



**THE HONORABLE  
ARTHUR RAYMOND RANDOLPH, JR.**

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

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The Historical Society of the  
District of Columbia Circuit**

**United States Courts  
District of Columbia Circuit**



**THE HONORABLE  
ARTHUR RAYMOND RANDOLPH, JR.**

Interviews conducted by:  
E. Barrett Prettyman, Jr., Esquire

March 15, April 19 and May 17, 2002  
March 1, 2004

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## **NOTE**

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

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## **PREFACE**

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

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

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

**INTERVIEWEE ORAL HISTORY AGREEMENT**

Historical Society of the District of Columbia Circuit

Oral History Agreement of

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

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

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

[Handwritten Signature] 1/22/09  
[Signature of Interviewee] Date

SWORN TO AND SUBSCRIBED before me this

22 day of January, 2009.

[Handwritten Signature]  
Notary Public

**ARMY WILKINS**  
**NOTARY PUBLIC DISTRICT OF COLUMBIA**  
My Commission Expires April 30, 2013

My Commission expires April 30, 2013

ACCEPTED this 4<sup>th</sup> day of February, 2009, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

[Handwritten Signature]  
Stephen J. Pollak

Schedule A

Transcripts resulting from four (4) interviews of Judge Arthur Raymond Randolph on the following dates:

<u>Dates</u>	<u>Pages of Transcript</u>
Interview #1, March 15, 2002	1 – 26
Interview #2, April 19, 2002	27 – 54
Interview #3, May 17, 2002	55 – 77
Interview #4, March 1, 2004	78 – 108

The transcripts of the four (4) interviews are contained on one diskette.

INTERVIEWER ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of

1. Having agreed to conduct an oral history interview with Judge Ray Randolph for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, E. Barnett Prattigauk, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings, transcripts and computer diskette of interviews, as described in Schedule A hereto, including literary rights and copyrights.

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

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

E. Barnett Prattigauk      9/19/07  
[Signature of Interviewer]      Date

SWORN TO AND SUBSCRIBED before me this  
19<sup>th</sup> day of September, 2007.

Marilyn Owendoff  
Notary Public

My Commission expires 2-28-10

ACCEPTED this 30<sup>th</sup> day of October, 2007, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak  
Stephen J. Pollak

Schedule A

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ORAL HISTORY OF JUDGE ARTHUR RAYMOND RANDOLPH, JR.

First Session, Friday, March 15, 2002

Mr. Prettyman: This is E. Barrett Prettyman, Jr. and I'm beginning the oral history of Judge Arthur Raymond Randolph, Jr. of the D.C. Circuit Court of Appeals on Friday, March 15, 2002. Judge, let's start at the beginning. Where were you born?

Judge Randolph: Riverside, New Jersey.

Mr. Prettyman: Do you remember your grandparents on your mother's side?

Judge Randolph: Only my grandmother.

Mr. Prettyman: How old were you when she passed away? Do you remember? I mean, were you in early childhood or was that later?

Judge Randolph: I was in college.

Mr. Prettyman: So you actually got to know her pretty well.

Judge Randolph: I knew her pretty well.

Mr. Prettyman: Was she a housewife or was she engaged in work?

Judge Randolph: Well, when I knew her she was not working. She raised a family of five children by herself, lived in Merchantville, New Jersey.

Mr. Prettyman: Nearby, so you got to see her.

Judge Randolph: We were there constantly – weekend visits of family, and my grandmother was very fond of Saturday night fights with arranged betting –

Mr. Prettyman: Not within the family?

Judge Randolph: Laughing No, no, on television. I remember the family always used to sit around – They were also very fond of games. We played numerous kinds of games. There were cards, there were board games. As a child, it was wonderful to go over to grandma's house and participate.

Mr. Prettyman: What about your grandparents on your father's side, did you know them?

Judge Randolph: My grandmother only; my father's father passed away when he was very young. My father contracted scarlet fever and my grandfather took care of him and got the disease himself and died.

Mr. Prettyman: Really.

Judge Randolph: Yeah. So my grandmother on my father's side also raised a family of four by herself. Is that right? – Three.

Mr. Prettyman: That's barely getting –

Judge Randolph: I knew a bit more about my family on my father's side than I did on my mother's side. My great-grandfather was a businessman in Philadelphia who had a very exotic business, among others, and he was noted for bone-carving and ivory-carving. He used to go to Africa and pick up tusks of elephants. One of the things I was very fond of when I visited my mother's house was to play with this scrimshawed walrus tusk which my cousin now has and

I've been trying to get from him for years. And so there was a great deal of ivory in the family. His property was located – the business that he had, which was a multistory building in Philadelphia – was on land now that is part of the Betsy Ross National Park because it was right next to Betsy Ross' house and I recall when my daughter went up on a school trip from National Cathedral School, I called the National Park Service and said that my daughter was coming up and would the Ranger that's showing them through the Betsy Ross House and the Park mention that the land they're standing on was donated by the Randolph family to the National Park. My daughter was just thrilled.

Mr. Prettyman: Of course she was, that's great. Now that was your great-grandfather. What did your grandfather do?

Judge Randolph: My grandfather, I believe, was an electrical engineer.

Mr. Prettyman: And your other grandfather, the one who died young.

Judge Randolph: I don't know anything about him.

Mr. Prettyman: Oh, interesting. What kind of relationship did you have with your parents growing up? Did you have brothers and sisters?

Judge Randolph: I had two brothers.

Mr. Prettyman: And were you a very close family?

Judge Randolph: I was a very outdoors person, hunting and fishing. We lived next to Big Timber Creek and a lot of marshland and farmland. As a matter of fact, our house was close to the largest dairy farm in New Jersey. I thought it was the largest. It was a huge dairy farm – Abbott's Dairies – and that was my playground when I was a kid. And the thing that I liked to do was just romp the fields.

Mr. Prettyman: By yourself? With friends?

Judge Randolph: With friends. My youngest brother was born when I was 11 so there was a great gap and my other brother was not an outdoors type person – not that kind of person.

Mr. Prettyman: Was he older or younger?

Judge Randolph: Younger.

Mr. Prettyman: Younger, so you both were younger?

Judge Randolph: Right.

Mr. Prettyman: So the implication is that you did not spend a lot of family time because you were outdoors so much. [Laughing]

Judge Randolph: Well, we did spend a lot of family time. Every evening was a family dinner where my mother and father used to talk about politics and events of the day, and so on and so forth, and that was, I think, a very important thing. And difficult in this day and age when both parents are working and children are off doing one activity or another, but nevertheless we managed to do that and that was very helpful. And, of course, we had these horrible trips where we'd pile into the car and go up to Watkins Glen or the Thousand Islands or someplace in Virginia to visit my father's sister who was a missionary. So occasionally they'd be in the country and be in some rural place in Appalachia and we had to go down and visit them, and they were just terrible trips. (Laughing)

Mr. Prettyman: What did your father do?

Judge Randolph: My father was a very interesting fellow. He – as I understand the story – he did very well in high school and got a scholarship to Oberlin College for public

speaking, of all things. And the depression hit and my grandmother was raising children without – she had no job as far as I know – there was some family money that kept her going, I guess, but he found it necessary to go to work and gave up the scholarship, which he talked about occasionally with us, and became a professional photographer for a while and couldn't make a living and then when the war broke out, he went to work in a –

Mr. Prettyman: This would have been WWII?

Judge Randolph: Yes. He went to work in a shipyard and became a rather skilled machinist. He did that for most of his life. He wound up toward the end of his life in the office of Owens Corning Fiberglass. He was also very active in union affairs and was president of the local union. I think the first job I ever had was doing dues checkoffs. I remember sitting at the dining room table and literally checking off each person's name to make sure that they had paid their union dues for the month.

Mr. Prettyman: This is not when you were with General Motors, was it?

Judge Randolph: No, this is long before. I think I must have been 11 years old.

Mr. Prettyman: Oh my goodness – yeah, yeah. (Laughing) Did your mother work?

Judge Randolph: She did. She worked in a dress shop for a while selling basically for weddings and things like that, but not for a long time – 10 years.

Mr. Prettyman: Right. So it was a close-knit family?

Judge Randolph: Yes.

Mr. Prettyman: And where did you grow up? You were born in Riverside. Did you stay there during your childhood?

Judge Randolph: No, we never lived in Riverside. We lived in a town called

Palmyra, New Jersey, for a while, which is where my grandmother and my great-uncle lived, and then moved in 1950 to what was then a very small rural town called Glendora. It's now a bedroom community for Philadelphia, but at that time it was very, very rural and we were one of three houses that had been constructed in the early or the late 1940's that were up on a rise on a hill that overlooked all this farm country. So it was interesting.

Mr. Prettyman: And you had your own room?

Judge Randolph: Yes.

Mr. Prettyman: And where did you go to high school?

Judge Randolph: I was a member of the first graduating class of a high school called Triton Regional High School.

Mr. Prettyman: And when did you graduate?

Judge Randolph: The year was 1961.

Mr. Prettyman: And what did you tend to focus on in high school – sports or the newspaper or yearbook or what?

Judge Randolph: Sports and girls.

Mr. Prettyman: Sports and girls, not in that order. (Laughing)

Judge Randolph: I had a varsity letter in track. At that time it was a fairly large high school, but I was the fastest sprinter in my high school and I had a varsity letter in football and a varsity letter in wrestling.

Mr. Prettyman: Oh. Now, after high school I've seen one reference to your being a General Motors factory worker and another that during the summer of '66 you were a labor relations representative. Will you straighten that out for us? Was one of these a summer job and

another was a regular job?

Judge Randolph: It's interesting how your life is filled with all kinds of chance things that happen and if I can back up a little bit. My last year in high school I was very successful in wrestling and given the fact that my family had very little money, I needed to get financial assistance if I wanted to go to college. So I thought I would use the wrestling to get a scholarship and, in fact, had one, I thought, at Columbia University. And I sent my application in and it was accepted, but I never got the papers for the scholarship. The coach had come down and knew the wrestling coach of my high school. And I kept waiting and waiting and waiting and he had promised me a \$1,600 scholarship which would enable me to attend Columbia. Finally, I called him, getting nervous as it was May, as I remember, and still hadn't gotten the papers. And I called him on the telephone. And this is a conversation that I will never forget. I couldn't afford to go to Columbia without that \$1,600 a year scholarship. And he said, "Wait a minute now. I did offer you a \$1,600 scholarship but I just haven't completed the paperwork and you will get it. But it is \$400 a year. Not \$1,600 a year." I panicked and as a result of that I wound up going at the last minute to Drexel in Philadelphia, figuring that I could commute, which I did for five years. And got a scholarship for wrestling and then managed to get a loan. So that is how I wound up at Drexel.

But even then I couldn't afford it so they had a coop plan where you work for six months and then go to school six months. But it takes you five years to graduate. I enrolled in the coop plan and wound up as a management trainee at General Motors outside of West Trenton, New Jersey. And the first year I was there General Motors was running full tilt and this was the branch that made all of the hardware: outside door handles, trim and all that. What happened is

that they were running 24 hours a day and some of the foremen on the assembly line took sick – they were under great stress – so here I was at 19 years old, a warm body, and the foreman of the outside door handle line at General Motors got ill and they put me in charge of 40 people on the assembly line, most of them were women. It was a fascinating experience. And the reason I wound up in labor relations the next time I came back was because – this would have been a year later – because you did your six months, and then you went to Drexel and then you came back; why I wound up there was because on the assembly line I watched these people and it really was a conveyor belt and somebody would put a spring on and someone would put a lubricant on and somebody would stamp it, and the next person would do this and that, all the way down until it reached the end of the line. As the foreman I walked around watching this and I thought, Gee what a boring existence. What I will do is rotate the people from one position to another. Of course I didn't consult with them at all. I just announced it. And I set a record at the plant for getting the most grievances filed against me in the shortest period of time. I immediately had 40 grievances filed. (Laughing) I would have thought they would have loved that. Well, that is what I thought. Then we had a meeting because I thought we had better meet about this. They all explained to me that if I thought that putting a spring on was more fun than dipping the spring into the lubricant or stamping the handle, I was out of my mind. There was not a single job on that line that gives any kind of reward except the only pleasure that they get is being able to do these jobs without thinking, so that they can gossip about who is going out with whom, and who is making this across the line. And I had destroyed their existence because now they have to think all the time on these stupid spring-loaded things that are coming down the line. And so I said, “Okay, everybody back to their original position.” (Laughing). Then I got the award for

settling the most grievances in the shortest period of time. They were all happy. The line ran on something like 90-95% efficiency for the rest of the time. So when I came back to work the following summer, they said, "Listen, you have some experience with labor relations. Why don't you come to work in the Labor Relations Department," which is what I did.

Mr. Prettyman: So you weren't a foreman any more?

Judge Randolph: I was not a foreman.

Mr. Prettyman: You were working in labor relations, so you did both?

Judge Randolph: This is what got me into law school. That is how I wound up being interested in law school, because at the time retired Justice Whittaker of the Supreme Court was the Chief Arbitrator at General Motors and there was a common law of plant by plant and within the entire company about various matters and I was given the duty of investigating grievances. I would look up what Justice Whitaker had said and what arbitrators had said. And I would interview people and take down what they had to say, and so on. And I said I really enjoy this.

Mr. Prettyman: Did you work with Justice Whitaker?

Judge Randolph: Oh, no. I don't know where he was. He may not have been in too good a shape in those days, actually. When he left the Court – this is '63. I can remember this because I was on an assembly line – '63 I was a foreman – February. That is right. I was 19 and that is the year that John F. Kennedy was assassinated. I was on the assembly line. I remember when the word came. Everything stopped.

Mr. Prettyman: What did you major in at Drexel?

Judge Randolph: I started out in business administration, which I absolutely hated and dropped out after three months. Then I didn't know exactly what I wanted to do so I began

taking courses that would enable me to get a degree in either chemical, electrical or mechanical engineering. So I took basic engineering, thermodynamics, calculus, chemistry and organic chemistry.

Mr. Prettyman: Did you intend at that stage to be an engineer?

Judge Randolph: I wasn't sure. I almost wished to become a physics major, which I could have done without too much trouble. Maybe a few extra credits in the summer. But I wasn't really quite sure. I think I wanted to be an engineer but I wasn't really sure about that. And then I saw what some of the engineers were doing at the General Motors plant and I wasn't happy that I would be doing that sort of thing. Then I came back and decided to go to law school after I switched to economics and did something we used to call econometrics, but now people call economics forecasting, using the mathematical background that I had to plug it into economics. I wound up with a Bachelor of Science in, I think they called it Commerce and Engineering, with a major in economics, a very odd degree.

Mr. Prettyman: I understand that you were on the dean's list every year?

Judge Randolph: I am not sure about that. I can't remember. If I said that at an earlier point in my life, it was probably more accurate. (Laughing)

Mr. Prettyman: But you did well, in any event.

Judge Randolph: I did fairly well.

Mr. Prettyman: At what point after you came back from your experience in labor relations did you think for the first time, gosh, I might like to go to law school, what year would that have been – '64 or '65?

Judge Randolph: Yes, '64 or '65. I also read a book that influenced me. Curious, it

was an oral history of Felix Frankfurter. It was called Felix Frankfurter Reminiscences. I may still have it. It was in paperback. When I recall reading it, it was the oral history done at Columbia by Felix Frankfurter. I read parts of that.

Mr. Prettyman: I would like to take a look at it.

Judge Randolph: So we won't forget it, I will go get it. [Leaves and returns]

Mr. Prettyman: As far back as you can remember, has anyone in your family ever been lawyers up to the time that you went to law school?

Judge Randolph: I don't know.

Mr. Prettyman: You don't remember anybody. Your brothers, father or grandparents were not? So, you graduated from Drexel in '66?

Judge Randolph: Yes.

Mr. Prettyman: Did you apply to several law schools or just one?

Judge Randolph: I applied to two. I applied to Villanova and Penn. And the reason I did that was, once again, the money question. I was told by General Motors that they would keep a summer job for me even when I was in law school

Mr. Prettyman: Oh. Was that in labor relations?

Judge Randolph: Yes, in labor relations. So I figured I wanted to stick close to home. I was accepted at both, and the moment of truth came for me because Villanova offered me a full scholarship, including books, tuition, housing expenses. Penn offered me a \$1,000 loan. I can recall trying to decide which I should do. I took a look at the figures and somehow or another I decided I would go to Penn. (Laughing).

Mr. Prettyman: You have described your first year at Penn as "intimidating." What

did you mean by that?

Judge Randolph: Well, I considered myself a poor boy from a rural background without any kind of great intellectual training, particularly having been an engineer and then having gotten into law school. Some of my classmates would stand up and talk for 30 minutes about the history of the Court of the Exchequer Chamber, of which I knew nothing in the beginning. I thought, Oh my goodness, I am out of my league here. It was an intimidating experience.

Mr. Prettyman: You had to learn a whole new language. How large was your class?

Judge Randolph: About 180.

Mr. Prettyman: Were you first in your class all three years?

Judge Randolph: I was.

Mr. Prettyman: You won a number of scholarship prizes.

Judge Randolph: I wound up after the first year getting a full scholarship, books, tuition.

Mr. Prettyman: That must have eased your mind.

Judge Randolph: I had no idea that such a thing was available. It shocked me. I remember after the first year I became good friends with a fellow whose in-laws had a house in Maine and we were going to drive up there for a week or so. And we were packing and went back to the law school and one of the professors, Professor Schwarz, had posted what he had considered the two best exams in criminal law, and Peter Gross (who later became General Counsel of Home Box Office) and I were reading these exams and I thought, Oh my goodness,

I'm done. Look, I said, this guy is citing cases and cases, and then I got about halfway through and I realized it was my paper. Talk about out-of-body experience. (Laughing)

Mr. Prettyman: During the summer of '67 you were research assistant to Professor Robert Gorman. Would you tell us a little about that? What did he teach and what did you do for him?

Judge Randolph: He taught contracts the first year and he also taught labor law. But he was putting together a book on copyright and I just did basic research for him, pulling cases together, material on copyright. None of which I remember.

Mr. Prettyman: Were you paid for that?

Judge Randolph: I was.

Mr. Prettyman: During the next summer of '68 you were a law clerk at Sullivan & Cromwell in New York. What did you do with them?

Judge Randolph: I did legal research memos and things of that sort. Worked on one very large case which was called Crain Company v. Westinghouse Air Brake. [<sup>1</sup>]

Mr. Prettyman: Antitrust?

Judge Randolph: It was a securities case. Once again, because of no money, I commuted daily from Philadelphia to New York City, which was a nightmare, on trains that weren't air-conditioned and would always break down at Princeton. My day was very, very long. Up at the crack at dawn and not home until –

Mr. Prettyman: Would you come back at night?

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<sup>1</sup> Crain Co. v. Westinghouse Air Brake Co., 419 F.2d 787 (2d Cir. 1969), cert. denied, 400 U.S. 822 (1970).

Judge Randolph: I did it daily and another reason was, I think, the law review was behind and I was working on that on the train. But I proceeded to do work on the train and I took the file in Crain Company v. Westinghouse Air Brake which hadn't been filed yet. I think it was a 16B case, but I am not really sure. And I had to stand, as I usually did, because I couldn't get a seat usually from New York to Princeton. And I had my briefcase between my legs. When the people exited in Trenton, I reached down and my briefcase was stolen.

Mr. Prettyman: Oh my God.

Judge Randolph: Here I had lost the case file. And the train took off. What I did was when I arrived in Philadelphia I hopped in my car and drove back to Trenton with a flashlight and all through the night I figured that anyone who opened that briefcase up was going to find something that was not worth anything to them and they would throw it away. I didn't find the briefcase. Never found it. Then I drove back to get the train to go back to New York again. But the partners were very nice about it. I explained what had happened and fortunately they had duplicates. But I lost a good many original copies.

