

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.3rd 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]