home to... He grew up on a farm and had to go home. He was the one that slaughtered the lamb and prepared the lamb for their Christmas dinner. I was trying to get him home. If I had it to do over again, I would look and see who's on that panel, and say, "Well, we don't have to file this on December 23, we can wait till January, when you get another panel." And I'm sure it would have been a much different panel.

LOWELL BERGMAN: So, it's a little thing like that, not, not considering someone looking for an opening that undid you?

THELTON HENDERSON: Yeah, absolutely.

LOWELL BERGMAN: Is there like a rebirth of the people who want things to go back to when there was segregation, when black people knew their "place", when people weren't, women weren't speaking up? Do you see that today? Now? After all these years on the bench in all these years?

THELTON HENDERSON: I do see that on the bench. I think that I'm seeing an effort to take us backwards. I see a concerted attack on voting rights, you know, which we worked on in the department so hard. To set those back, and to minimize the effect of the blacks and minorities in the voting booth. In all kinds of ways, I see things regressing. I see people... Just an article in the New York Times this morning, there's an article about the symbolisms that are returning. Nooses being hung on college campuses, and crosses being burned and the N word being used openly. And people feeling free to say things that they didn't feel free to say publicly just a few years ago. Yeah, there's a... Yes, I see that returning and it's frightening and disappointing.

LOWELL BERGMAN: Is there a way in which the prison system and the way that it has expanded and the proportion of people who are African American or of Hispanic descent, way out of proportion to their numbers in population, undone basically the Civil Rights Movement?

THELTON HENDERSON: I think in a very significant way, it has. It's affected the Civil Rights Movement. It's affected the minority populations. There are so many black males who can't get a decent job when they get out because they have a prison record. And I think that there has been unequal prosecution, unequal charging. And just one very simple and obvious example is crack cocaine, which is used primarily by blacks. At one point, they cracked down and the sentence was something like twice as much for using crack cocaine as it was for using powder cocaine which was used primarily by whites. It's things like that that are perverting our system.

LOWELL BERGMAN: Your career has been, being successful in places where white people were usually the only people around, the Civil Rights Division, you're the first black in the Civil Rights Division for example. You pride yourself on being, intellectually being able to figure out where the path is to get a usually white judge to agree with you even if they're a Republican, right? And get things done. But in the end, today, has that ability to do that really made a difference? Are you really frustrated that, you say you don't have enough power, it takes 14 years? And then you have a current administration, you have Jeff Sessions. Right? Alabama prosecutor, kind of your worst nightmare, in power.

THELTON HENDERSON: Yeah. Well, that's almost an abstraction. It's not... Like as you know I'm retiring next month. So, it's not a reality that I will deal with but yeah, no, it's my worst nightmare in the sense that I've always been pleased with the progression of minority advancement in our society.

LOWELL BERGMAN: The arc of justice.

THELTON HENDERSON: The arc of justice. Exactly. I mean, I delight in telling young law students and high school students that there is a future for you, just look at me when I went to law school, there were no black federal judges, ever been one sitting in this country. And now I am one, and now there are a couple hundred more around the country. That's progress. All of the things that are happening now...

LOWELL BERGMAN: You don't think Donald Trump is going to bend that arc?

THELTON HENDERSON: I think he will bend the arc, but it'll spring back again, I think, using the other analogy. I think he's going to take us a step backwards. But I think that we're not going to end the progress. Or, I think, I do think that he would like to end that, and I think that when he says, "Make America great again," I think he's talking about a time when people like me had no relevant place in this country and in this society. But I don't think we'll go back there. I don't think he'll succeed.

LOWELL BERGMAN: Will it take violence to stop it?

THELTON HENDERSON: Uh, I mean, that's an interesting question and I'm not quite sure how to answer it. I just read in the paper this morning that a black policewoman was ambushed and shot in New York. That's violence. So, we're getting violence. I don't know if it will take violence. I think we're getting violence. If you mean like revolutionary violence and people-taking-to-the-streets violence. I—

LOWELL BERGMAN: Well, you spent time around Martin Luther King.

THELTON HENDERSON: Right.

LOWELL BERGMAN: You also saw Malcolm X when he was at his prime.

THELTON HENDERSON: Right.

LOWELL BERGMAN: You lived through the riots. You attended meetings with Huey Newton and Bobby Seale, when they were, just before they were Black Panthers.

THELTON HENDERSON: Right.

LOWELL BERGMAN: And you saw the impact of them carrying guns.

THELTON HENDERSON: Mm-hmm.

LOWELL BERGMAN: And in many ways, people say that it was only when there was violence did the country pay attention. That in the end...

THELTON HENDERSON: Okay, I see what you're saying.

LOWELL BERGMAN: Right, and that today with a, you know, an access that the internet gives to somebody like Donald Trump directly to the mass of people unfiltered. Is there any way to stop that and the results of that in using the compromise, the sophistication that you have brought to this discussion?

THELTON HENDERSON: Yeah. I don't know if there's a way to stop the kind of violence we're seeing and probably increased violence of that type. I think that, you know, and I'm certainly not a, what's the word I want? Not someone who can predict the political future of this country, but I believe that Donald Trump will not serve out this term. I just, I find it hard to believe, that the things he's doing are so contrary to anything we've seen in my lifetime from a President that I think we'll get to the point he has a hard 35%-40% of people backing him. I see this dwindling as he gets more and more outrageous. His wrestling scene with CNN just takes him, you know, where he's supposedly pinning and beating the CNN guy, is another step beyond just his regular Twitters. And I see at some point, even the moderate Republicans are going to say, "This is not what I want of my President and this is not what I want our country to do." And at that point, I think we will return, the Arc will start bending again in the direction it has been going.

Lowell Bergman: Martin Luther King talked about the Arc of Justice, is that what you're talking about?

Thelton Henderson: Yeah. Yeah. He talked about it and I believe that the "Arc of Justice bends toward freedom," as I believe he said, and that that arc is bending. And again, I can see the progress. I can see progress that angry young black students now in college and law school don't see, because they just see what was there when they became aware of social conditions. I can see it back when there were no black federal judges. I can see it back when blacks couldn't vote in Mississippi. I, now, I go back to Birmingham, where I could only stay in one hotel in that town, and they've had a black mayor. That's the Arc of Justice right there, but it's slowing down. Now, to get back to your original point, I think there are people intent upon slowing down that Arc. I think there will be setbacks. But the other way I put it is I think that the march toward equal justice has been two steps forward and one step back, and I think we're in a period now we're taking that step back. That's the way I would put it.