Mr. Prettyman: And a good night's sleep.

Judge Randolph: It was just awful.

Mr. Prettyman: It is like the Hemingway novel – gone. You graduated from law school summa cum laude and you became managing editor of the law review in your last year. Was that enjoyable work?

Judge Randolph: It was. The law review was well behind the March issue, which would be published in January of the following year, and so a fellow named Loftus Becker and I wound up putting together not very good material but enough to fill the pages up. Our major

accomplishment was that we caught up so we published – I don't know what they were publishing, six to nine issues – but we did one and a half times that within the period of time that we were on the Review.

Mr. Prettyman: What were your politics during college and law school? The same as they are today? I mean were you a conservative Republican or were they different in those days?

Judge Randolph: I think they were different. I think I was more Democrat than Republican. I think I voted for LBJ rather than Barry Goldwater, as an example. But I don't think I was very ideological at that time. I was more inward looking.

Mr. Prettyman: Was your family a Democratic family?

Judge Randolph: Very much.

Mr. Prettyman: And your brothers?

Judge Randolph: Democrats.

Mr. Prettyman: When did you begin to get a different view?

Judge Randolph: In law school.

Mr. Prettyman: Because of the law?

Judge Randolph: I don't know why. I began finding myself more in line with the Republican viewpoint than with the Democratic. I think that one of the reasons was that I didn't look very fondly on many of the Warren Court decisions. [CHANGES TAPE] It was a long-standing joke of mine and several of my classmates at law school that in our law school class of 180 or so, there were only three Republicans, and now they are all federal judges. [Laughter] Jay Waldman and Stewart Dalzell are both district judges, one in Boston and the

other in Philadelphia

Mr. Prettyman: At any time during your college or law school career were you involved in anybody's campaigns? Did you go out and work for anybody?

Judge Randolph: My father ran for office. I don't even remember what it was. It was a local office.

Mr. Prettyman: A city office or a statewide office?

Judge Randolph: It was a township office. I went door-to-door with pamphlets and passed them out. And he didn't win. [Laughter] I don't know what the lesson of that was.

Mr. Prettyman: Did you date much in college or law school?

Judge Randolph: I was married in law school. We got married in 1966.

Mr. Prettyman: What year of law school would that have been?

Judge Randolph: I got married right before I went to law school. I got married right after I graduated from college and right before I went to law school in the summer of 1966.

Mr. Prettyman: Tell us how you met your wife.

Judge Randolph: At a wedding. This was my first wife. We met at a wedding and it turned out we had mutual friends and started dating and I think we were dating three years.

Mr. Prettyman: Instant attraction?

Judge Randolph: Yes.

Mr. Prettyman: So you knew her before the end of college.

Judge Randolph: I am not sure if it was three years of dating, maybe two.

Mr. Prettyman: After law school, did you take both the California and the D.C. bar exams?

Judge Randolph: I took only California.

Mr. Prettyman: Now why did you take California?

Judge Randolph: Well, between law school and working, O'Melveny & Myers made me an offer I couldn't refuse, which was to come out and work with them at an associate salary.

Mr. Prettyman: Had you worked with them during the summer?

Judge Randolph: No. And they moved all my furniture and stored it. They moved it to New York and stored it for me. Then, as I recall, I got a month off with pay if I would agree to take the California bar.

Mr. Prettyman: So they wanted you to work in California rather than in New York.

Judge Randolph: I don't know if they had a New York office at that time. So they said, that is the deal and we will pay for your bar review course and classes and everything else. So I accepted [thinking] I am not going to take the bar review courses – just get the material and have a good time and study just from the material – which is what I did.

Mr. Prettyman: But then you did take the California bar?

Judge Randolph: Yes.

Mr. Prettyman: You then became a member of the D.C. bar as a result of being a member of the California member. Waived in?

Judge Randolph: Yes.

Mr. Prettyman: During the summer after law school you became an associate at O'Melveny in L.A. What kind of work did you do with them?

Judge Randolph: I did some labor relations work. I think it was CBS they were representing. I am not quite sure. I don't remember what else.

Mr. Prettyman: Did you plan at that stage on being in California indefinitely?

Judge Randolph: I decided at the end of that summer that it would be impossible for me to live in California because the distractions were so great. I still loved the outdoors. I liked to play golf. I liked to fish. I liked to swim and to surf. And all the rest of it. I thought I'd turn to mush if I moved there. I don't think I would have enough self-control to resist all of these other temptations and so I decided that I just couldn't possibly do it.

Mr. Prettyman: Were you living near the ocean?

Judge Randolph: Fairly close We were living in West L.A. but you are not very far no matter where you live in L.A. You can get there for surfing. And I played golf and tennis and swam. So I had a great time. I thought this is not the kind of life I want.

Mr. Prettyman: Tell us how you became Judge Friendly's law clerk on the 2nd Circuit.

Judge Randolph: Paul Mishkin, who is a professor now at Berkeley, told me that Henry Friendly had said to him and to Tony Amsterdam that if they both recommended a fellow, he would hire him at some point. So they both recommended me and I got hired.

Mr. Prettyman: Now was that because you were really looking to get out of L.A. or did this come clearly out of the blue to you?

Judge Randolph: No. I interviewed in the fall of my third year of law school before I even accepted the position at O'Melveny & Myers. So I was interviewing for a clerkship. I applied to Judge Friendly and Judge McGowan. I also applied to Judge Leventhal and I think I applied to Justice White and Justice Stewart. That was it. And I was fortunate enough to get the Friendly position.

Mr. Prettyman: How did you know Tony Amsterdam?

Judge Randolph: He was a professor at Penn. I took him for criminal procedure.

Mr. Prettyman: You liked as well as respected Judge Friendly?

Judge Randolph: I did very much.

Mr. Prettyman: He became a hero of yours.

Judge Randolph: Yes.

Mr. Prettyman: To what extent did his judicial philosophy vary from yours, to the extent that you had one at that stage, but I mean philosophy of the law, if you will.

Judge Randolph: Well, I liked to think not very much. I think he is the most brilliant person I have ever encountered in my life and I think he was approaching genius if not a genius. As far as his analytical abilities, I can't possibly compare. As far as his philosophy of judging, I think I try to evaluate each case as it came and he tried to render an impartial decision. I don't think he was predisposed in any case that I saw. He struggled through a good many opinions that he wrote. Sometimes even to the extent of not knowing exactly even after a conference how he was going to come out and he would just start writing and he would work his way through it. And that happened occasionally to me, although not as often as I think it happened to Friendly. As you can call it conservative, or whatever, but I don't know that I ever thought of his judicial philosophy in any particular way other than in trying to get the thing right. And not reaching out in a way that the Warren Court did. He was very critical of that.

Mr. Prettyman: To what degree did you disagree with him on individual cases? In other words, that you were aware at the time that you would have voted differently if you had been a judge?

Judge Randolph: Well, there were two cases that I disagreed with him on.

One of them – let me back up. Friendly drafted all of his own opinions. He did it on a yellow pad or a white pad, depending on his whim at that particular minute. And I never saw him spend more than a day writing an opinion, even if the opinion in print was 40 pages. That experience is one that other law clerks – at least in his prime – also experienced. He would close his door and just start writing and he would get it typed up into triple-spaced legal paper. And sometimes he would not show it to a law clerk for three or four days. He'd put it in a file he called "The Cooler" because he might have further thoughts and reconsider.

Mr. Prettyman: What Harry Truman should have done. [Laughter]

Judge Randolph: But over the Christmas holiday he went on a trip and then stayed at home for a while and I was working on a particular opinion and I just thoroughly disagreed with his disposition of the case. And so he called me. He used to get nervous if he didn't have anything to work on. So he asked, "Where is that such and such opinion? Are you finished with that yet?" And what I had done was written another opinion coming out the entire opposite way. He said, "Bring that up." I thought, "Oh my goodness, this is the end of my career as a law clerk." He was very gruff. So I went up to his apartment on Park Avenue and he said, "Do you have it?" I said, "Not exactly." I thought he was wrong and so I drafted another opinion. He said, "Give it to me," and I did, then said, "Goodbye." A few days later after the holiday was over, he came storming into the chambers and threw my draft down on my desk and wrote across the top (which I still have): "I yield."

Mr. Prettyman: Really? What area of the law was that in? Criminal?

Judge Randolph: No. I can't remember. The case was Devonian [<sup>2</sup>] and something. It dealt with natural gas and Indians and complicated statutory interpretations, and so on.

Mr. Prettyman: Interesting that you would depart from him on a complicated case like that.

Judge Randolph: I don't recall the details. I just remember, "I yield."

Mr. Prettyman: Well what about the other case?

Judge Randolph: Well, there is a tale about the other case.

At the time I was clerking it was the height of the Vietnam war protests. There was a riot in New York at Pace College which was not very far from Foley Square, and I went out at lunchtime and was walking around and I heard all of this commotion. I walked down to see what was going on and there were a lot of people around and students and construction workers, I believe, were the ones who were rioting. They had pipes in their hands and they were starting to beat people and kids. I went down there and I saw some kid get hit with a pipe and I made the mistake of wading in and promptly got smashed across the face with a pipe I thought I was going to lose my eye. Constance Baker Motley was a district judge and an action was filed in the Southern District of New York against the police commissioner, claiming that the police had just stood by while these riots were going on instead of joining other police to protect people. I didn't know this until after but it was a temporary restraining order that she entered – a TRO – because it was the next day. It was an emergency appeal, and Friendly took it and wrote the opinion and did not show it to his law clerk who was sitting in the chambers with a great big patch over his eye wondering if he was only going to have one eye for the rest of his life. I didn't agree with the

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<sup>2</sup> United States v. Devonian Gas & Oil Co., 424 F.2d 464 (2<sup>nd</sup> Cir. 1970).

opinion for reasons that had nothing to do with the merits; I thought he totally stretched the law because TROs are not appealable.

Mr. Prettyman: He upheld the TRO?

Judge Randolph: No, he struck it down. He accepted the appeal and then reversed. And made up some sort of doctrine which baffled me. I taught injunctions for a number of years at Georgetown and I would bring this case up without telling the students the background that I just told you. And ask them to please explain this distinction that Friendly had made in this particular case.

Mr. Prettyman: I think that would be interesting if you could find it there.

Judge Randolph: Here it is. Belknap v. Leary, 427 F.2d 496. [<sup>3</sup>] This was at the end of my tenure on May 27. Plaintiff asked Judge Motley in the district court, without notice to the defendants, for an order to restrain the police commissioner for failing to afford protection against physical harm that legally constituted demonstrations on the Memorial Day weekend. The Second Circuit issued an opinion: “We are met at the outset with a question of our appellate jurisdiction. The order is not a final decision under 28 U.S.C. § 1291, and the grant or denial of a temporary restraining order is generally not appealable. However, . . . unlike most temporary restraining orders, the one here under appeal is essentially affirmative. We regard it as a mandatory injunction, appealable under 28 U.S.C. § 1292 (a)(1), even though it is of short duration . . .” So this is mandatory and the other is prohibitive which is a distinction that used to prevail in England in the 17th century. There is no prohibitive injunction, which can't be reframed in mandatory terms.

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<sup>3</sup> Belknap v. Leary, 314 F. Supp. 574 (S.D.N.Y.), vacated, 427 F.2d 496, 498 (2d Cir. 1970).

Mr. Prettyman: Describe your typical working day with the Judge.

Judge Randolph: I arrived shortly before he did. He always arrived promptly at 9:30 a.m. and he rarely went to lunch. He would take cheese, crackers and a drink called “Snappy Tom” at lunchtime and read law reviews or work on a law review article and then he would leave at 5:30 p.m. And then my co-clerk, a fellow named Monty Gray, a marvelous fellow, and I would break out the Go board which is a Japanese game that has little white and black disks on a matrix. And we would start playing Go. That was a typical day. Sometimes we would have absolutely no interaction with Judge Friendly because he would close the door and write. And he would be writing law review articles, or he would be writing opinions if he had opinions to do. And unless he had something to discuss with you, there would be no interaction. So that would be a typical day.

Mr. Prettyman: Now, when you got a draft, would you then go fill in the cites and add law review citations or whatever, treatises or whatever? But you wouldn't revamp very much.

Judge Randolph: Well, sometimes we did. I think both of us, Monty Gray and I, rewrote things. We thought they could be framed better. We changed sentence structure. We'd do additional research. If we saw problems in the case, we would write a memo to him about it.

Mr. Prettyman: Did you ever do bench memos?

Judge Randolph: No.

Mr. Prettyman: Did you sit in on any oral arguments?

Judge Randolph: Very rarely. The quality of attorneys who were arguing in the 2nd Circuit, which I thought was very poor – and I didn't think it was a productive use of my time to

go attend the oral argument. Occasionally, I would go if it were a case that I knew the attorney's name. Simon Rifkind argued, and I thought he was marvelous so I went to watch him. And a few others. But by and large, I wouldn't go to the oral arguments. What would happen is that they had a very different system in the 2nd Circuit than now. If they were cases that I was working on, I would robe the judge. We would go into the robing room and the tradition there at the time was the law clerk would take the robe and put it on the judge so you would listen to the banter and discussion among the judges before they went out. Then I would leave and go back to the chambers. But after the oral argument there was not an immediate conference like we have now. The judges would go back to their chambers and each one would write a memo about how they thought the case should be disposed of.

Mr. Prettyman: They did not meet right away?

Judge Randolph: Correct. Then about a week later they would have a conference after the memoranda had circulated. What would happen in our chambers is that after the argument I would talk to Judge Friendly about the case and then, as I recall, the law clerks did a good bit of the memo writing and then he would edit that. By and large, we did those memos, the post-argument memoranda to other chambers. And then he would have his conference and come back. If the opinion was assigned to him he would immediately start working on it.

I don't know if I have told this in that interview I did with Jeff Cole but –

Mr. Prettyman: Well, don't hesitate to repeat because this is going to be for an entirely different audience.

Judge Randolph: Several weeks into my clerkship I went back after oral argument and into his chambers and Judge Friendly asked me what I thought about a particular case and it

was a case involving exhaustion of administrative remedies in the selective service prosecution. The fellow was a divinity student. He looked like he qualified for conscientious objector status but he hadn't raised the claim before Selective Service, and they prosecuted. And he was sentenced to a fairly stiff jail sentence. Judge Friendly asked me what I thought about the case, and I told him in these exact words: "I am biased against application of exhaustion doctrine in a criminal case which leads to a conviction when it's clear as a bell this guy was a conscientious objector. And I thought it was much too harsh." And he said, "Harsh, I don't care about harsh. I don't care about your biases. What's the law? That is what you should be telling me." Anyway, he assigned the opinion to Wilfred Feinberg and some time went by, I think it was the following spring, and they were going to affirm the conviction. And Judge Feinberg wrote a memo and came back and said that he was struggling and that he had decided that he could not vote to affirm the conviction because application of the exhaustion doctrine in this case was too harsh. [Laughter] So I took the memo into Judge Friendly. I was feeling redeemed. He picked up the opinion and wrote it affirming and Feinberg dissented. And the beginning of the Feinberg dissent was that this application of the exhaustion doctrine is much too harsh. The Supreme Court took the case [4] and Justice Marshall sustained the exhaustion doctrine in the criminal case. I went off to the Solicitor General's office and at some point I got a call from Henry Friendly and he said, "Do you remember that such and such case?" Of course I remembered. I said, "Yes." He said, "Well, after we affirmed, the petition for certiorari was granted and the case went back and there was an application for resentencing which was denied by the district judge. Now the case is up here on appeal for sentencing review. You know we have this long-

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<sup>4</sup> U.S. v. McGee, 426 F.2d 691 (1970), affirmed, 402 U.S. 479 (1971).

standing doctrine that we don't review sentences that are within the maximum." That was the law. You don't review sentences. I said, "Well, Judge, what do you want me to do about it." He said, "The sentence is really harsh. Why don't you tell Erwin Griswold of our conversation because if I can't figure out something, I may have to make inroads into the nonreviewability doctrine of sentences. Maybe Erwin has some ideas." Of course I went and told Griswold and then within a day the U.S. Parole Commission convened in Erwin Griswold's office and this fellow was released.

Mr. Prettyman:           What an interesting story. The harshness doctrine.

ORAL HISTORY OF JUDGE ARTHUR RAYMOND RANDOLPH, JR.

Second Session, Friday, April 19, 2002

Mr. Prettyman: One thing, Judge. Oh, incidentally, this is E. Barrett Prettyman, Jr. and this is our second session for the oral history of Judge Arthur Raymond Randolph, Jr. and it is April 19, 2002. Judge, one thing I believe you have tried to illuminate with regard to Judge Friendly is that he confronted difficult issues and let his readers know in his opinions that he was struggling on occasion and then carefully explained why he eventually came out the way he did. Do you feel that you have tried to do the same thing and that you have been successful in that?

Judge Randolph: I sometimes . . . don't know whether I have been successful in that. [Inaudible due to microphone moving.] There have been cases where I wasn't sure exactly . . . a) whether the result that we had reached in conference was correct and I wasn't sure how that would write, and those kinds of cases lend themselves to trying at least to put out both sides of the coin and map it out. I don't know whether I have been very successful at it. Friendly, there were occasions where he would come back from their conference and I would ask what the result was and he would say we're really not sure and I'm going to start writing. The opinions that reflect the competing arguments are basically, at least during the time when I clerked, basically opinions where he was struggling through – not entirely sure how it was going to come out.

Mr. Prettyman: Well, that was actually going to be my next question, because I

knew that happened occasionally with him. Have you had that happen very often with yourself?

Judge Randolph: Not very often. It's happened but not very often.

Mr. Prettyman: If Judge Friendly had a fault or a habit that you deliberately not followed, what would that be?

Judge Randolph: Well, he had a fault but I wish I could follow it, actually. He was the first one to talk about it and I can't follow it because I'm not – I don't have the firepower that he does, did. And that was: he thought he was too fast. He thought that he wrote opinions too quickly and came to conclusions too quickly. And what he would do in order to counteract that was draft an opinion and he had a little cabinet which he called The "Cooler" that he would put the draft into after he finished it and let it sit there. Sometimes as long as a week before he would let law clerks get their paws on it and massage it or do whatever we did with it, which often times wasn't very much.

Mr. Prettyman: He must have been a very fast writer if he could write opinions, law review articles, speeches and all the rest of it in the course of the normal day.

Judge Randolph: Right.

Mr. Prettyman: After your clerkship did you continue to see Judge Friendly socially up until the time of his death?

Judge Randolph: I don't know if I ever saw him socially. I saw him certainly once a year, when we had an annual clerks' dinner in New York and I saw him then. I would occasionally drop by when I was in New York City, which wasn't very often, when I was in the Solicitor General's office. I corresponded with him, not on any frequent basis and talked with him on the telephone once in a while. But I kept up with him.

Mr. Prettyman: What happened at those dinners? Did he talk to you and the clerks? And if so, did he give a synopsis of the year or what kinds of things did he talk about?

Judge Randolph: They were at the Century Association or Club in New York and they had this enormous roundtable. Let me back up. The first clerkship dinner I went to was at Pierre Leval's mother's apartment on Park Avenue, I think it was, and it was this enormous place. And there was myself, Peter Edelman, Pierre, Mike Boudin, my co-clerk Monty Gray. I can't remember whether there were many others there – it was a very small gathering. And as the years went by, he obviously had more and more law clerks, and people started coming from great distances. So the dinners later were at the Century Association. But there was this enormous round table and everybody after dinner or before dinner, I can't recall, – he would start talking about whatever was on his mind, the issues of the moment and it was not necessarily legal issues. It might have been foreign policy or domestic policy or whatever. And then we went around the table in the order in which people were sitting and they had the floor for five or ten minutes and talked about whatever they wanted to talk about. It got rather interesting because he had some quite interesting former law clerks. The one that was also the most controversial was Bruce Ackerman, who is now teaching up at Yale and has been for years. And David Currie from the University of Chicago would come. So it was an interesting evening.

