

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.