Mr. Prettyman: When it became your turn to talk, did you normally talk about what was happening to you at the time in your work or did you talk about world events or politics?

Judge Randolph: I don't really recall what I talked about. I don't have any memory of anything in particular.

Mr. Prettyman: Did the judge ever talk politics?

Judge Randolph: Not politics in the sense that this person running –

Mr. Prettyman: Partisan.

Judge Randolph: Yeah, partisan politics, I don't think so. I don't remember him doing that.

Mr. Prettyman: Do you think that your clerkship was valuable in your later career as an advocate in that it gave you insight into how judges decide cases and what sways them and what turns them off?

Judge Randolph: The most valuable thing I got out of clerking for Henry Friendly, and I'm going to quote Mike Boudin. As you know, he is a judge on the First Circuit. And Mike was fond of saying, and I think it's true, that after a year of clerking for Henry Friendly, it is impossible to be intimidated by anyone again. [Laughter] You go through that fire for a year, you come out somewhat tempered. And that was absolutely true. So I think that was the most valuable thing, and also to watch a master at work and the efficiency that he brought to the business at hand, and I am sure that he was exactly the same way when he was practicing law, which makes one wonder about hourly billing rates. Because an hour from Henry Friendly would be worth –

Mr. Prettyman: Six hours from anybody else –

Judge Randolph: A week from somebody else and they get paid more. [Laughter]

Mr. Prettyman: During your clerkship did you get to know other judges on the Second Circuit or were you pretty well confined to Judge Friendly's chambers?

Judge Randolph: Well, I don't know that I got to know them. I had some interaction with them. Judge Hays, whose chambers were in Foley Square; Judge Moore, Judge Lumbard.

Some of the other judges, like Sterry Waterman, for example, didn't keep chambers there. He was in Connecticut. Unlike this court where everybody has chambers here, they came in for the oral argument and then left. But I don't know that I got to know them very well.

Mr. Prettyman: Did you have law clerk dinners, where they – or lunches rather or breakfasts where the other judges would come to talk to you occasionally?

Judge Randolph: Not that I –

Mr. Prettyman: Like we did in the Supreme Court.

Judge Randolph: Not that I recall.

Mr. Prettyman: Did you find as a result of your clerkship with Judge Friendly that your view of the law, that your legal philosophy, changed in any way?

Judge Randolph: It's hard to say because I'm not sure that I had a very firm legal philosophy when I began clerking. [Laughter] Certainly influenced by his approach but I don't know if I came in with any firm legal philosophy.

Mr. Prettyman: And you were with him for one year?

Judge Randolph: One year, right.

Mr. Prettyman: Now, was it Judge Friendly who suggested that you go from his clerkship to the Solicitor General's office?

Judge Randolph: Yes. Sometime – I don't recall exactly when it was, he said what are you going to do next year. I said I really didn't know. And he said why don't you go argue cases in the Supreme Court? I was thunderstruck. I said how could I do that? He said, well, just – I was in his chambers, in the inner sanctum, he said give me a minute and I'll call Erwin. So, he went and called Erwin Griswold up and the next thing I know I was heading towards Washington

for an interview, and was hired.

Mr. Prettyman: Wow, on the spot, so to speak.

Judge Randolph: No, I don't know if I was hired on the spot but I got the job. I began in September of 1970.

Mr. Prettyman: And you were at the Solicitor General's office this first time for three years from 1970 to 1973.

Judge Randolph: Right.

Mr. Prettyman: Tell us about the Kent State massacre incident on your first day of work.

Judge Randolph: They didn't have an office ready for me and the Solicitor General's office at that time was very small, I think. It was either eight or nine people. Lawyers. And they didn't have an office ready for me so they put me on the next floor up, the sixth floor, in a kinda isolated area that was difficult to reach. You had to go up steps and – I'm trying to bring this back now. But it was the FBI file room. And they gave me an office that was all glass and closed in the middle of the FBI file room. The FBI was on the fifth floor at the Department of Justice then. J. Edgar Hoover, his offices abutted the Solicitor General offices on 9th Street on the fifth floor. And I really had nothing to do, and I just sat around and got some papers, filling out employment forms and things like that. I don't know, I left for a while. I came back and there was a very large cardboard box on my desk and I figured, oh well, this is my first assignment, must be. But there was nothing on it. I opened it up and I started looking and reading and there were all these FBI interview reports and photographs and it was the entire investigation of the Kent State massacre, which was a very prominent event in which some

students were shot. I spent the rest of the afternoon looking at it until, I don't know, it must have been three or four o'clock and an agent walked in and was just appalled that I had this.

[Laughter] He said, "You're not suppose to see that. Give me that back." I had all the papers spread out and I was comparing the interviews. I didn't know why I was supposed to be doing this. But I figured I'd familiarize myself. [Laughter]

Mr. Prettyman:           And on your second day of work, did General Griswold give you an assignment in Bivens? [<sup>5</sup>]

Judge Randolph:        I don't recall whether it was the second day. It was not very long after I'd gotten there and Griswald was very gruff and threw some papers down on my desk. This, I do distinctly remember. He said, "If I can't get a persuasive brief from you in nine days, I'm confessing error in this case." So I looked at it and the case was Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, at that time. The case is a Henry Friendly case. The case began with the filing in the Southern District of New York by this fellow named Webster Bivens, who at the time was a prisoner who wound up at the Atlanta Penitentiary. He filed a complaint and he sued under 42 U.S.C. §1983 and the case was dismissed. He was claiming that his Fourth Amendment rights had been violated when the narcotic agents went into his house and shackled him, and so on and so forth, as I recall. The district judge threw it out because Section 1983 only applies to state officers, and so Henry Friendly was on motion duty when the case came up. He looked at it, said to himself that well, yes, it's true that he sued under the wrong statute but this is an important issue and the Supreme Court has yet to decide it. They

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<sup>5</sup> Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

ducked it in Bell v. Hood [6] and so I think I'm going to appoint counsel for him and we'll see what happens. And he called Steve Grant, who was a partner at Sullivan & Cromwell, a former law clerk of his, and asked him to take the case pro bono, which Steve did. And he lost in the Second Circuit.

Mr. Prettyman: And Friendly was on the panel, do you remember?

Judge Randolph: He was not on the panel, as I recall. The Supreme Court took the case on certiorari and Steve at the time when they took the case was practicing with Sullivan but he was in Paris and he wrote the brief obviously for Bivens and I wrote the brief for the Government. So Friendly's influence was all over that case. [Laughter] It was interesting. Steve told me later – of course the Government lost – and Steve told me later what happened with the case. Well, it turned out that there were not six unknown named agents, there were really only five, and he wound up settling the case when he realized that he couldn't prove any of the allegations. This great momentous decision was done solely on the basis of a complaint and they settled the case for \$100 per agent after Sullivan & Cromwell had spent hundreds of thousands of dollars in what would have been legal fees had they not done it pro bono.

Mr. Prettyman: You did not argue the case?

Judge Randolph: No, I didn't.

Mr. Prettyman: But, you –

Judge Randolph: Jerry Feit argued the case.

Mr. Prettyman: But you did write the brief in nine days?

Judge Randolph: I did. Yeah.

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<sup>6</sup> Bell v. Hood, 327 U.S. 678 (1946).

Mr. Prettyman: And you convinced Griswold not to confess error, obviously?

Judge Randolph: Obviously, yeah. That was probably a mistake. [Laughter] We might have been better off had –

Mr. Prettyman: Your title was Assistant to the Solicitor General at that time?

Judge Randolph: Right.

Mr. Prettyman: And as I count them, you argued 24 times in the Supreme Court altogether in 23 cases because American Trucking [7] was argued twice. And six of those Supreme Court cases were argued during your first service with the SG's office from '70-'73.

Judge Randolph: Right. Pro Hac Vice. Because I wasn't, I hadn't been in a – you had to be in a state bar for three years before you could get admitted to the Supreme Court bar. So every time I argued they had to make a special motion to get me accepted.

Mr. Prettyman: Isn't that interesting. During that whole three-year period.

Judge Randolph: During that whole three-year period, right. And the other thing that was annoying to me is that, as a result of the fact that I was not a member of the Supreme Court bar, even though my name was on the briefs, which was okay, when the reports came out, the Supreme Court reporter struck my name so that in none of the briefs that I filed is my name in any of the – If you look at Bivens you won't see my name there and the reason they struck me was because I wasn't a member of the bar yet.

Mr. Prettyman: I'll be darned. Interesting.

Judge Randolph: Too young to –

Mr. Prettyman: What was the first appellate argument you ever gave in the

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<sup>7</sup> American Trucking Assn's. Inc. v. Smith, 496 U.S. 167 (1990).

Supreme Court?

Judge Randolph: It was a case called Affiliated Ute Citizens v. United States. [<sup>8</sup>]

Mr. Prettyman: And tell us about that experience.

Judge Randolph: The argument?

Mr. Prettyman: Yes

Judge Randolph: Well, it was a curious argument because I defended the United States against an SEC Act charge. It was not brought by the SEC but it was a 10(b)(5) claim and I won't go into the details because it's rather boring. Then I appeared amicus curiae in the same case on behalf of the SEC saying that the United States is not liable but the bank and bank officers were. The interesting part of the case was that it was a material omission case and the question was to what extent did one have to prove that the defrauded individual, and in this case it was Indians, relied on the omission in selling their stock. That was a very difficult thing to prove. I can't remember exactly – there was a fellow at the SEC when I was working on the brief. We kept struggling with how to do this and I finally wrote some stuff out that said that the test has to be an objective test. It can't be a subjective test. Whether this particular individual would have not sold the stock had he been told of fact X and it can't be that the more gullible the individual the more he can be defrauded because it wouldn't matter to him. Well, anyway –

Mr. Prettyman: Would it be enough that he testified that he did, in fact, rely on fact X?

Judge Randolph: We said it had to be solely objective, and Justice Blackmun, who was fairly new to the Court at that time, wrote the opinion and just copied this language out of

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<sup>8</sup> Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972).

the brief. I wasn't sure exactly what I had meant when I wrote it and I was reasonably certain that it wasn't entirely clear to him either. Maybe it was, but it spawned a whole series of law review articles and commentary of one sort or another trying to parse this language and figure out exactly what the Court had in mind. [Laughter]

Mr. Prettyman: Now, were you nervous before that first argument because this was the first appellate argument you had ever made?

Judge Randolph: Right. Yes, I was nervous. Sure.

Mr. Prettyman: Did you have a moot court?

Judge Randolph: No, I never did moot court in my life and never would during that period.

Mr. Prettyman: Would you explain your reasoning on that?

Judge Randolph: I thought it took away, would take away spontaneity. That I would start chanting answers and I didn't want to do that. I felt confident enough that I could formulate on the spot an answer to a question. I tried to anticipate and think about it but I didn't want to get so wooden. Not only that, but to hear myself say the same thing twice was boring and I thought a moot court would be just deadly. It would take all the fun out of the arguments. I don't recall us doing any moot courts in the SG's office. Now they do them endlessly. My wife had her – is arguing Monday at the Court and she had her second moot court yesterday.

Mr. Prettyman: Yeah, routine now.

Judge Randolph: Routine now.

Mr. Prettyman: Justice Jackson never had a moot court. He never even told the people who wrote the brief what he was going to argue. They would go to the Court in great

anticipation to see what was going to happen. [Laughter]

Judge Randolph: Maybe he wasn't exactly certain what he was going to – it just came out.

I got an award for that argument. God bless Erwin Griswold. It was a cash award for distinguished service.

Mr. Prettyman: For that argument?

Judge Randolph: Yeah.

Mr. Prettyman: Really?

Judge Randolph: It was nice of him to put me up for it.

Mr. Prettyman: Was it because it was your first or he just thought it was good regardless?

Judge Randolph: I think it was because he thought I needed the money. [Laughter]

Mr. Prettyman: Now, do I understand that before your first argument you read John W. Davis?

Judge Randolph: Oh, I read everything. Who was the other fellow? Felix Weiner?

Mr. Prettyman: Fritz Weiner.

Judge Randolph: Yeah, I read everything and figured that there has got to be a secret to doing this. I thought that Davis was the best and not that I ever saw him argue. Obviously, it was well before my time but from all the accounts he was the master at oral arguments.

Mr. Prettyman: I saw him argue Brown. [<sup>9</sup>]

Judge Randolph: Did you?

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<sup>9</sup> Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Mr. Prettyman: Yeah.

Judge Randolph: How was he?

Mr. Prettyman: He was good. He was elderly at that stage, and he was a little bit formal, but he was still very good, very good. What did you take to the podium with you?

Judge Randolph: Oh, Davis had this one article, maybe it wasn't Davis, maybe it was somebody else but that recommended not taking a letter-size paper with your notes on it because when you flip it it's just so obvious and distracting. So what you should do is have these 3 x 5 cards with your notes on it. That's what I took up and that turned out to be an unmitigated disaster because the pitch of the lectern was at such a steep angle that when I put the cards down, they all slipped down to about the area of my bellybutton and I couldn't see them. [Laughter]

Mr. Prettyman: Well, you probably were so well prepared that you didn't need them. And another time I, understand you left your notes behind. Tell us about that in the Mourning case. [<sup>10</sup>]

Judge Randolph: This is one of these – living out one's nightmares one has as an attorney. There are all kinds of nightmares. Some people say they have these nightmares where they are going to appear in court and have forgotten to put their pants on, or something like that. Some silly thing like that.

Mr. Prettyman: I have a test tomorrow morning and forgot to study.

Judge Randolph: Right. That is a recurring nightmare to anybody who has a higher education. Pat Wald and I used to talk about it. I still have those dreams and she did too. [Laughter] It's the anxiety factor and it's such a relief to wake up and realize that you don't have

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<sup>10</sup> Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973).

an exam. But anyway, I had prepared – this was a case, a very, very difficult case, it was called the Four Installment Rule of Regulation Z of the Federal Reserve Board enforced by the Federal Trade Commission and the case was Mourning v. Family Publications Service, and it dealt with disclosure of interest rates on sales. This was a magazine sale, in this particular case. But anyway, I don't even remember what the details were except the fact that it was very complicated. It was a very difficult case. And everyone was coming that mattered in terms of the number of governors of the Federal Reserve System who were coming and the Federal Reserve Board and commissioners from the Federal Trade Commission were going to be coming. Of course, I invited some family and friends. They were all going to be there. I had that case prepared about as well as I could ever prepare a case and I wanted it to be a perfect case. I had anticipated questions and I had Xeroxes of the relevant statutes and the relevant regulations I knew I had to work through and the question was whether the regulations were authorized and how they were enforced. And I had all kinds of notes and other things typed out and references to the appendix. I had a big pile of stuff and the briefs, and so on and so forth. And I – I was just as confident as I could be. I mean, I was nervous in my first case. I was not nervous at all on this case. I thought I could field any question and I thought I had a persuasive way of presenting the case. So I took the – it was the first case in the morning as I recall and I took the Attorney General's car from the pool from the Attorney General and I went up there in the morning suit and tails and I had my briefcase with me. I kind of yawned. Cravath, Swaine & Moore's Robert Rifkind was on the other side. I nodded to him and I sat at the counsel table waiting for the Court to come in with my arms folded and at about five of ten when I reached down for my briefcase to get my material out of it and opened it and it was empty. [Laughter] I thought, oh, my goodness. I had two

government-issue briefcases. They were exactly the same.

Mr. Prettyman: Grabbed the wrong one.

Judge Randolph: Yeah, the nutty professor and picked the wrong one up. And I turned back to one of the guards at the court and said, "Please call my secretary, ask her to get a car from the Attorney General and bring my briefcase up. I brought the wrong briefcase." And he said to me that I can't do that. The court is just about ready to come in And they did. They came in and I'm sitting there. And I turned around.

Mr. Prettyman: You were first case up?

Judge Randolph: I was the first case up. And I turned around to Danny Friedman who was waiting for the next case and I told him what had happened. He said don't worry. That happened to John W. Davis once, which was great comfort. So, Barrett, I sat there and they put a white pad in front of you and that's all I had, a white, empty pad. And I started trying to reconstruct my argument in writing. And I couldn't even read what I had written. [Laughter] I thought oh my God, everything had left me. I didn't know what I was going to say.

Mr. Prettyman: Your mind went blank.

Judge Randolph: I tried to look cool but I can tell you that I was in a total panic mode. Anyway, I can't remember who it was. We were amicus curiae, as I recall. The clock clicked on and on and on. I kept turning around looking, hoping the guard had done what I had asked him to do even though he said he wasn't going to. And just as one of the counsel was about to sit down – it may have been Rifkind; it may have been somebody else – Justice Marshall, God bless him, asked a question that kept the fellow up for another five minutes and just as he was concluding, down the aisle walks my secretary with the briefcase. And I opened it

up and –

Mr. Prettyman: Had she been called?

Judge Randolph: She had been called, yeah. And there was all my material. It took me a few minutes to get it all out and assembled and I stood up and argued. As usual, I didn't even look at it.

Mr. Prettyman: Yeah.

Judge Randolph: It was there and –

Mr. Prettyman: Confidence that comes with having it there if you need it. Oh boy.

Judge Randolph: It was a nightmare. [Laughter]

Mr. Prettyman: Were you ever surprised by a hypothetical during your argument?

Judge Randolph: I was surprised by a hypothetical asked of somebody else. As a matter of fact, I was shocked by a hypothetical of someone else.

Mr. Prettyman: Your opponent or by somebody else?

Judge Randolph: It was asked by Chief Justice Burger. My opponent in the case when I was in private practice was Larry Wallace. It was a case called Ruckelshaus v. Monsanto<sup>[11]</sup> and I was representing Monsanto. They have a product called Roundup that you spray on weeds and things. It kills the weeds and dissipates into the air. The Government, the EPA, required Monsanto to file a lot of information with EPA. [Change of tape]

You have to ask me about a case I argued from the SG's office in the D.C. Circuit. It was my first –

Mr. Prettyman: Private case?

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<sup>11</sup> Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

Judge Randolph: No, no, no. While I'll was in the SG's office Griswold sent me over here to argue a case.

Mr. Prettyman: But you were telling me about this –

Judge Randolph: Well, anyway, so Monsanto deposited all this information with EPA and then Congress passed a new law that required that the information deposited with the EPA be disclosed to the public. One of the issues in the case was whether trade secrets were property within the meaning of the Fifth Amendment. And I can talk about the research on that but – And the second issue in the case was whether the later law being passed after information had already been deposited with EPA constituted a taking of their trade secrets because trade secrets are gone as soon as they are disclosed to the public and, of course, the companies – the “public” that was interested in seeing what Monsanto's information consisted of – was not John Q. Public but basically foreign corporations that were potential competitors because that was Monsanto's biggest product at the time. Anyway, all that is a big wind-up to the following question which was asked of Larry Wallace at the end of his oral argument. He was representing EPA and it went something like this: The Chief Justice said, “Now, Mr. Wallace, I want to ask you a question about this idea that this isn't a taking here. Now, this is a hypothetical, this is just a hypothetical. But suppose we were at war with France.” And Wallace said, “Yes.” And I'm wondering, and I noticed the puzzled look on some of the other Justices at the time. And he said, “I'm not saying we would be at war but let's suppose we were. And let's suppose that we wanted to damage the French economy.” And Wallace said, “Yes.” “So what we did is study the French economy – and I'm not saying this is true – but we determine that the French economy was largely dependant on sales of wine.” “Yes.” “And let's suppose that we decided that the

Government, the Defense Department decided that the best way to destroy the vineyards of France was to send paratroopers in and spray the fields with Roundup and we needed a lot of Roundup and so we took all the Roundup that Monsanto had. Would that be a taking?"

[Laughter]

Mr. Prettyman: Oh, my.

Judge Randolph: Of course, Larry Wallace says, "Well, that's a very different case than this one." [Laughter] Burger didn't crack a smile but every Justice was almost in tears trying to withhold their – [Laughter] That was a hypothetical that surprised me.

Mr. Prettyman: Yeah, I can see why. [Laughter]

Mr. Prettyman: Okay, as I understand it, as you indicated you liked to have notes even though you didn't use them and, in addition, you used the system that Generals Griswold and Bork also used of writing out every argument in advance even though you obviously never read your argument.

Judge Randolph: No, but I did. I did that to implant thoughts in my mind. I found that was the best way to get a flow in the argument and I worked pretty hard on framing up things in various and different ways. I might have three or four options when I wrote things out but it implanted it into my mind. And it also got me into thinking about transitions which I think are very, very important, at least in the structured type of argument that used to take place in the Supreme Court, although I haven't been up there for twelve years now, but I'm told things are not so structured now. That there's a barrage of questions like there is on this court. I always thought it was very important – that if you get a question not only should you answer it but you should also use it somehow to your advantage if you possibly can, and use it to transition into

another point that you were going to make during the presentation that is in your favor, that's good for you since the whole objective is to persuade. So I found that by writing things out, somehow or other, the way my brain works, it made it easier for me to field a question, answer it and transition it into another subject that I wanted to reach.

Mr. Prettyman: Do you have any other particular memories of those six cases that you argued during your first – in the SG's office?

Judge Randolph: Jeez, I can't even remember what they were. I remember there was one under the Antitrust Expediting Act. Oh, I remember the last case. I think I won the first. How many did I argue? Five? Six?

Mr. Prettyman: Six. There was Iowa Beef Packers. [12]

Judge Randolph: That was the antitrust thing –

Mr. Prettyman: Affiliated Ute, Tidewater Oil, [13] Mourning, NAACP, [14] and Moreno. [15]

Judge Randolph: Yeah, Moreno I remember. And I remember the NAACP case vaguely. Moreno I remember because a number of my colleagues in the office came out to watch me get bloodied up. [Laughter] Somebody said that to me. We're coming – we're all getting into the car to watch you get creamed because there is no way you are going to win this case. And it dealt with something about related households and welfare payments. I lost that. I think I

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<sup>12</sup> Iowa Beef Packers v. Thompson, 405 U.S. 228 (1972).

<sup>13</sup> Tidewater Oil Co. v. United States, 409 U.S. 151 (1972).

<sup>14</sup> NAACP v. New York, 413 U.S. 345 (1973).

<sup>15</sup> United States Dep't of Agric. v. Moreno, 413 U.S. 528 (1973).

won the other five, but I lost that one. I think the only cases I lost were the last ones I argued, which was Moreno, and I argued a case called Chadwick. [<sup>16</sup>] It was my last bout.

Mr. Prettyman: Why did you leave the SG's office in 1973?

Judge Randolph: I thought I had reached the point of diminishing return on the appellate part of it and I wanted to see what trial work was like.

Mr. Prettyman: And how did you choose and why did you choose Miller, Cassidy, Larocca?

Judge Randolph: I wanted to go to a small firm because I thought it would have a greater and faster opportunity to get into court if I did that. I had worked at Sullivan & Cromwell one summer and I knew the way they operated: people came up through the ranks, you had to be there a certain period of time. I might work on discovery for the first year, and so on and so forth. That was really not my cup of tea. I didn't like the large, structured, organized law firm atmosphere. Miller, Cassidy was like the Solicitor General's office. They were small and had a wonderful reputation. I liked the people immediately.

Mr. Prettyman: Did you know Jack Miller ahead of time?

Judge Randolph: No, I didn't know Jack. John Cassidy is my best friend now. I didn't know him and I didn't – I encountered Nat Lewin because he was arguing a few cases up at the Court and I think, as I recall, I initially called Nat and asked him whether they had any openings. So we had lunch with Miller and Cassidy and Ray Larocca and that's how I wound up there. And I don't regret that for a minute. We just had a heck of a time during that period. Watergate broke not long after I arrived.

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<sup>16</sup> United States v. Chadwick, 433 U.S. 1 (1977).

Mr. Prettyman: What area did you go into, or was it so small that everybody sort of did everything?

Judge Randolph: Well, the first thing I got put on doing, put in charge of, was preparing for trial in Springfield, Illinois. I can't remember when I arrived in the office, sometime in May, June 1993, and the trial was to begin the beginning of January –

Mr. Prettyman: You mean '73.

Judge Randolph: '73. Began January '74. I didn't get very much instruction. It was a very complex case. It was tax fraud and I started writing memos on each count and assembling documents the best I could, trying to figure out how to get an exhibit into evidence, whether this would be admitted or not admitted.

Mr. Prettyman: I note that you argued at least one case in the D.C. Circuit, Carter, [17] and a case in the Sixth Circuit, Peterson, [18] and three cases in the D.C. District Court and a case in the Southern District of Illinois during your first two years or during your two years with Miller, Cassidy.

Judge Randolph: Carter I argued while I was in the Solicitor General's office.

Mr. Prettyman: Oh.

Judge Randolph: What's the year of that?

Mr. Prettyman: I don't think that's right. Let me see.

Judge Randolph: I'm certain. Versus the Panama Canal Company.

Mr. Prettyman: Carter, D.C. Circuit case. It was decided in '72.

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<sup>17</sup> Carter v. Panama Canal Co., 463 F.2d 1289 (D.C. Cir.), cert. denied, 409 U.S. 1012 (1972).

<sup>18</sup> Peterson v. Richardson, (6<sup>th</sup> Cir. 1972)(unreported).

Judge Randolph: Right. I was in the SG's office.

Mr. Prettyman: Oh, Peterson, you were also in the SG's office.

Judge Randolph: Right.

Mr. Prettyman: Okay, those two. Alright.

Judge Randolph: When was Peterson decided?

Mr. Prettyman: That was '72, Sixth Circuit. Okay, let's skip those.

Judge Randolph: Well, Carter was an interesting case.

Mr. Prettyman: Tell me about Carter.

Judge Randolph: The other – what was the name of the other case?

Mr. Prettyman: Peterson v. Richardson.

Judge Randolph: That was because I was getting bored in the SG's office. There weren't that many arguments I was getting, and I went to the civil division and said can you give me a case to argue. Of course, when they are giving cases to someone other than their own people, the city is important and they are not going to send you to San Francisco, New York or Chicago. So they sent me to Cincinnati. The case involved a denial of disability benefits to a miner, with a history of heart disease and congenital clubfoot. They denied disability benefits because he didn't meet a time limit for filing. It was just a wonderful case. It was horrible.

Mr. Prettyman: Talk about the equities.

Judge Randolph: Yeah, thanks a lot to the fellows for giving me this wonderful argument. The Carter case came through the Solicitor General's office, and Erwin Griswold asked me to argue it because the liability we would have had had we not won that case was just absolutely enormous. I don't know if you recall the portal-to-portal cases back in the late '40s,

late 1940's. The question was under the Fair Labor Standards Act when the workweek, work day, began – was it when the miner went through the entrance to the mine or was it when he finally reached the mine wall and began working. The reason that was of such enormous importance was because if it was when they were paying on the basis that the miner's workday didn't start until he hit the mine wall, but if it, in fact, began when he went through the portal, then time and a half overtime was due and owing for however long you can go back under the statute of limitations, with enormous liability. And in a couple of cases, the Supreme Court decided that the workday began when you went through the gate and not when you hit the mine wall. The United Mineworkers were opposed to that and the reason they were opposed to it is because they represented old mines, basically, deep old mines. And this would have put the old mines at a huge competitive disadvantage because the miner had to travel a long distance to get to the mine wall. They lobbied and got it reversed by Congress and there is a part of Hart & Wechsler that deals with the portal-to-portal cases. The question being whether Congress can retroactively reverse a Supreme Court decision and the Supreme Court had decided that the workday began at the gate. It was a case called Jewell Ridge [<sup>19</sup>], and some other cases. Well, anyway, so that got settled. I can't remember. There was litigation about it. There was a lot of law review-type commentary about whether the Congress can do any such thing. And years went by but somebody dropped the ball. When the Fair Labor Standards Act was applied to the federal government, and I can't remember the exact date, they just took it lock, stock and barrel but didn't enact the portal-to-portal qualification. And there are many, many jobs within the

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<sup>19</sup> Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America, 325 U.S. 161 (1945).

federal government where an individual at a military base goes through the gate and it may take him 20 minutes to get to his duty station, or in this case, the Carter case, it was the Panama Canal operators. They operated these trains and, at the end of the shift, wherever the train happened to stop they got off and walked back. It might be a couple of miles to get back to the gate and the new guy coming in to take over the train had to walk over a couple of miles. So it was a very interesting jurisprudential argument. Does the court, the D.C. Circuit, have to follow the Supreme Court's interpretation of exactly the same language in the Fair Labor Standards Act or should it recognize that Congress overruled that in legislation which doesn't apply to the federal government? And if we lost the case, the amount of back pay that would have been owed in terms of time and a half overtime for people all over the United States was just – we did some calculations. It was enormous, talking of hundreds of millions of dollars. Griswold saw the case and asked me to come over here and argue it, and I did and won. I don't know whether all that jurisprudential stuff got into the opinion. I don't remember what the opinion was much about. But it was really an interesting case.

Mr. Prettyman: Wow. A lot at stake. Well, now what about the three cases in the district court and the Southern District of Illinois that you argued at Miller, Cassidy?

Judge Randolph: That was a trial in the Southern District of Illinois that I recall. Yeah, it was, that began in – that was the case I was telling you about that began in January and ended in heaven knows, March or something like that.

Mr. Prettyman: Was one of those Rothblatt v. Nixon? [<sup>20</sup>]

Judge Randolph: Oh no, that was a case I argued while I was here. That was a fun

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<sup>20</sup> Rothblatt v. Nixon, 530 F.2d 1094 (D.C. Cir. 1976).

case. We were representing by that time Richard Nixon and that was the first case in which Nixon was sued after he left office.

Mr. Prettyman: This was while you were at Miller, Cassidy?

Judge Randolph: Right.

Mr. Prettyman: And how did you get to represent Nixon? Were they already, was Jack Miller already representing Nixon?

Judge Randolph: No, Nixon came in while we were – we were picking up – we had more Watergate clients than any firm in town, the eight of us. We represented Richard Kleindienst and a fellow named Ralph Newman, who was an appraiser of presidential papers. Tim Babcock, who was the former governor of Montana. We were representing the president of American Airlines. We were representing a bunch of Haldeman aides, Ehrlichman aides and then one fine day, Richard Nixon walked in the door of our little suite on 19th Street and – He actually called Jack Miller to come to the White House, and we wound up representing him. And, of course, Miller negotiated the pardon with President Ford and some of the other people there, and then when Nixon left office he got sued by Henry Rothblatt. Henry Rothblatt was one of the attorneys for the Watergate burglars and he brought this lawsuit claiming that they hadn't paid him his legal fees and he claimed that he was a third-party beneficiary of a contract between Richard Nixon and the Watergate burglars that their legal fees would be paid if they got into trouble. That was his claim. He was a prominent lawyer, had all these treatises on white-collar criminal defense. He sued John Mitchell, Ehrlichman, Haldeman, and so on and so forth. The case was wonderful for me. Sued Howard Hunt. Because I was teaching civil procedure at Georgetown at the time and I would come in each class and give them an update on Rothblatt.

There was one time when they tried to serve Howard Hunt and he was evading service and finally the process server found him over in McLean and was trailing him in his car. The traffic light turned red and the process server ran out and he put the complaint under the windshield and Hunt turned the wipers on and the complaint flew. [Laughter] I came in the next class and asked them whether that was proper service, so we went all through that. Anyway, everybody – Bill Hundley and Plato Cacheris were representing Mitchell. I can't remember who all the cast of characters were. But everybody answered the complaint, and I filed a motion to dismiss. The motion was based on this: even if there were such a contract, it was void against public policy and can't be enforced, or some such thing. And Judge Hart, was it Judge Hart, yeah, I think it was Judge Hart dismissed the complaint. Well, so I told the students at the next class that rather than answering, I thought the better strategy was to file a 12(b)(6) motion, and we talked about that in class. The next thing I know, Rothblatt appeals. So I asked the students how I should respond to that. I filed a motion in the D.C. Circuit to dismiss the appeal, the reason being that he hadn't gotten a Rule 54(b) order. When only part of the case is dismissed there is no final judgment until the rest of the case is decided. He had not filed a proper appeal and hadn't gotten a 54(b) order. Well, so Rothblatt, after I filed my motion, went back to the district court and asked for a 54(b) order before Judge Hart. And I filed a motion in the district court saying that the district court did not have jurisdiction because once a notice of appeal is filed – [Laughter] So we had this wonderful time in class. Henry Rothblatt was somewhere in never-never land. He was not in the court of appeals and he was not in the district court. [Laughter] We talked in class about what he should do. We all knew what he should do and he finally figured out what he should do, which was to dismiss his appeal and ask for a 54(b) order, which he finally did. I

came in the next class and the students all clapped [Laughter] but had he finally figured us out. But it took him several months to do this. And then he asked Judge Hart to grant him a 54(b) certificate so that he could take the case up. I remember Judge Hart saying, “Mr. Rothblatt, I'm not going to do that. I'm going to do something else that will enable you to take an appeal. I'm going to dismiss the entire case.” Which is what he did. [Laughter]

Mr. Prettyman: Did Rothblatt take that up?

Judge Randolph: He took that up but by the time of argument in the D.C. Circuit, I was back in the Solicitor General's office, and Ray Larocca argued it and, needless to say, won. That was fun.

Mr. Prettyman: Now, let's see, then, did you argue during the two years that you were with Miller, Cassidy, did you argue circuit court cases?

Judge Randolph: Not that I recall. I don't think we did any of them.

Mr. Prettyman: Right.

Judge Randolph: We did some – we had a wonderful, interesting case that came out of the D.C. Circuit that, once again, I had left, went to the Supreme Court. It was Eastland v. United States Servicemen's Fund [<sup>21</sup>] where we represented Senator Eastland, who was chairman of the Senate equivalent of the UnAmerican Activities Committee, that they don't have any more.

Mr. Prettyman: Yeah, I don't see any.

Judge Randolph: It was a big speech and debate clause case.

Mr. Prettyman: Yeah. I don't see any circuit court cases from that period. With whom did you work, principally, at Miller, Cassidy? Any one person?

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<sup>21</sup> Eastland v. U.S. Servicemen's Fund, 421 U.S. 491 (1975).

Judge Randolph: No, not really. Nat Lewin and I spent a great deal of time together on the case in Illinois.

Mr. Prettyman: As you've mentioned, in '74, while you were still with that firm, you became an adjunct professor of law at Georgetown and you taught, as I understand it, civil procedure and injunctions.

Judge Randolph: The first year I did it I taught first year civil procedure and thereafter I started teaching a course on injunctions, which I think I did for about four years, until I became totally bored with it and decided not to do it any more.

Mr. Prettyman: You taught the harshness doctrine, I assume?

Judge Randolph: Sure. [Laughter]

Mr. Prettyman: How many students were in your class?

Judge Randolph: The first year civil procedure was about 140, something like that.

Mr. Prettyman: What year were they? Were they first year students?

Judge Randolph: First year students. Right.

Mr. Prettyman: Did you enjoy that teaching? You must have since you kept it up.

Judge Randolph: Oh, I loved it. I enjoyed it then and I enjoy it now.

Mr. Prettyman: We are now at the two junctures. Number one, you are about to go back in the Solicitor General's office, and, number two, our hour is up so that is a pretty good place to break.

Judge Randolph: Yeah, that is a good place to break.

ORAL HISTORY OF JUDGE ARTHUR RAYMOND RANDOLPH, JR.

Third Session, Friday, May 17, 2002

Mr. Prettyman: This is E. Barrett Prettyman, Jr. and I am beginning the third session of the oral history of Judge Arthur Raymond Randolph, Jr., of the D.C. Circuit Court of Appeals, and it is Friday, May 17, 2002.

Judge, before we get into your second tour at the SG's office, at what point in your career did you get to know Bill Bittman?

Judge Randolph: I guess in 1974.

Mr. Prettyman: In what connection?

Judge Randolph: He came over with a partner from Hogan & Hartson to meet with Jack Miller because of a problem that he had. The partner was Austin Mittler, and Jack called me in and the two of us sat down at the Miller, Cassidy firm, and Bill laid out what his problem was, which dealt with his representation of Howard Hunt, and he was receiving cash payments for legal fees in rather odd circumstances – envelopes taped in a phone booth – in the Hogan & Hartson offices –

Mr. Prettyman: In the building downstairs – ?

Judge Randolph: Yes. In the building – I've seen the phone booth. It is probably not there any more. No need for phone booths now since cell phones. And then cash deliveries at Bill's house on Bradley Lane. And then there was another circumstance – the allegation at the time was this was money being paid so that the Watergate burglars, which included Howard Hunt

and Gordon Liddy and several Cubans, were being paid off to keep quiet about what they knew regarding White House involvement in the Watergate burglaries. Bill took the money as legal fees. The money, from what I understood, was money that Herbert Kalmbach had collected from various corporations, including American Airlines, whom we also represented during this period of time. And a good many other large corporations – I can't remember them all – but a number of the Fortune 500 were making illegal cash payments to the Nixon reelection campaign.

Mr. Prettyman: Did you say legal or illegal?

Judge Randolph: Illegal. Well anyway, that was the genesis of the problem and Jim Neal was the Watergate prosecutor at the time, who was a former Kennedy Justice guy and knew Bill when he was in the Department of Justice. Bill was the prosecutor of Jimmy Hoffa in Chicago. Also, Bobby Baker here in the U.S. District Court. Do you know the famous story about Bill's closing argument?

Mr. Prettyman: In which case?

Judge Randolph: In the Bobby Baker case.

Mr. Prettyman: No.

Judge Randolph: It was against Edward Bennett Williams and, in fact, when Bill passed away about a year ago and his son, Bill Bittman's son – it is an irony to all of us given the Watergate thing, but Bill Bittman's son, Bobby Bittman – who you'll know, I am sure, as the head of the Monica Lewinsky investigation for Ken Starr. So Bob Bittman called me up because he knew his father was very, very ill. He had cancer and didn't have very long to live and asked if I could help him get a transcript of the closing argument in the Bobby Baker case where Bill, his father, went up against Edward Bennett Williams and won. And Bittman's house on Bradley

Lane was directly across the street from Ed Williams' house and I was told that after Bill won that case Edward Bennett Williams would never talk to Bill Bittman again.

Mr. Prettyman: Really?

Judge Randolph: Yes. They did not have a conversation again, even though they were neighbors and saw each other in the yard and everything. So I wound up finally locating in the Archives the transcript and, unfortunately, Bill passed away too early to get it retrieved. Someday Bobby is going to go out there. It is out near College Park where we found it.

Mr. Prettyman: Did you read it?

Judge Randolph: No. I haven't seen it. He was going to go out and bring me a copy of it. But the closing argument took place in the Ceremonial Courtroom. Bobby Baker – just for the record was the boy Friday appointment secretary of Lyndon Johnson, the deal maker, when Johnson was in the Senate – and he got charged with and ultimately convicted of taking bribes, all of which Lyndon Johnson claimed he knew nothing about.

Mr. Prettyman: Of course. [Laughter]

Judge Randolph: But the closing argument took place in the Ceremonial Courtroom on the 6th floor because so many people came to see it, and Bittman had some reputation from his – he was an Assistant U.S. Attorney in Milwaukee, then got called into Chicago to prosecute Jimmy Hoffa. And at the very last minute the lead trial attorney took sick and Jack Miller asked, “Do you have any real hot-shot young guy that would be willing to undertake this?” Anyway, Edward Bennett Williams got up and gave this absolutely spellbinding closing on behalf of Bobby Baker, and Bill stood up and – I don't know the exact words but it went something like this: “Ladies and Gentlemen of the Jury, you have just heard the greatest trial lawyer in the

United States give that closing argument on behalf of the defendant.” He said, “He was brilliant. He was spellbinding. His statements were in some ways inspiring.” He said, “I can't possibly even come close to that because all I have are the facts.” [Laughter] So anyway, Bittman got into trouble because his client, Howard Hunt, was a wild man and gave Bittman a memorandum that seemed to suggest that Hunt was extorting money from the White House. I think it was addressed to Jeb Magruder or John Dean. Or both. I can't remember. I don't think it had an address on it. And so Bill was really concerned when all this blew up; the Washington Post was running a new article every day and Woodward and Bernstein had their Deep Throat source. And so on and so forth. And he didn't know what to do. But the long and short of it was that we had a very trying summer. I remember meeting on weekends out at Bill's house trying to figure out what to do. What kind of strategy. And ultimately turned the memo over to Jim Neal and he was furious that he hadn't received it earlier and made Bill Bittman the target of his investigation and was going to indict him and told us that was his intention, to indict Bill Bittman, and as a courtesy invited Bill Bittman to go before the grand jury. And every criminal defense lawyer knows that when your client is about to be indicted the last thing in the world you do is put him before the grand jury and, of course, I had virtually no white-collar criminal experience. But Jack Miller was head of the Criminal Division when Bobby Kennedy was Attorney General. And we talked to Bittman until we were blue in the face long into evening after evening because he wanted to go before the grand jury and we didn't want to let him. And I guess now that he is gone I can tell you what his strategy was. He said, “Look, he is going to indict me. That will ruin my life. And in this climate I will be convicted. It doesn't matter what I do because the whole town is abuzz with Watergate and to win an acquittal would be very, very difficult. And

my only hope is not to talk Jim Neal out of it but to talk the Grand Jurors out of it.” Which is unheard of. It never happens.

Mr. Prettyman: Right.

Judge Randolph: So, he said, “I am going. I have got nothing to lose.” And he did. He went before the grand jury and he was there forever. I remember standing out in the hallway with Jack, and it just went on and on and on. And the long and short of the story is that he did it. He talked them out of indicting him.

Mr. Prettyman: Amazing.

Judge Randolph: They would not indict him. Incredibly courageous performance. There were a good many other people who would have just given up and melted away. But he was a fighter.

Mr. Prettyman: A tough guy.

Judge Randolph: Yes. Absolutely. Then what happened was that I went back into the government – which is what I guess we were going to talk about – and by the time I came out again in 1977 the D.C. Bar had a special prosecutor to disbar Bittman. That was not public. Nobody knew about it because it was a proceeding that was under investigation. And I wound up representing Bill for three years, I think, with all kinds of – I don't think there was much evidentiary material that wasn't known – but putting it together was another thing. And ultimately we were successful, and they never brought a charge against him.

Mr. Prettyman: Wow. Nine lives.

Judge Randolph: Yep.

Mr. Prettyman: Well, let's see. Then you did go into the Solicitor General's office

in 1975. What drew you back there?

Judge Randolph: Well, Larry Wallace called me up sometime in December and asked me if I would consider coming back as a Deputy Solicitor General to Bob Bork, whom I had met when he was coming through but didn't know him. I have a philosophy and maybe it is not a good one, but sometimes it is: when an opportunity comes along like that, I always ask myself what would I rather be doing at the moment because I might not even be alive next year or next month for that matter. So I've always made decisions about career moves or whatever – it was a very simple calculation – would I rather be practicing law with Jack Miller and John Cassidy, whom I dearly love, and are really close friends and that is really fun, or would I rather be back in the Solicitor General's office as a deputy with some control over what I can argue and brief, and it was an easy call. The money was another thing, and heck, I didn't care about that very much at that time. So I said, “This looks like fun.” So that is why I did it.

Mr. Prettyman: So you went over and met –

Judge Randolph: I had an interview with Bork and then I talked to some of the other deputies and they told me that he was just an absolute delight to work with and gave the deputies a great deal more responsibility than Erwin Griswold had. Bork was a great delegator and he got involved deeply when there were cases he was particularly interested in, either because of their importance or it was an area he cared greatly about. But, by and large, the office was run by the deputies and that made it even more fun.

Mr. Prettyman: Sure. And you remained close friends? What prompted you to write the article that you did in the Chicago Tribune, the op-ed piece?

Judge Randolph: That was during the confirmation. What prompted me? I thought

Bork was getting criticized unfairly. By that time, he was a man I had known for a decade and knew his legal analysis as well as anybody. We worked together for several years and we would talk about cases in great depth and I thought there were a great many misrepresentations made about him during that time and I thought it was particularly cutting to him to have Phil Kurland, whom he considered a friend, I mean he was shocked. And the op-ed article was really about something Kurland had written or testified, I can't remember. And I knew that Bork took that rather hard. And I thought, well, it is not for him to respond to whatever Kurland was saying but I thought I would.

Mr. Prettyman: Well, we have skipped ahead a bit and I want to get back, but I just wanted to mention that you were so close to him that when he withdrew from consideration for the Supreme Court, you went with him to the White House.

Judge Randolph: Actually, he didn't withdraw. We can talk about that, but it was in 1987 and the question on the table when I went over to his house and the head counting was being done, and it was clear that he was not going to win confirmation by the Senate, and the question was whether he should withdraw or put them to a vote – make them vote.

Mr. Prettyman: As long as we are there, let's cover that and then we will come back. Had he decided when he left the house what he was going to do or did he not decide until he got to the White House?

Judge Randolph: We went over to his house in Washington. He was living in the Palisades and George Will was there and I guess it was Bob, my wife, Lee, Bob's wife, I think his son, his oldest son, was there and George Will and myself. And it was unanimous that he should not withdraw. And so we started writing a speech that he gave at the White House the following

day announcing that he wouldn't withdraw. That he wanted a vote. And he got it. I don't remember what the numbers were.

Mr. Prettyman: Well, what I read was obviously wrong, then, because I read that you went with him to the White House, that he then went upstairs to the president's quarters alone, and that he told the president that he would withdraw.

Judge Randolph: I went with him to the White House. I went into the Map Room and he went up to see President Reagan and told President Reagan that he was not withdrawing.

Mr. Prettyman: Not withdrawing?

Judge Randolph: Yes. And then he went down and gave a speech in the White House Press Briefing Room.

Mr. Prettyman: I am glad to get that straight. Alright, going back to your SG days, during your two years there this time, 1975 to 1977, you argued some 13 cases in the U.S. Supreme Court, and I note that eight of those were argued in one term. That was certainly a busy term for you, wasn't it?

Judge Randolph: Gee, I don't recall it.

Mr. Prettyman: Well, why don't I stop the tape for a minute while we double check.

Judge Randolph: Although it may be because you have the dates that it was in different terms –

Mr. Prettyman: It's true. I checked those – let me see –

Judge Randolph: Oh, it's not worth going back –

Mr. Prettyman: I had my own set of tables here –

Judge Randolph: Boy, you have done a lot of work, it is very impressive.

Mr. Prettyman: The way I have it is one term was from here to here – I have seven cases but I think you argued – so I guess it was seven instead of eight – but, in any event, you had a busy term. [Laughing] And you were now the Deputy SG so you were No. 2 in the office?

Judge Randolph: No. There were several other deputies. Danny Friedman was one. We had our own personal – the deputies split up the office in terms of jurisdiction. I had –

Mr. Prettyman: What was yours?

Judge Randolph: I had, I guess, the strangest mix. I had all the ICC, I had all immigration, I had all of the environmental cases which involve not simply EPA at that time but also a good many other things coming from the Land and Natural Resources Division. I had an odd mix of other things which I can't remember. I did do some – the last case I argued when I was deputy was a criminal case and I did some civil too.

Mr. Prettyman: Hmmm. They were, in effect, outside your immediate area of responsibility?

Judge Randolph: Right. I would get drawn into cases. Two come to my mind One which was not in my jurisdiction was Buckley v. Valeo, [22] which was the campaign finance case, and the other was Gregg v. Georgia, [23] which was the death penalty case.

Mr. Prettyman: How was this second stint in the SG's office different from your first one, other than the fact that you were now deputy? For example, was it now easier because you knew a lot of the people and you certainly knew habits and you knew what the agenda was, and so forth? Or was it more difficult?

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<sup>22</sup> Buckley v. Valeo, 424 U.S. 1 (1976).

<sup>23</sup> Gregg v. Georgia, 428 U.S. 153 (1976).

Judge Randolph: No, it was easier. And the main difference was, the main difference was that I was not – by and large although I did a good deal of it – was not writing the first drafts of briefs. What I was doing was working over briefs that the assistants to the solicitor general – which I had been doing – had done. And they were all really well worked through, the briefs were by that time, ‘cause they had gone through a draft and the division from which the case came and then the assistant had worked it over so that by the time I got it – by and large a good many of them were very polished and that made it fairly easy. Although there were a number of incidents where they were not so polished and there were a number of cases where I basically did the brief myself, not many, but that was the main difference. And then the opportunity to choose the cases that I wanted to argue was also there.

Mr. Prettyman: Had the position that the SG would take been finally decided by the time the brief got to you?

Judge Randolph: Almost always

Mr. Prettyman: So there were very few incidences where you rewrote because you wanted to take a different position.

Judge Randolph: Right. But we had meetings to decide such things.

Mr. Prettyman: How many attorneys were in the office the second time around?

Judge Randolph: Probably 12 to 14, somewhere around there. I can't remember them all.

Mr. Prettyman: Had the personnel changed dramatically since you were there the first time?

Judge Randolph: It had changed, and I had not been gone that long – two years – but

Bob Bork had done some hiring. He hired, let's see if I can recall – he hired Ed Korman, who is now the Chief Judge in the Eastern District of New York. He hired Danny Boggs who is now on the 6th Circuit. These were all Assistants. Frank Easterbrook is now on the 7th Circuit.

Mr. Prettyman: Great way of getting on a court. [Laughing]

Judge Randolph: Either that or he made very good judgments about people. And then he also hired – this is a name that will probably be a surprise – he hired Robert Reich as an Assistant.

Mr. Prettyman: Really. I didn't know that.

Now, in these Supreme Court cases you appeared with or against some outstanding appellant advocates, including Moses Lasky and Robert Rifkind, Jack Greenberg, Bruce Ennis, Roy Englert, Charles Horsky, Francis Shea, Andy Frey. Did you feel like you learned from any of them or were you so experienced now that you just sat back and enjoyed?

Judge Randolph: I don't feel that I learned anything. I had my own way of doing things and don't tell me not to do it that way. I don't know whether it works, just this is the way I do it. It's me.

Mr. Prettyman: During the second tour at the SG's office, you had the experience of arguing two cases three weeks apart, SCRAP [24] and Alaska. [25] Two companion cases on the same day, Delta Mining [26] and National Industries, [27] and three cases over a two-month

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<sup>24</sup> Aberdeen & Rockfish R. Co. v. SCRAP, 422 U.S. 289 (1975).

<sup>25</sup> United States v. Alaska, 422 U.S. 184 (1975).

<sup>26</sup> Kleppe v. Delta Mining, Inc., 423 U.S. 403 (1976).

<sup>27</sup> National Independent Coal Operators Ass'n v. Kleppe, 423 U.S. 388 (1976).

period, Andresen, [<sup>28</sup>] New Mexico [<sup>29</sup>] and Sierra Club. [<sup>30</sup>] Was any of that particularly difficult that you remember now? Or was it all in the normal course?

Judge Randolph: I probably thought it was difficult back then but I didn't –

Mr. Prettyman: You are not having nightmares about it still?

Judge Randolph: I guess I was fortunate because I could pack a good deal of work into a single day. I was fairly described as an insomniac and I would get by on four hours of sleep. I would have dinner and I would go to work again until one or two in the morning. And then –

Mr. Prettyman: Do you still do that?

Judge Randolph: Heavens, no. I don't do that at all. But, as a matter of fact, one of the consequences of my staying up late, and I won't call it insomnia – had an impact on one case that – I don't know how exactly one can measure this, but I am fairly certain that it made a very substantial difference, and that was in the death penalty cases. We were – I think that that was one of the first major cases that I got involved in when I went back.

Mr. Prettyman: Gregg?

Judge Randolph: Yes, Gregg. And Bork said, “I am going to take this out of the ordinary and I am going to assign you an assistant and it is going to be you, me and this assistant.” And I said, “Well, who is the assistant?” And he said, “It is this guy I hired named Frank Easterbrook.” And I didn't even know who Easterbrook was. And I thought, Oh, my

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<sup>28</sup> Andresen v. Maryland, 427 U.S. 463 (1976).

<sup>29</sup> Kleppe v. New Mexico, 426 U.S. 529 (1976).

<sup>30</sup> Kleppe v. Sierra Club, 427 U.S. 390 (1976).

goodness, this is going to be a lot of work for me. Well, Easterbrook produced what was just a magnificent draft. And I worked it over and then Bork worked it over. And then we went and filed it. It was 100 pages long, the brief. Occasionally, I go back and look at it and I think it said everything there was to say about the death penalty. And it was, I think, a first-rate product. And that's bragging – but I think it was. But I think we had devised a strategy because at that time the Supreme Court had held the death penalty unconstitutional because of procedural flaws. I can't remember the name of the case.

Mr. Prettyman:        Furman? [<sup>31</sup>]

Judge Randolph:       It might have been Furman. We had to change two votes. We were amicus in the case because all of the cases were coming from – but we got argument time on behalf of the United States because the United States had a number of statutes.

Mr. Prettyman:        White was one of those whose vote you had to change.

Judge Randolph:       White and Stewart were the two votes we had to change. And in the face of the Supreme Court striking down the death penalty – I think 39 states reenacted it. And I think that was what was going on here. So we had to change those. And we were up against – Tony Amsterdam was on the other side, and he had been a professor of mine at the University of Pennsylvania. He is a brilliant, brilliant advocate and writer. So we knew we had our work cut out for us. And so, one of the difficult things that we had to deal with at the time was the notion that the death penalty had no deterrent effect. And there were studies by Marvin Wolfgang. And there were studies by other people – criminologists, and so on and so forth. And we dealt with those studies in an appendix to the original brief and pointed out that we thought

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<sup>31</sup> Furman v. Georgia, 408 U.S. 238 (1972).

they were flawed. And we were pointing out that what they do is they compare a state where they had the death penalty with a state that didn't have the death penalty and then say, look, the murder rates are comparable, therefore the death penalty has no deterrent effect – not a very sophisticated analysis. It didn't even take into account whether the death penalty was being used in the state that had it. It didn't take the demographics into account or anything else. But, nevertheless, it was there. Well, anyway, as I am working on the brief I am listening to – there was a program called The Tomorrow Program with Tom Snyder – it was after the late night Johnny Carson. And I had the TV on in the background. I was working on the brief. And Tom Snyder had a debate between Ernest van den Haag –

Mr. Prettyman: Oh, yeah –

Judge Randolph: [continuing] who was a philosopher at NYU, and Louis Nizer, who was a famous trial lawyer. And the debate was about the death penalty. So I, I had then heard so many debates. It was the big thing back then. In fact, I debated David Kendall down at Duke about the death penalty. And I wasn't all that interested. But I had one ear to the television and my eyes on the paper as I was writing. And suddenly I hear Louis Nizer say, “And that professor at the University of Chicago who did that regression analysis and proved that eight lives are saved for every execution – he will never publish that thing.” And I said, “What the heck is this?” So the next morning I come into the office and I called Louis Nizer. There was a kind of ballet between his secretary and mine about who was going to get on the telephone first. Some silliness. So I got on and I said, “You mentioned a study.” He said, “Oh, yes.” I said, “Can you give me any more information about it?” He said, “Well I don't have a copy, I just heard about it from a friend of mine who is in the Economics Department at the University of Chicago.” I said,

“Who is the fellow you are talking about?” He said, “Some professor named Isaac Ehrlich who got a grant to study the deterrent effect of the death penalty and held demographics and did a regression analysis – and he is against the death penalty – and it got this result – he has been checking his data and rechecking his data and he doesn't want to publish it because it came out exactly opposite to what he thought.” I thought, wow, I have got to get this. So I called Easterbrook and said, “We have got to get this thing. Do you know anybody at the University of Chicago who can go over to the Economics Department and talk to this guy? I am going to call him, but I don't want to call him out of the blue.” And he said, “Yeah, I know Dick Posner.” Posner was teaching and he had a connection with the Economics Department. Posner went over and talked to him and told him that he would be getting a call. And I called him up, and he was very reticent. “Yes, I did this study. Yes, I got a grant. No, I haven't published it. I don't want to publish it. No, I don't want to give you a copy.” I said, “Well, please, this is really important.” And finally we negotiated and the deal was that I would not call him as a witness to testify before the Supreme Court if he gave us a copy.

Mr. Prettyman: [Laughing]

Judge Randolph: Tough deal . . . . [tape ends -- changes tape]

Mr. Prettyman: You were able to get that study, you introduced it into the Supreme Court, and you were saying that the Supreme Court ruled your way.

Judge Randolph: Well, after they got the Isaac Ehrlich study, what they did is that they set the cases down for reargument the following year. I think it was the following year. Yeah, I am sure it was because then pressure built up on Ehrlich to publish. And he did. He published his death penalty study in the American Economic Review, I think it was. And over

the summer as the cases were still pending, getting ready for reargument, the Yale Law Journal ran a whole issue on that study and I don't know whether Ehrlich wrote in about that study or not but others attacked him. But the effect of it was to neutralize (your word for which I am grateful) the argument that the death penalty had no deterrent effect. And when the cases were reargued, that did not play, I don't think, a prominent role. And Justice White and Justice Stewart changed their votes. And the death penalty was upheld as a result of it.

Mr. Prettyman: And I asked whether any one Justice gave you the most difficulty or asked the most difficult questions.

Judge Randolph: I don't recall any of them being particularly hard on me, in any way, or on anybody. The Court was much more formal in those days and there was not this constant barrage of questions. You had the opportunity to get your argument out at that time. Which you don't now.

Mr. Prettyman: Did you ever have the experience of having almost no questions?

Judge Randolph: One case I think I had a very short argument. It was a case called Andresen v. Maryland. As I recall, I went through my entire argument without a question. And I don't know why but I had a sense that I might get away with that, because I had a number of things I wanted to say that were not in the brief that we had filed. We were amicus curiae in that case and the case dealt with whether Boyd v. United States [<sup>32</sup>] should be overruled. A case which the Supreme Court back in the 1800s had meshed together the 4th and 5th Amendments and they had this lawyer, who was arguing pro se by the way, who had been subjected to a search warrant in his office and the police not only picked up a good many files from his clients – I

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<sup>32</sup> Boyd v. United States, 116 U.S. 616 (1886).

think he was accused of fraud but I am not really sure – but also a good many documents that he had written himself. And he had claimed that that had violated his 5th Amendment privilege against self-incrimination. Which the Boyd case had held, I think wrongly, and so what I did was, I constructed an argument analytically to show why that was wrong and then gave a series of hypotheticals that made it seem so ridiculous. And the only one I recall right now is the idea that the police can seize it – if they find a kidnapper's premises, they can go in and seize his typewriter, but they can't seize the half-completed ransom note in it. Which is utterly absurd. What was the cite on that case?

Mr. Prettyman: What, Andresen?

Judge Randolph:: Oh, it doesn't say. It was Blackmun.

Mr. Prettyman: I believe you said Blackmun actually used some of your hypotheticals in his –

Judge Randolph: He did. As I remember: “[A] contrary determination – would prohibit the admission of evidence traditionally used in criminal cases and traditionally admissible despite the Fifth Amendment. For example, it would bar the admission of an accused's gambling records in a prosecution for gambling; a note given temporarily to a bank teller during a robbery and subsequently seized in the accused's automobile or home. . . . And incriminating notes prepared, but not sent, by an accused in a kidnapping or blackmail prosecution.”

Mr. Prettyman: Okay, now in 1977 you came back to private practice. What was the occasion for your leaving the SG's office at that time?

Judge Randolph: The administration changed. Jimmy Carter was elected and I had

had my run. I think I reached the point of really diminishing return in the Solicitor General's office. And I was also a little bit concerned about myself because one of the last cases I had argued was Tribal Business Committee v. Weeks, [33] and I was getting, I think, a little complacent 'cause I didn't start preparing for the argument for that case until 10 o'clock the night before.

Mr. Prettyman: Oh my Lord.

Judge Randolph: I knew the case. I figured, well, I will do something spontaneous. I thought, this is dangerous. And so I thought I better hang it up. And Bob Bork was leaving. And he had been a partner at Kirkland Ellis before. And also a professor at Yale Law School when he came up, and Bob and I decided to form a law firm. And Howard Krane, who later became the managing partner of Kirkland Ellis, was going to set us up. They were going to finance us and, as I recall, we had more associates we could bring on than we could shake a stick at. Anyway, that is what we were going to do. And then sometime in late January, I guess it was, Yale had gotten a grant or whatever, for the Alexander Bickel Chair at Yale Law School. And Alexander Bickel, who had passed away, was Bob Bork's best friend. Bob couldn't refuse to be the first Alexander Bickel Professor of Law at Yale. So that whole idea of us forming a law firm went by the way. I had decided to leave and I talked to a number of firms, one of whom I still recall because they wanted me to be the managing partner and head up their Washington office. And I will probably forget the name – oh, it was a firm I had never heard of – I thought I don't want to do that – Skadden Arps.

Mr. Prettyman: Born to fail.

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<sup>33</sup> Delaware Tribal Business Committee v. Weeks, 430 U.S. 73 (1977).

Judge Randolph: I make all these great business decisions in my office. But, once again, I made the judgment – I don't know – I have been in somebody else's firm – wouldn't it be fun to have your own firm?

Mr. Prettyman: Did you give any thought to going back to Miller Cassidy?

Judge Randolph: Well, I did. But I talked to Jack Miller and John Cassidy about this idea of starting – I had gotten into this mode of thinking with Bork and I didn't want to give it up. I thought this would be really nifty. It would be a little frightening to walk out with no business. But both of them said, if you want to do that, we will make absolutely certain that there will not be a period of time when you don't have clients.

Mr. Prettyman: That is nice.

Judge Randolph: So I said, Well, okay. How can I refuse? I am going to do this. And I met a guy named Jim Sharp who was a trial attorney and he had an associate with him named Richard Janis so we formed this firm called Sharp, Randolph & Janis.

Mr. Prettyman: Where were you located with them?

Judge Randolph: We were on 19th Street near Sunderland. We rented space from a real estate firm. Bob Bennett was in the firm – I can't remember the name. We did a lot of real estate work.

Mr. Prettyman: How many lawyers in your firm?

Judge Randolph: Oh, yeah. I hired someone you know. Pat Ambrose.

Mr. Prettyman: Oh, yeah.

Judge Randolph: She was the first associate I hired. I had gotten to know her because she was the first in her class at Georgetown and I had been teaching at Georgetown for

four years -- '74, I think, until '78. She was in my class and then she went to the Justice Department. I saw a bit of her there. And she had a year in between clerking for Tamm, I think she clerked for Judge Tamm. Anyway, she was the first one. And then we hired Carol Chomsky, who is now a professor at the University of Minnesota, and a fellow named Tom Lankford, who had clerked for a 4th circuit judge whose name escapes me now.

Mr. Prettyman:           What kind of practice did you have?

Judge Randolph:        It was all litigation of one sort or another. It was rather ironic. The first piece of major business I got. And I would take anything, even if it wasn't litigation. A businessman in town called me up, and I won't give his name to respect his confidentiality, and said, "I know a fellow from Florida who is in big trouble in Rhode Island and is this the kind of thing you would do – criminal trouble?" I said, "Sure." I had done some criminal stuff with Miller in litigation, and so on and so forth. The next thing I know I am representing this fellow up in Rhode Island and it was a case – it was in Time magazine – it was called the New England Connection – it was off of Point Judith in Rhode Island – they found a freighter from Columbia and somehow or other the Customs officials boarded it and the thing was filled with marijuana. The New England Connection. And so they found in the ship some telephone numbers that they (the Columbians) were to call and the telephone numbers were of a motel outside of Providence, Rhode Island. And the police got the address and went in and arrested four people, all of whom were from Miami. One of whom was my client. And they seized documents and a gun and a case, and so on and so forth. So I went up there to represent him. You ought to hear the details on this thing. This is the cross-examination of which I am most proud in my life. Well, my client told me that the police knocked and as soon as they opened the door the police just rushed in and

arrested them. They didn't have a warrant, of course. The story of the police was rather different – that they had knocked and asked if they could talk to these guys. And they opened the door to the motel room and the police saw a case – one of these leather sample cases where the flaps come up and close and with a combination lock on it. And it was open, and they saw a gun coming out of it – a gun that they could see – and, of course, that created exigent circumstances – they didn't need a warrant – they wanted an arrest. These were the two stories. I didn't know what I was going to do. But I still remember the detective's name; the lead detective's name was Godbolt. And I started questioning. And they brought the case out. I had asked to see the case. It was this black leather case. And my client told me that he was particularly perturbed that they had seized this because he had just bought the thing and it had cost him \$400. It was belting leather. A really expensive case. Which somehow or another triggered a thought in my mind. So I got the cross-examination. We had a suppression hearing and I was cross-examining Godbolt. I brought the case out and I put it in front of him on the stand. I asked if this was the case you saw in room 520 of the Providence Motel. “Yes, it is.” I said, “Was it in this condition when you saw it first?” He said, “No.” I asked, “What is different about the case?” “Well, you noticed the locks?” I said, “I have noticed the locks. There are jimmy marks on the locks, aren't there?” “Yes there are.” Through lousy cross-examination I got him to then testify that they had closed it but didn't know the combination, got it back in the police station and had to rip it open. My client was sitting there and he said, “That is a lie. The thing was locked and closed and they opened it in the motel room.” How am I going to prove that? The police say one thing, and all the officers will swear the same. And then it occurred to me. I don't know how it occurred to me. I said, “Well, you can open it now, can't you, detective?” He said, “Yes.” I said, “Would you do that?” He

lifted the flaps up and closed them down. I said, "I want to be absolutely clear where this case was when you entered that room. There were two beds and they were side by side. It was not up against one of the beds, was it?" "No." If it had been he couldn't have seen inside it. I said, "It was in the middle of the room. When the door opened, you saw this case in the middle of the room. Is that correct?" "Yes." I said, "Would you demonstrate to the Court exactly how the case was open at the time you saw it?" And he did. And he opened the flaps up. This is a brand new \$400 belting leather case. And you know what happens when you pull those flaps down? They hop right back and close. And he scrambled to open them again. And I said, "Oh, I guess we didn't have them exactly right, Detective Godbolt. You demonstrate again exactly what condition the case was in when you looked inside it from the door of the motel room." And he opened the flaps again. And this time I pulled the case away. And we just stood there and the flaps closed like that. The Judge – now I give him great credit for this. This was a big publicity – Time magazine, headlines, and so on and so forth – and the Judge – his name was Rogers – he said, "We are going to adjourn this hearing. Detective Godbolt, I advise you very strongly that before you say another word, you get counsel." And the long and short of it was he suppressed all the evidence and my client never went to trial. I mean, talk about luck.

Mr. Prettyman: I don't know about luck. I mean that was really good – You didn't even know. You would surmise that with a new bag maybe it might do that. But you hadn't actually tried it.

Judge Randolph: I hadn't actually tried it. This was in police custody.

Mr. Prettyman: I had an experience like that once with the police too.

Judge Randolph: Well, I will interview you.

Mr. Prettyman: Well, the time is about up for your hour here so shall we quit for today?

Judge Randolph: Yes.

ORAL HISTORY OF JUDGE ARTHUR RAYMOND RANDOLPH, JR.

Fourth Session, Monday, March 1, 2004

Mr. Prettyman: This is E. Barrett Prettyman, Jr., and I am beginning the fourth session of the oral history of Judge Arthur Raymond Randolph, Jr., of the D.C. Circuit Court of Appeals, and it is Monday, March 1, 2004. Judge, when you were arguing cases in the D.C. Circuit did you ever argue before any judges whom you later sat with?

Judge Randolph: Yes, Harry Edwards.

Mr. Prettyman: Harry Edwards was the only one?

Judge Randolph: I think I argued a case before (microphone adjustment) George MacKinnon, I didn't argue many cases in the D.C. Circuit.

Mr. Prettyman: In 1979, you became Special Counsel to the House Ethics Committee. Did you remain with your firm during this period?

Judge Randolph: I did. I had a staff on the Hill and spent about half my time in that capacity, then half my time in the law firm.

Mr. Prettyman: And how did that assignment come about?

Judge Randolph: I think Bill Geoghegan recommended me. The immediate problem was that Ayatollah Khomeini forces had deposed the Shah and the new regime had taken over the Iranian Embassy here. There was a fellow name Rouhani that they brought over from Iran, and he made a public announcement that he had found evidence that American congressmen had been

bribed. The former ambassador was Ardeshir Zahedi; don't ask me to spell that. And the Iranian Embassy was, at that time, one of the lively social party places in Washington; there were always these galas going on and it was widely reported in the press that all these parties were taking place and there were congressmen involved, and so on and so forth. So when Rouhani made the announcement, there was this great hue and cry that went up in Congress that we needed to investigate this. And so I was hired initially to conduct that investigation. I did several others, but that was the initial one.

Mr. Prettyman: I held that same position.

Judge Randolph: Right after me, I'll get to that – Yes.

Mr. Prettyman: Was the committee badly divided at that time?

Judge Randolph: Very much so, very much so.

Mr. Prettyman: Not so much on the Zahedi matter?

Judge Randolph: Well, it was, it was on the Zahedi matter. You see, I did another investigation involving South Africa. They called it “Rudigate.” But yes, I have one clear memory of trying to get subpoenas issued for people who were in the Tip O'Neill camp; he was the Speaker then, and it was a Democratic majority in the committee at that time. The staff director was a guy that you know, John Swanner. Do you remember him?

Mr. Prettyman: Oh, very well. Yes.

Judge Randolph: Yes, good old southern politician type. But I remember distinctly one afternoon trying to get subpoenas issued for a congressman in New York and I kept getting voted down in executive session by one vote, and I apparently was letting my disappointment show and I was slinking lower and lower into the chair and there was a first-term congressman

sitting immediately to my left, Dick Cheney. And Dick Cheney said to me, whispers to me, I'll never forget it, he said, "Ray don't let it bother you, in Congress it's not whether you win or lose, it's how you place the blame." [Laughter]

Mr. Prettyman: That's a great, great line.

Judge Randolph: Yes, that was a great line.

Mr. Prettyman: What exactly did you do as Special Counsel; you took depositions, met with government officials, and so forth?

Judge Randolph: Yes, we took depositions. There had to be one member present, as you know, when we did that. And we gathered documents, we interviewed people at the Embassy, we kept trying to get these documents that Rouhani said proved conclusively that there had been bribery. And then the Ambassador had fled the country to take up residence in Switzerland. But he had a daughter at Princeton, and we knew that, and so I put a border watch on him because I thought he would come in to visit his daughter. And low and behold, he did; he arrived in New York, and his attorney was furious that he was stopped and called me up and just in the foulest language, loud, you son of a bitch, this is a great man, on and on, and his attorney was William Rogers, who was the former Secretary of State and Attorney General. So anyway, I said, "Look, all I want to do is question him and you make him available and we'll see where we go from there." So he agreed to do that and I went up to New York with Bob Birmingham, who's the former head of Foreign Liaison for the FBI – was he still working on the committee when you were? I hired him.

Mr. Prettyman: Well, I – that name is so familiar to me, and so I knew who he was, but I don't think he was still with the committee.

Judge Randolph: Yes, well anyway, so we went up to New York, and I'll never forget it because Rogers had this great big office, as I recall it, he had a chandelier in the middle of the office, and Birmingham and I went in and he was sitting behind this desk with a bunch of briefs, and I remember, he got up and this is my second encounter with him and I said, "What are you working on?" and he said he had this argument in the 10th Circuit or some circuit, for Merrill Lynch or some brokerage house. And I said, "Oh, when is it?" He said – he named some date, it was a week away, and I said, "Boy, what luxury. When I was in the Solicitor General's office if we had a day to prepare it was really fantastic." [Laughter] So off we went and we interviewed Zahedi. I'll never forget it because he claimed he never gave any money to an American congressman, but he did give gifts. He started pulling out during the interview – Birmingham's there taking notes – and he started pulling out all these various things that he gave. It would have taken probably an hour to mug him that day. He had all these various coins and trinkets and there's some Iranian holiday where you give coins; there were gold coins – they weren't worth that much – and there was the caviar at Christmastime, Beluga caviar that he gave away, and so on and so forth, and he said to me, "Turn that off."

Mr. Prettyman: Judge, what was the final result of your investigation?

Judge Randolph: Well, the final result after a good long time – more than a year, as I recall, and we interviewed former cooks and butlers and people that worked around the Embassy. We interviewed congressmen, we interviewed, as I said, Zahedi; we interviewed a good many others. We looked into various congressmen who had attended frequently the parties and into their financial affairs and I finally came to the conclusion there was absolutely no evidence whatsoever. And I went back and confronted Rouhani, and again it was Bob Birmingham with

me, and said that after all this investigation, all this time, I am convinced – and I said this straight to his face – that you're a liar, and he said, yes, he admitted it, and he said but it wasn't, something to the effect that there was nothing wrong with that because he was doing it in the name of Allah.

Mr. Prettyman: Really!

Judge Randolph: Yes, it was astounding to me that there was absolutely no remorse, no apology; it was for the good of the Iranian Revolution to tarnish, the heck with the American congressmen; what he was trying to do was tarnish the ambassador who was very close to the Shah. And so the end justified the means by which he did it, which was an eye opener. Shocking!

Mr. Prettyman: Turning to your personal life for a moment, I believe you were divorced in 1983 and later that same year you met the lady who would become your second wife.

Judge Randolph: Right.

Mr. Prettyman: Tell us about her, how did you meet?

Judge Randolph: Well, we met, I met Lee initially when she was a client at the law firm and she was at Arthur Anderson at the time and had a grand jury appearance and I substituted for my partner Tom Green who had to be out of town that day. I can't even remember when that was, at the time, I think, it may have been 1981. Lee was engaged to be married at the time, I remember because her fiancé came to the grand jury. It was not a grand jury on her. She was giving evidence regarding something else. She had been with the IRS and this related to something she knew as a result of the IRS. So anyway, I sort of lost touch with her and then I got separated in July of 1982, and I don't know how long after that I saw Lee and asked her if she was married now. This was a year or so later. She told me that she had just called off the engagement. And I said, "Well, do you play tennis?" [Laughter] And we played tennis over at East Potomac

Park someplace on our first date. The first real date when we went out was Bob Bork's wedding. Whenever that was, I think it was 19\_\_\_. I think it was, I can't remember, it was in the fall.

Mr. Prettyman: And you now have how many children?

Judge Randolph: Two. My son is an investment banker in Houston, TX, and my daughter is in the Graduate School of Fine Arts in Michigan.

Mr. Prettyman: My daughter is an aeronautical engineer in Houston.

Judge Randolph: Trevor went to Rice on a golf scholarship. When Lee and I got married, we bought a house that backed up to Congressional Country Club and I didn't play golf and the children did. Trevor lived with us from about the time he was 12. He's 31 now. And Cynthia lived with us from the time she was about 12 and so one fine day after doing yard work I said to Trevor, who was 12 or 13 years old, I said, "You know we're members of Congressional, we ought to learn how to play golf." So he said, "That's a great idea." So the next thing I know, we went out and bought clubs and he became just a fantastic golfer. He came within – he got a golf scholarship to Rice University, which is very helpful, given the pay in the judicial system and came within an inch of turning pro. Raised all the money and didn't do it. But I've caddied for him at his amateur events. All the familiar players – Tiger Woods was there – amateurs.

Mr. Prettyman: Wow!

Judge Randolph: Yeah!

Mr. Prettyman: I note that in 1979 the name of your firm changed to Sharp, Randolph & Green. How did that come about and who was Green?

Judge Randolph: Dick Janis, for personal reasons was our partner but left, and Tom Green was at Dickstein, Shapiro. Thomas Green, he was a former Assistant U.S. Attorney, he's

now a partner at Sidley & Austin and joined us. That's basically how it happened.

Mr. Prettyman: Then in 1983 the firm became Randolph & Fox and finally in 1984 it became Randolph & Truitt. Tell us about those changes.

Judge Randolph: Well, I had a disagreement mostly with Jim Sharp at the time about the way that our firm was going and, in a nutshell, I was doing a good deal of litigation, almost entirely appellate litigation, moving in one direction and some of the other people in the firm were moving in a different direction, namely, representing cocaine people down in Florida. I had done one case, a marijuana case in Rhode Island, and got an indictment dismissed on the basis of an illegal search and gained some fame as a result, because this was a huge case. As a result of that we had all the business we would ever want involving this sort of thing, but it was not to my taste. There was a lot of money in it, but that's not what I wanted to do. So I left with several associates. Phil Fox at the time was a friend and wanted to practice with me and we formed this firm, and Phil was unfortunately going through a divorce at the time and was having a difficult time concentrating on work. He said to me, "Look, I'm not really contributing here," and so, at the same time, another good friend of mine said, "I want to go out and do this thing together," and I said, "Great!" So that's how it happened. I'm still very good friends with all of them.

Mr. Prettyman: Did that firm, Randolph & Truitt, grow?

Judge Randolph: It did, not to a real great extent. We had Susan Launer and there was a fellow who I just heard from the other day, Chris . . . Bonner, I can't remember, who is now an Assistant U.S. Attorney; he was in the Department of Justice after he left us. But what happened in about 1987 Steve, my partner, got this client which was the National Iranian Oil Company that had a suit against Ashland Oil for millions of dollars as a result of the Iranian oil

embargo. The claim was that Iran had shipped oil to Ashland, Ashland never paid them for it, and so the problem was the statute of limitations. And I remember Steve looking through every state that he could find where Ashland had a presence to try to find a statute of limitations that hadn't run. And he did, he finally found one, it was Mississippi. And anyway, we knew that to handle that case was going to require a lot of people. And at the same time, I was retained by the State of Utah to defend against suits brought by every major oil company in the U.S. and some in the world suing for a return of all the severance taxes that they had paid for drilling on the Navaho Indian Reservation, claiming they were immune from state taxation because they were drilling on an Indian reservation. So we had these two huge cases that suddenly came in, neither one of which we wanted to give up. So the question was do we go out and hire a whole bunch of people – we figured we would need ten immediately – or do we merge. And the point of least resistance was merging, so we merged the firm into Pepper, Hamilton & Scheetz. And I have to tell you one quick story. I thought Steve had not a chance in Mississippi of prevailing and he lost every motion that was filed, and so on and so forth. But anyway, Iran asked us to take this case on a contingent fee, which I said was ridiculous.

Mr. Prettyman:        Yeah.

Judge Randolph:      And he eventually won that case. He won hundreds of millions of dollars.

Mr. Prettyman:        Did he take it on contingency?

Judge Randolph:      No. No.

Mr. Prettyman:        You wished you had.

Judge Randolph:      I'd be wearing better clothes.

Mr. Prettyman: Now, let's see, it became Randolph and Truitt in '84 and then three years later you became a partner, as you just said, in the Washington office of Pepper Hamilton and Scheetz. That was a Philadelphia firm?

Judge Randolph: Right.

Mr. Prettyman: And you just explained why you left to go with Pepper Hamilton, and did you continue to do primarily appellate work with them?

Judge Randolph: I did. I had several trial-type proceedings, but it was primarily appellate and my practice really sort of transitioned into representing states. I eventually won the Utah case. Then I represented 13 Western states before the Supreme Court in the amicus brief which wound up as Justice Stevens' opinion, who basically copied it in a case called Cotton Petroleum [<sup>34</sup>]. And then I represented Arkansas twice in the Supreme Court. I argued the same case twice, a trucking case, and then I was representing the Commonwealth of Virginia when I got appointed to this court, but I had a number of state clients.

Mr. Prettyman: My notes indicate that from the period between 1978 until your appointment to the D.C. Circuit in 1990, you argued 17 cases in eight different circuit courts of appeals. Were most of those criminal?

Judge Randolph: I can't remember. Some of them were.

Mr. Prettyman: Yeah, my notes indicate that some were drug cases, mail fraud, tax fraud, breach of plea agreement, and breach of fiduciary duty. Does any of that sound familiar?

Judge Randolph: Yeah.

Mr. Prettyman: And how did those cases come to you, just general reputation?

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<sup>34</sup> Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

Judge Randolph: It came in all different ways.

Mr. Prettyman: As is so often the case. Were you basically pleased with your oral arguments or were you one of those who are constantly self-critical?

Judge Randolph: I've often heard it said by excellent advocates that when they finish the argument, they always think of various things that they should have said and they should have done differently. I have never had that experience. I finish it and it's over and there's nothing I can do to change it. I just gotta go on and I have really never –

Mr. Prettyman: Don't look back.

Judge Randolph: I never thought about what I should have said or how I could have done it differently, or anything.

Mr. Prettyman: What did you take to the podium?

Judge Randolph: I was scared out of my wits the first time I argued a case. And the first time I ever argued a case was in the Supreme Court, and it was Affiliated Ute Citizens v. United States, this, that and the other thing. It was a 10B5, it was a complicated case, but that's neither here nor there, and so in order to figure out how one does this –

Mr. Prettyman: Oh, you told us about that – when you read John W. Davis.

Judge Randolph: So after that, that didn't work with cue cards, after that what I almost invariably did was, I typed out the argument, word for word, as I would give it if I weren't asked a single question. And I'd have in the margin references to the page of the joint appendix that would support any factual representation that I was making or a question of fact that might come up in the response to an assertion that I was making. And, of course, the argument never went exactly like that, but I did that, and I never read the argument, but I did that to implant it in

my brain. And once I did it, then when I was asked questions and had anticipated them I was able to pluck out of that thing that I had carefully written out or typed out a response and was able to transition from answering the question into another part of the argument fairly easily.

Mr. Prettyman: So you had all that on one sheet or a series of sheets?

Judge Randolph: It would depend on the case. It could be ten pieces of paper.

Mr. Prettyman: Okay. You've noted that you became a special assistant to the attorneys general for several states, because you had to do that in order to argue a case on their behalf and those states included: my notes show Utah, Montana, New Mexico and probably others, too. During your entire career arguing before the Supreme Court, who was your toughest questioner?

Judge Randolph: Justice White comes to mind, as someone who, I don't know if tough is the word; he always asked, I thought, the appropriate question. He probed. The Court was very different then, very, very different then; they allowed you to get an argument out and to have some coherent presentation, whereas now – The last time I was up at the Supreme Court was about this time two years ago, but my wife argued a case for the tax commission and I was taken aback. She had a half-hour and she got about two sentences out and from then on it was off to the races. Never was like that when I was –

Mr. Prettyman: I once went back and counted and I had 93 questions in 30 minutes.

Judge Randolph: How can you make a coherent presentation? Matter of fact, I had this conversation at dinner with a Justice who will go unidentified, and I told him that I thought it was appalling, and he said, “Oh I couldn't disagree with you more,” and I said, “Why?” He said, “Well, the attorneys have nothing to say, really to add,” and I said, “How do you know? How do

you know?” And then I said, “What I find particularly appalling is when someone has two minutes left of rebuttal time and they stand up and before they even reach the lectern they're asked a question and it cuts in, you have no idea what their response was.” And then he confessed to me and said, “Well, we had discussions about that, we're going to try to allow some more argument, particularly in the rebuttal.”

Mr. Prettyman: During this period, you also participated in about 23 trials, two-thirds of which were civil and one-third criminal. Did you like trial work?

Judge Randolph: I liked the trial. I disliked intensely the preparations work.

Mr. Prettyman: It's hard work. And particularly during the trial, having to prepare for the next day.

Judge Randolph: There was never enough time to get ready and the trial was often an endurance test – you were up to midnight or one o'clock, then you're off the next day doing a trial.

Mr. Prettyman: Yes. Well, believe it or not, we have finally reached your appointment to the court. How did you come to be appointed to the D.C. Circuit?

Judge Randolph: Well, the inner workings of the White House are unknown to me. I really don't know, but I had a telephone call, and I don't remember from whom, asking if I would be interested in the district court or the court of appeals, and I said I am not interested whatsoever in the district court, which ties in with our last conversation about trials. [Laughter] And I said I'm probably not interested in the court of appeals, given the financial part of it, because I had two children, one at St. Albans, and Cynthia was at National Cathedral School, and just the tuition alone was enormous and I just couldn't see how we could possibly do it. I wanted to make absolutely certain that I provided for them to go to college and rather than me doing something

that I would enjoy, I'd rather provide for them. So that's why I said I probably wouldn't take it. Anyway, from that moment on, my dear sweet wife, who is an expert at things like this, started doing spreadsheets. She did one after another after another, projecting into the future beyond high school into college and taking into account the cost-of-living increases and, so on and so forth. I don't know where these spreadsheets are, but they went on and on to convince me that financially we could do it and she eventually did, and that's how it came about. I went over and had lunch with Boyden Gray.

Mr. Prettyman: So you called them back to let them know you changed your mind.

Judge Randolph: They called me several times and had lunch and the next thing I know, I was up for nomination.

Mr. Prettyman: Did you actually meet with the first President Bush before you were appointed?

Judge Randolph: No, but I talked to him on the telephone. He called me up and said, "I'm convinced now and I want you to know that I want to nominate you." And I said, "I'd be very honored, Sir."

Mr. Prettyman: Incidentally, I do have one more question before your appointment to the Court. [End of Tape #7]

[Tape #8]

Mr. Prettyman: All right, I'm going to repeat that question because I think we may have lost part of it when we changed tapes. How did you get to represent Rashida Moore, who lured former Mayor Barry to a hotel in a sting operation?

Judge Randolph: Some people do pro bono work in various and sundry different

ways. Everybody does it to some degree. I did pro bono work for the FBI. FBI agents were around the country constantly getting in one sort of trouble or another. There might be a paternity suit in California; there might be a charge of driving under the influence in some other state, or whatever. To the extent I could, I helped out and didn't charge them. These were government employees, I thought, doing an important public service and they were not being paid a lot, and for them to have to retain private counsel would have, in many cases, wiped out their life's savings. So anyway, I was known to the FBI, and Rashida Moore was, of course, the woman who was set up to lure Marion Barry. Before I get into Rashida Moore. The other thing that got me into the relationship with the FBI is I represented first a gentleman named Cortland Jones when he was sued in Cointelpro, which is the counter-intelligence program of J. Edgar Hoover. And then I ended up representing a number of FBI agents. I filed an unsuccessful petition for certiorari from a decision of the D.C. Circuit. Well, anyway, Rashida Moore was the woman who was used to lure Marion Barry to smoke crack in a hotel room. She was a former girlfriend of Marion Barry's and it was photographed and ultimately Barry was convicted and sentenced as a result of that and other things that had been done. But when it got serious with Rashida Moore, as they were planning this action, they realized that she had some exposure – it was quite obvious – and she had other potential criminal difficulties, and, of course, she was accepting their assurances that she would not be prosecuted. But they very wisely realized that she should have counsel. And so I was called and went over to the Virginia FBI office – it was in Virginia for reasons I'm not very clear about, it was over near Tyson's Corner – and met her and undertook her representation; that was pro bono too.

Mr. Prettyman:           So that was really at the request of the FBI.

Judge Randolph: Right.

Mr. Prettyman: When you were appointed to this court, your confirmation –

Judge Randolph: Let me tell you a story – I mentioned Cortland Jones. Cortland Jones was head of either the Washington Field office or one section of the Washington Field office, my memory is not that sharp about this, but a wonderful old gentleman, retired FBI agent. And he came over to dinner several times. He told one story which is just quite wonderful. He was the agent that was assigned to find the Woodstock typewriter in the Alger Hiss matter. The typewriter that was used to type out the papers that ultimately became the Pumpkin Papers –

Mr. Prettyman: The typewriter that ultimately convicted him.

Judge Randolph: And everyone knew that Alger Hiss had a typewriter, a Woodstock typewriter. The question was what became of it and the one that was used to type the Pumpkin Papers. They didn't have Xeroxes in those days and so the allegation was that Hiss used to bring documents from the State Department and either he or his wife would type up a duplicate copy and then he would turn the papers back. But the one that was revealed in the Pumpkin Papers had distinctive key strokes, as all typewriters did, and there was one in particular, I think it was “e,” it was really off center when it was typed. But anyway, J. Edgar Hoover assigned Cortland Jones to find the typewriter and he had dozens and dozens of agents scouring the country trying to find that typewriter. And they made no progress whatsoever, they couldn't find it, and they looked high and low. Well anyway, the way Cortland tells it, the agents were playing poker one Saturday night over in Virginia and were very frustrated and Hoover was a real tough task master, so they – The other thing they had done was, they had gone to the gas company, the telephone company, any place where Hiss may have typed up something and sent it to show the off-center “e.” They

found absolutely nothing. Zero. When they were playing poker one night in Virginia and one of them got this bright idea, he said, "You know Hiss' kid (during this period when we know he had a typewriter and we know he had a Woodstock typewriter because people had testified to it) went to Landon School, had to get admitted to Landon School and if it there was any document that Alger Hiss would have typed up, it would have been a letter to the Headmaster at Landon, asking him to admit his son for this period." So another agent said, "I know the Headmaster at Landon." They called him up and he came in on a Sunday and they asked him whether Landon had kept papers from back during that period of time and he said yes, they're stored in an attic in a barn-like structure. So the agents go through it, box after box after box, and suddenly, one of them yells out, "I found it." And they found the document typed out on a Woodstock typewriter, distinctive keys, signed Alger Hiss, and as soon as they saw it they knew, because the "e" was off center.

Mr. Prettyman:           Wow!

Judge Randolph:       Called up J. Edgar Hoover, he came in on a Sunday and by that time they had already had the documents examined and had the chief document examiner of the FBI go through it and verify that this was a document typed on the same typewriter that the Pumpkin Papers were typed on and Cortland Jones went in and handed the report and the document to J. Edgar Hoover. He looked it over, and the way Cortland tells it he said, Cortland, that's good work, so find the goddamn typewriter. [Laughter]

Mr. Prettyman:       That's so quintessential Hoover! Your confirmation hearings were pretty perfunctory, was that expected?

Judge Randolph:       I had no reason to think that there would be anything controversial.

Mr. Prettyman:       An AP story back in December 1990 said that in your first opinion

as a federal judge you ruled against the administration that had chosen you. Do you remember that case? With Buckley and D. Ginsburg you held that a board set up to regulate a nuclear weapon plant couldn't meet secretly in light of the FOIA. Does that sound right?

Judge Randolph: Was it that, or was it the Federal Advisory Committee? But anyway, that's the essence of it. Yes.

Mr. Prettyman: Do you believe with Chief Judge Edwards that politics have little to do with how opinions turn out?

Judge Randolph: I think politics should not have anything to do with how opinions turn out.

Mr. Prettyman: And the question is, do you think they do?

Judge Randolph: I can't read everyone's minds – there never – but there rarely is any overt reference to political consequences of the decision.

Mr. Prettyman: Is it fair to say that you suspect that sometimes politics may play a part? I don't want to put words in your mouth.

Judge Randolph: I don't really have a view one way or the other. All I can do is make my own independent judgment, and I'm not a mind reader. I assume the good faith of my colleagues when they vote – now whether something is rolling around in one of their minds, I don't know – but certainly during conferences that is not the way things play out. It's pure legal analysis rather than any political considerations.

Mr. Prettyman: Unlike most of the other judges on the D.C. Circuit, you almost never reveal the outcome of the case in the first few paragraphs. Why is that?

Judge Randolph: Well I sometimes do. I just start writing and however it comes out

is the way it's written.

Mr. Prettyman: You don't have a theory that you shouldn't do that; it just isn't the way it comes out for you?

Judge Randolph: You know, Henry Friendly said that once, he really wrote in *Reflections of a Lawyer Who Newly Becomes A Judge*, he wrote that judges judge differently from case to case and write differently from case to case. That's certainly been – I don't know that I judge differently, but how an opinion is going to be written according to my style is that I have no set style, no set format, I just start writing and sometimes I will say the issue is such and so but then without saying we affirm the rest of it being anticlimactic. I don't like opinions that have first background and then analysis. Seems to me that more often than not what is stated in this background is that this party argues this and this party argues that, and so on and so forth, and then when you get to the so-called analysis part of the opinion, it's repeated all over again. I get bored very, very quickly, so if I'm writing the same thing twice, I'm beginning to get bored. I think repetition is a valid form of argument, but I don't like to write that way, so that's why I don't do it.

Mr. Prettyman: Tell us about a typical opinion once you're assigned to write it. Do you discuss it first with your clerks?

Judge Randolph: Well, I discuss it before we have argument, not always, but most of the time. I get a two-, three-page single-spaced document from them, not regurgitating the facts or the law, but giving me what they think, if they were the judge, how would they decide, and give me the reasons why, and I'll talk to them about that and may send them off to do memos. After the case is decided and I'm assigned the opinion, then I'll do one of two things: I'll ask the clerk to

do a draft and tell the clerk how I think it ought to get organized and, obviously, what the result is, or I'll do the draft myself and give it to the clerk, and there are constant discussions back and forth in the preparation. I am a great believer in the power of writing to concentrate your analysis. I am not so much a great believer in talking about cases all the time. I find that when you start writing, questions appear, difficulties emerge, and your analysis becomes focused. But in the talking back and forth oftentimes you find yourself going around and around and covering the same ground, and I think you can waste a great deal of time doing that, so I like to get it in writing.

Mr. Prettyman: Do you write on the computer or in long hand?

Judge Randolph: No, I write on the computer.

Mr. Prettyman: How do you go about selecting your clerks?

Judge Randolph: That varies from year to year. The last several years have been somewhat different than previous years, but we get close to 600 applications for three slots. There's no way I can go through them all. I don't. I have used my current law clerks to help, only in the following respect: they take from the various law schools and rank the applicants from one to three, one being the worst, three being the best. Sometimes I agree with those rankings, sometimes I don't. But I'll go through probably a dozen or so law schools and look at the various applicants. The reason it's been different in the past several years is because things have gotten off so quickly. The applications came in last year right after Labor Day and the interviews began within less than a week, as a result of which I didn't have a chance to go through a lot of the applications and so I relied very, very heavily on law professors who called me up and said, I have this person who's really great, I have that person who's really great, and so on and so forth. I've been fortunate in the last two years, though, because I've hired, one fellow this year, and one

fellow last year, who were friends of my children. BJ, who's clerking for me, my daughter was in his wedding and I've known him from before he even went to law school, and he's number two at NYU, fortunately, so that made things easy.

Mr. Prettyman: You tend to take them from law schools all over the county or do you stick with local schools, or what?

Judge Randolph: No, it's sort of catch-as-catch-can. No.

Mr. Prettyman: I won't ask you for specifics but have you ever made a mistake in that selection process?

Judge Randolph: Oh sure, yes, oh sure. The paper record does not always pan out.

Mr. Prettyman: Yes, it's hard to determine good judgment out of paper records. You often quote from a great variety of sources. For example, in a dissent a year or so ago, you quoted from John [Lord] Campbell Campbell on The Lives of the Chief Justices of England. Are these quotes from extensive reading or do you consult anthology, or how do you pick those out?

Judge Randolph: Almost never consult an anthology, and that particular quotation had stuck in my head. It was Lord Chief Justice Ellenborough presiding, and the attorney said, "In the book of nature, my Lord, it is written," and it was Ellenborough interrupting, "Would counsel kindly cite the page?" And the reason that quotation stuck with me was because when I was in law school working on the law review late at night, I used to take a break and I would go into the stacks and pull stuff down and start reading it, and one fine evening in 1969 or 1968 I just happened upon The Lives of the Chief Justices and pulled that out and read that and I remembered it. And so we had this case list that we've got to it – we had a heck of a time trying to find that quotation, we had to get the books from the Library of Congress and then I didn't even know what

volume it was in, but fortunately they're organized by Chief Justice, and so the clerks went and read it. And Ellenborough was quite a wit – there are all kinds of funny things there. Well, the interesting thing for me was that when my clerks – was that last year or the year before?

Mr. Prettyman: This was a couple of years ago.

Judge Randolph: Couple of years ago when they left me in the summer they presented me with a gift and they gave me four volumes of The Lives of the Chief Justices. They had such a good time. [Laughter]

Mr. Prettyman: So for most of these quotes, you've read it somewhere and remembered. As a moderator of a Federalist Society panel discussion on national power and unconstitutional conditions, you raised this question: Could the federal government give the states matching welfare grants with the condition that the states could not use any of the federal funds for welfare payments to women who have more than two children? Without in any way indicating how you would vote in a particular case, could you comment generally about this type of condition?

Judge Randolph: I have found over the years that conditions on grants-in-aid is one of the most difficult things to analyze because there's always the idea that if you don't want the money, just don't take it. And what I was trying to do is just suppose that possibility as against the government doing it directly. No one would, I think, support the idea that the federal government can pass a law and say women can't have more than two children. Does it matter if it's a condition in a grant-in-aid? That makes you think of it in a different way and there's controversy about that question. Whether the federal government can do it. I don't know what the conditions are now on the welfare payments or any of that. See, that's why I posed it that way.

Mr. Prettyman: Yes, I had a case once involving the well-known condition where the federal government gave money to the states for highways, but on condition that they pass certain speed limits.

Judge Randolph: Right, a good many things that the federal government can't do directly, it tries to do indirectly through grants-in-aid. I wrote a paper on that in law school back more than 30 years ago. Won some money for it, but never published it. [Laughter]

Mr. Prettyman: You gave a talk that was published in the Harvard Journal of Law and Public Policy entitled "Dictionaries - Plain Meaning and Content in Statutory Context." Would you summarize your view as to the proper approach by a judge to statutory construction?

Judge Randolph: I have no problem whatsoever looking at legislative history. I think the problem is not that judges look at it, it's what they do with it -- that's the problem. And I have often thought and constantly practice that reading legislative history gives me background and context for what Congress was trying to do. Oftentimes, I find legislative history is just a plant, and it's planted into the reports as a way of swaying courts and not necessarily reflected, oftentimes not reflected at all, in the statutory language. I'm careful to do that and what I try not to do is pluck out little bits and pieces. I read the language of the statute, I look at not only the particular provision that's involved, I look at the surrounding provisions, and to the extent that I can, I try to understand the entire statutory context and then I'll turn oftentimes to read the committee reports. There'll be many, many times when I don't cite them because I think it's unnecessary, I find nothing helpful in it; what I'm not enamored with is the plain-meaning doctrine which, to me, is often just a subjective judgment on the part of the court that's pulling that out. It was Felix Frankfurter who said, I may have quoted it, no, he quoted Huxley and said with respect

to the plain-meaning doctrine that a theory survives long after its brains have been knocked out.

[Laughter]

Mr. Prettyman: You traveled abroad quite a bit as a judge. Is there any one country whose judicial system has particularly impressed you?

Judge Randolph: Actually, I have not traveled abroad very much. No, I've been to Scotland once, and my wife and I were in Italy, and that's about it.

Mr. Prettyman: That's interesting, I don't know where I got the impression. I got it from somewhere reading about you. Is there any other federal circuit in this country that you particular enjoy sitting on?

Judge Randolph: Would enjoy sitting on?

Mr. Prettyman: Do you not sit on other circuits?

Judge Randolph: No, no, I don't know exactly what the rule is, but in order to do that, to sit by designation, there has to be some sort of a judgment made about whether your court is caseloaded or workloaded or is overstaffed or some such thing, and I think the Chief Justice has to make a designation, so I don't think there's a single judge on our court, active judge, in 14 years who has sat on another circuit.

Mr. Prettyman: My father used to go sitting on a lot of other circuits and since he had claustrophobia he couldn't fly so he had to take a train to California.

Judge Randolph: Oh my goodness!

Mr. Prettyman: Is there any particular area of the law that you think is more confusing or difficult today than other areas?

Judge Randolph: There are many difficult areas and there are many areas that I think

are in disarray. The difficult areas are oftentimes the ones dealing with these enormously complex regulatory statutes. EPA has a number – the Clean Air Act, the Clean Water Act, and several others. The FCC, the 1996 Telecommunications Act is a nightmare. FERC to some extent has difficulty; FERC oftentimes has difficulty understanding what is really going on in the gas or electric utility industry. And as far as “confusing,” I don't know that confusing is the right word, but as to “disarray,” I think the Supreme Court is in substantial disarray in the First Amendment freedom of speech area for one thing. I think they've gone soft at the core, which is political speech, and strict and rigid in the peripheral speech, child pornography and things of that sort.

Mr. Prettyman: Is there any one area of the law that you particularly enjoy writing opinions about?

Judge Randolph: Probably criminal law, with the exclusion of sentencing issues. Criminal procedures. We don't get many of those cases anymore.

Mr. Prettyman: Judge Bork has written that the Supreme Court should not necessarily have the last word in constitutional interpretation in some cases. Do you agree with him on that?

Judge Randolph: No.

Mr. Prettyman: During your 14 years on the bench is there any one area of the law wherein your views have evolved and changed, or are you pretty much the same judge you were when you came on the bench?

Judge Randolph: I think I'm pretty much the same.

Mr. Prettyman: Do any opinions jump out at you when I ask whether some have been particularly memorable or noteworthy, or about which you are particularly proud? To help

you here, I'm going to show you a two-page list from the Almanac of the Federal Judiciary titled "Noteworthy Rulings" under your name and just see if any of those spring to mind.

Judge Randolph: Well, the ones that leap out at me are the ones that are the most recent because I oftentimes remember, didn't I write something about this? I'll say something to law clerks, and then ask them to go find it. But I've had the experience in oral argument where somebody is quoting something and I would say, who wrote that, implying that some fool wrote it, and was then promptly told that I wrote it. [Laughter] Well, there are several of them I'm looking at here, my most recent opinions that leap out at me are from last year, and one was on the Guantánamo Bay prisoners, detainees, and two aspects of that: one the majority opinion which I wrote and then I wrote a concurring opinion with myself that dealt with the Alien Tort Act and the Guantánamo case is now before the Supreme Court. Don't know what they'll do with that. And then the Alien Tort concurrence I would like to think had an influence. This has been a recurring problem since 1980 about the proper interpretation of a statute that goes back to 1789, and the Supreme Court finally granted certiorari on a case that deals with that. And I also dissented in the Cheney case last year, and that's another case. So I'm watching three cases in the Supreme Court that I shot my mouth off about. There's one opinion here that I had forgotten about that I probably got more correspondence about than any opinion that I wrote in 14 years, and it's a case called Lindsay v. National Transportation Safety Board, 47 F.3d 1209, [<sup>35</sup>] and that opinion I remember – had taken all the material home – was one of the opinions I would do myself, and we got snowed in, and so I had a three-day weekend and I was not going to work on it and then I decided, what the heck, I'll do it. It was known as the naked flyers case. [Laughter] And several press

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<sup>35</sup> Lindsay v. National Transportation Safety Board, 47 F.3d 1209 (D.C. Cir. 1995).

people called me up and apparently it was reported in Europe, but I remember receiving a letter from an administrative law judge, whose name I can't remember – anyway, I wouldn't tell you who it was – and he said in all my years as an administrative law judge being confronted with D.C. Circuit law opinions, I have never been able to finish reading one all the way through until the Lindsay case. [Laughter] And I guess U.S. v. Crowder, [<sup>36</sup>] which dealt with the stipulations – and actually, I was prouder of my dissent than the – [End of Tape #8]

[Tape #9]

Mr. Prettyman: Tell me about Crowder.

Judge Randolph: I ended the opinion in a paragraph – I won't read to you the whole paragraph – but said, this is a dissent – “These are just a few of the obvious questions raised by today's ruling. Many others will continue to bubble up the deeper we sink into this Serbonian Bog.” [Laughter] The Supreme Court vacated the majority opinion, and then it came back, we heard it, the votes changed, and I wound up writing the majority. But the reason that that comes to mind is that when I was in law school, there was a judge who did wonderful writing named John R. Brown from the Fifth Circuit. Do you remember him? I always admired his writing; I thought he was very colorful. And I remember reading, I think it was a labor law opinion, it doesn't matter; he said something to the effect that we would either flounder on Charybdis or wind up sinking into the Serbonian Bog. I knew Charybdis. Yeah, the whirlpool, but I had no idea what this Serbonian Bog was. So I'm in law school and set out to the main library to find out what the Serbonian Bog is, and it's from Milton's Paradise Lost, and it says the Serbonian Bog, where

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<sup>36</sup> United States v. Crowder, 87 F.3d 1405, 1429 (D.C. Cir. 1996), vacated and remanded, 519 U.S. 1087 (1997, on remand, 141 F.3d 1202 (D.C. Cir. 1998)).

whole armies have sunk; it's mythical, I think, but it's in Egypt. In any event, my admiration for Judge Brown went down a little bit as a result of that because geographically it's impossible to avoid Charybdis and find yourself in the Serbonian Bog. [Laughter]

Mr. Prettyman: Have you ever changed your mind in a case as a result of oral argument?

Judge Randolph: Many times, many times.

Mr. Prettyman: Do you enjoy oral argument?

Judge Randolph: I do.

Mr. Prettyman: And I don't mean conducting one, I mean being on the bench to hear one.

Judge Randolph: Yes, it concentrates the mind. You have a conversation with the attorneys. Oftentimes the attorneys may not realize it, but somebody who's experienced, like you, does: it's conversation between the judges that is going on. Now, I have had the experience on one particular day several years ago, I remember that three of us had four cases that day, and we were chatting before we went out about where we were leaning – which we don't usually talk about very much before the argument – and we were all leaning in the same direction in each case and the oral arguments were over and we found that all three of us had changed our minds in all four cases.

Mr. Prettyman: No kidding. Wow!

Judge Randolph: Absolutely amazing!

Mr. Prettyman: What percentage of the time would you guess you hear really good oral argument?

Judge Randolph: I think we hear good oral arguments in the vast majority of cases. We have a terrific bar here; it's not just that the government attorneys are almost invariably excellent and the private bar in non-criminal cases, some in criminal cases as well, are very, very good. We have a very strong group of advocates that appear before us. I forget who it was who was telling me, it may have been one of my former law clerks who went up to the Supreme Court and told me that he or she thought that the level of advocacy was far superior than in the Supreme Court.

Mr. Prettyman: That's interesting, I don't doubt that. You ask a lot of questions; is that because it just comes naturally or are you trying to get at the roots of the case or trying to persuade your brethren? What motivates you?

Judge Randolph: Depending on the question, there are a lot of different reasons. One of the main reasons is testing the theory that is being advocated and how far it goes and whether it's consistent with either precedent in our – I hate that phrase prior precedent, is there any other kind? – precedent in our court; it may be because I am genuinely confused about the state of the record. It may be spontaneous in response to something the attorney has to say. I often regret that I ask too many questions. Our time is so short; it's different than the Supreme Court where we only give 10 or 15 minutes; we don't do a one-half hour – as an aside, if it were one-half hour, I'm sure I'd listen and let the attorney argue more, but given the time constraints I don't do it.

Mr. Prettyman: Do you enjoy being a judge today as much as you did in 1990?

Judge Randolph: I enjoy it more.

Mr. Prettyman: You've stated that judges do and should make social policy some of the time and shouldn't in others. Can you elaborate on that a little?

Judge Randolph: When did I say that?

Mr. Prettyman: I'm sorry, I don't have where you said it.

Judge Randolph: I think I probably said that out at the – there's a question about injunctions controlling institutions – and the only thing I meant by that is that oftentimes there's a gap between the governmental officials who won't and the judges who have to decide, and in making the decision, particularly in the structural injunction cases, there's often no other choice but to set some sort of social policy. One example is school desegregation. Now you're a judge, you have a segregated school system, what are you going to do – you've got to issue an order, you've got to desegregate that school system, that's the law, and if the local official won't do it, the only way you can do it is by setting some sort of social policy, it's inevitable, you can't help it; there's a lot you can't help in this whole business.

Mr. Prettyman: Is the work here difficult?

Judge Randolph: It's challenging. It takes a lot of effort, as you know, to get into a case deeply enough in some of these really complicated regulatory cases to get past just hitting the top of the waves and really understanding the case. The unfortunate part about it is that once you really get deeply into a good many of these cases, it turns out that there's far less intellectual interest in the case than is commensurate with the effort it takes for you to understand what's really going on –

Mr. Prettyman: Particularly if the briefs are bad and confusing, and leave things out.

Judge Randolph: It's not simply bad briefs, it's that the attorneys and their 50-page brief have to take a lot for granted that the judges know, and you'll hear arguments orally where

they'll say, "As the court well knows in the such and such a case" involving an obscure federal statute dealing with the Federal Energy Regulatory Commission, because there was an opinion that was circulated five years ago about that subject; well I don't know, I don't remember that anymore.

Mr. Prettyman: [Laughter] Of course! One last question, Judge, then we're all through. What are your hobbies, how do you spend your spare time? I'm thinking of things like sports, reading, TV, music, films, plays, dancing, eating out.

Judge Randolph: Yes, I have an abundance of outside interests. It's almost to a fault. I like to play golf, and that's very time consuming; I like to garden, that takes time; I like to fish, I tie flies, so I do fly fishing and surf fishing, and so on and so forth.

Mr. Prettyman: Deep-sea fishing?

Judge Randolph: I don't like boats, like Samuel Johnson once said that being on a boat is like being in prison with the added possibility of drowning. [Laughter] I never liked boats. I paint in watercolors; that's my son that I painted –

Mr. Prettyman: This [pointing]?

Judge Randolph: To the left, the U.S. Amateur tournament in 1997.

Mr. Prettyman: Yes, isn't that oil?

Judge Randolph: No, that's all watercolor. That's a small watercolor I did one evening. I like watercolor because it's got immediacy to it, I can do one in the evening.

Mr. Prettyman: I love oils, but I can't do watercolors I mess it up every time.

Judge Randolph: Oh, you paint in oil?

Mr. Prettyman: Yes, used to.

Judge Randolph: It's fast, you just –

Mr. Prettyman: My father and I did a mural against the whole back wall of the basement.

Judge Randolph: Really!

Mr. Prettyman: Our seven favorite characters from fiction. It took us probably four years or so.

Judge Randolph: And I play chess. I used to play tournament chess, now I'm playing on the Internet. All these photography books.

Mr. Prettyman: Reading, probably read a lot of books.

Judge Randolph: Tons of reading.

Mr. Prettyman: Do you like mostly fiction or non-fiction?

Judge Randolph: I like both, reading Ian McEwan, have you ever read any of his? Got one more of his books and I'll be finished.

Mr. Prettyman: Do you tend to take an author and read everything he or she has written?

Judge Randolph: If I like the author. Then I read history and it depends on where I sit down in the house what I read, because there are books, we're inundated by books. My wife reads more than I do, I think, so we're always packing them up in boxes and shipping them out.

Mr. Prettyman: Judge, I really enjoyed this, and it's been really nice getting to know you; I enjoyed it a lot and I thank you. [End of tape #9]

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**A. Raymond Randolph**  
Circuit Judge  
United States Court of Appeals  
for the District of Columbia Circuit  
Washington, D.C.

Judge Randolph was confirmed by the Senate and appointed to the United States Court of Appeals for the District of Columbia Circuit by President George H. W. Bush in July 1990. The D.C. Circuit is generally considered the second highest court in the United States.

Judge Randolph received his B.S. degree in 1966 from Drexel University, majoring in economics and basic engineering. At Drexel, he was president of the debate society, vice president of the Student Senate, and a member of the varsity wrestling squad. In 1969, he received his J.D. from the University of Pennsylvania, *summa cum laude*. Judge Randolph ranked first in his law school class and was managing editor of the Law Review.

After graduation, Judge Randolph served as law clerk to Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit in New York.

Admitted to the California Bar in 1970 (and to the District of Columbia bar in 1973), Judge Randolph worked as Assistant to the Solicitor General, U.S. Department of Justice, in Washington, D.C., 1970-1973.

After two years in private practice, Judge Randolph was named Deputy Solicitor General of the United States, a position he held from 1975-1977.

In 1979, Judge Randolph was appointed Special Counsel to the Committee on Standards of Official Conduct (the Ethics Committee) of the United States House of Representatives, remaining in this position until 1980.

In the 1980s, Judge Randolph held a number of positions while in private practice, including Special Assistant Attorney General for the states of New Mexico (1985-90), Utah (1986-1990) and Montana (1983-1990). He also served as a Member of the Advisory Panel of the Federal Courts Study Committee.

From 1971-1990, Judge Randolph argued 25 times in the United States Supreme Court.

As an Adjunct Professor of Law at Georgetown University Law Center from 1974-1978 he taught courses in civil procedure and injunctions. In 1992 he taught a course in constitutional law. He is a Distinguished Adjunct Professor of Law at George Mason School of Law and for the past eight years has been teaching First Amendment law. He also serves on the Judicial Advisory Board of the George Mason University Law and Economics Center.

From 1993 through 1995 Judge Randolph was a member of the Committee on Codes of Conduct of the Judicial Conference of the United States, and from 1995 to 1998 served as the Committee's chairman. He currently serves as the judicial liaison to the American Bar Association's Administrative Law Section.

Judge Randolph is a member of the Board of Visitors at Drexel University Law School and was named to the "Drexel One Hundred" as a leading alumnus. In 2002 he was presented the James Wilson Award by the University of Pennsylvania Law School. In November 2005 he delivered the Fifth Annual Barbara K. Olson Memorial Lecture at the Annual Lawyers Convention of the Federalist Society. He has published numerous articles, the most recent of which is in the June 2006 issue of the Harvard Journal of Law and Public Policy.

Judge Randolph is married to the Honorable Eileen J. O'Connor, formerly Assistant Attorney General, Tax Division, U.S. Department of Justice. His son John Trevor Randolph is an investment banker in New York. His daughter Cynthia Lee Randolph is an artist living in San Francisco.

**E. BARRETT PRETTYMAN, JR.**

- 1945 - 1949: Yale University (B.A., 1949)
- 1949 - 1950: Reporter, Providence Journal (Rhode Island)
- 1950 - 1953: University of Virginia Law School (LL.B., 1953). Decisions Editor, Virginia Law Review; Winner, 1953 Moot Court competition; Winner, prize for best Note in Vol. 38, Virginia Law Review.
- 1953 - 1955: Law Clerk, successively, to Hon. Robert H. Jackson, 1953 Term, Hon. Felix Frankfurter and Hon. John M. Harlan, 1954 Term, Supreme Court of the United States
- 1955: Co-editor, Justice Jackson's post-humous book, "The Supreme Court in the American System of Government".
- 1955 - 1963: Associate, Hogan & Hartson, Washington, D. C.
- April 1963 - July 1963: Special Assistant to the Attorney General of the United States.
- July 1963 - April 1964: Special Assistant to the White House and the President's representative on the Interagency Committee on Transport Mergers.
- January 14, 1998 - April 10, 1999: Inspector General of the District of Columbia
- July 1, 1964 - January, 13, 1998; May 1, 1999 - December 31, 2002 Partner, Hogan & Hartson
- January 1, 2002 – Present: Of Counsel
- Special Counsel to Committee on Standards of Official Conduct of the United States House of Representatives, "ABSCAM" investigation (1980 - 1981).
- Outside Counsel to Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, in United States v. AT&T (1976 - 1977).

Special Consultant to Subcommittee to Investigate Problems  
Connected with Refugees and Escapees,  
Senate Judiciary Committee; fact-finding  
trip to Vietnam (1967 - 1968)

OTHER PROFESSIONAL ACTIVITIES:

Fellow, American College of Trial Lawyers

First President, District of Columbia  
(Unified) Bar (1972-73)

Past President, American Academy of Appellate Lawyers

Past President, D.C. Bar Foundation

Past President, PEN/Faulkner Foundation

Past President, the Lawyers Club of Washington

Past President, Washington Children's Fund

Chair, past President, Historical Society of the District of Columbia Circuit

Chair (appointed by the Chief Justice), Supreme Court  
Judicial Fellows Commission

Chair (1965-67), Board of Governors, St. Albans School  
Washington, D. C.

Vice President, Supreme Court Historical Society

Trustee Emeritus, American University,  
Washington, D. C.

Former member, International Advisory Group, Toshiba Corporation

Member, Judicial Conference of the District  
of Columbia (since 1958)

Winner 1999 Common Cause Public Service  
Achievement Award; 1998 Lawyer of the Year,  
D.C. Bar Association; 1999 Distinguished  
Public Service Award, D.C. Government,

Member, District of Columbia and Supreme Court  
Bars. Also admitted to practice in the United  
States Courts of Appeals for the 2nd, 3rd, 4th,  
5th, 6th, 7th, 8th, 9th, 11th and District of  
Columbia Circuits

Past Member, Committee on Appellate Practice, Appellate Judges Conference

Author, "Death and the Supreme Court" (Harcourt, Brace & World 1961) (winner, Edgar Allen Poe Award; Scribes Award); "Petitioning the United States Supreme Court -- A Primer For Hopeful Neophytes", 51 Va.L.Rev. 582 (1965); "Opposing Certiorari in the United States Supreme Court", 61 Va.L.Rev. 197 (1975); "Supreme Court Advocacy:: Random Thoughts in a Day of Time Restrictions", 4 Litigation Magazine (No. 2, 1978) 16; "Differences of Opinion", The American Lawyer (May 1995) at 75; and other articles.

Argued: 19 cases in U.S. Supreme Court.