Mr. Kapp: This interview is being conducted on behalf of the Oral History Project of the District of Columbia Circuit Court. The interviewee is E. Barrett Prettyman, Jr. The interviewer is Robert H. Kapp. The interview took place at the offices of Hogan & Hartson L.L.P. on the 15th day of July, 1996, shortly after noon.

Mr. Kapp: Barrett, the United States Courthouse for the District of Columbia was recently named for your Father. I wonder if you would like to comment on those points in his career which you believe may have influenced that decision.

Mr. Prettyman: Well, of course I don't know for sure, but I think that there are three aspects of his career that led to this. The first is because of things that he did locally. The second was because of things he did nationally. And the third reason relates to the sponsor of the Bill in Congress. Locally, although my Father lived much of his life in Virginia and nearby Maryland, he also lived for a time in D.C. He attended a D.C. public school. He attended Georgetown Law School. He was a member of three D.C. churches. And he was Corporation Counsel for the District, a name partner in a District law firm. He was President of the D.C. Bar Association, President of the Washington Board of Trade, President of the Georgetown University Law Alumni Club of Washington. He was a hearing officer for conscientious objectors for D.C. in the Office of the Attorney General during the Second World War. He was President of the Civitan Club, and then he engaged in a

great variety of activities, such as the D.C. Area Council on Alcoholism, Goodwill Industries Group, the Red Cross Roll Call, and a wide variety of other activities for the general good, all of them here in D.C. On a national level, in addition to being on the D.C. Circuit, he was appointed by four Presidents to special assignments. One of them was as Chairman of the President's Conference on Administrative Procedure, and in fact he has been generally recognized as the creator of the Administrative Conference. He was also Chairman of the Judicial Conference Committee to study procedures in antitrust and other protracted cases. He was appointed by the President as Chairman of the Board of Inquiry in the Francis Gary Powers U-2 case. In that case, he was the one judge who was acceptable both to Powers and to the CIA to determine whether Gary Powers had performed his duties adequately after he was shot down over Russia. That was, of course, a very sensitive assignment. He was also Chairman of a Committee on Veterans' Hospitals, and he was appointed by the President as Chairman of the President's Commission on Narcotic and Drug Abuse. So each of these was somewhat related to, but in many ways outside the ken of, his normal judicial assignment, and each of these jobs involved national policies and priorities. So I think that in that sense he was more, if you will, than just another judge. And the third reason for the Bill is because of one of his law clerks. John Warner became my Father's law clerk against all odds, if you will. *[Laughter]* He went from there to work with the U.S. Attorney's Office. He worked with a fine law firm, namely ours, and went forward

from there, and I think he always felt that being my Father's law clerk was what got him started. He was very appreciative, and he was the one who introduced the Bill in the Senate and guided it through Congress and of course President Clinton signed it recently.

Mr. Kâpp: I wonder whether you have any recollection at all with regard to your Father's handling or findings in the Francis Gary Powers case.

Mr. Prettyman: The answer is no, because it was very secretive, and so far as I know the hearings themselves have never been released. And he did not talk about it. The only public part was when the decision came out that Gary Powers had in fact conducted himself within the confines of the rules. Interestingly, Gary Powers wrote a book about this whole thing and said that he did not like my Father. And I was stunned by that *[Laughter]* because frankly so many people have come up to me to tell me how much they cared for my Father that this is virtually the only memory I have of anybody who disliked him. I would guess that Gary Powers was affronted by the difficult questions that had to be asked of him, questions that even implidely suggested that he might have done anything wrong. And therefore he took offense at the person who was questioning him. But just as my sister when she worked for the CIA never revealed any aspect of her work and to this day I don't know what she did, so too my Father never revealed to any of us the details of that investigation.

Mr. Kapp: As we move on here I'd like to talk a bit about your marital life and your family. I wonder if you could tell me about that.

Mr. Prettyman: I met Evelyn Savage who lived in Baltimore on the beach in Ocean City, Maryland. Probably about 1946, right after the war. We dated for quite a period and were finally married in June of 1950 in Baltimore on one of the hottest days in history. My parents rented a bus to take friends of theirs and mine over to Baltimore, and it was pretty uncomfortable apparently with the heat. But anyway it was a beautiful wedding. I'd already gotten to know Evelyn's parents. Her father was in the insurance business, and I had dated Evelyn during her Wellesley years at the time I was at Yale. So in any event we were married in 1950. We were fortunate enough to be able to adopt two children, a boy -- E. Barrett Prettyman, III -- who goes by the name of Ty, and a girl -- Jill Savage Prettyman -- both of whom ultimately became engineers and married engineers, and each of whom has a son. So I have two grandchildren. We were ultimately divorced after many years of marriage, primarily because we just grew apart. She had different interests than I did.

And sometime later, just before I left on my Sabbatical, I met Victoria Keesecker from Hedgesville, West Virginia. Met her in Washington at a function. We wrote to each other during my Sabbatical, and after going with each other for a number of years we married and remained married for some six years. She had a great desire to be an actress, and she appeared in plays out here in Columbia,

Maryland, which I went to see. She then felt, however, that she needed the contacts and training that New York would offer her, so we got an apartment in New York and traveled back and forth on the weekends. And ultimately she decided that she needed to be in Hollywood, so she went to California and the marriage could not sustain that for too long and so we were ultimately divorced.

I have not married again but for the last 10 years have gone with the same lady, Dr. Noreen McGuire, a psychologist from New Jersey who has been working in Washington at American University and George Mason University during that period of time. We are still together. We are very well suited, and we have traveled a lot -- to Ireland, Britain, France, Italy, Greece, Japan, Switzerland and to most States. She is a lot of fun.

Mr. Kapp: And your children -- are they here in Washington or are they elsewhere?

Mr. Prettyman: It's interesting. My daughter lived in nearby Virginia until recently and then moved to Texas. Whereas my son lived in California until recently and then moved to nearby Virginia. So I had a period when I could see one grandson regularly, and now I have a period when I see the other one regularly. As I think I mentioned, both children are married to engineers, so there are no lawyers in the family -- at least until I can get hold of my grandchildren and point them in the right direction. *[Laughter]*

Mr. Kapp: I want to return here to your earliest legal experiences following graduation from law school. Can you tell me what you did immediately following your law school graduation?

Mr. Prettyman: Well I clerked immediately upon graduation. And then I came with Hogan & Hartson. I very much wanted to clerk at the Supreme Court, and in those days you did not have to clerk at a lower court before you went there. Virtually all of the clerks on today's Court have clerked for another judge, usually a Court of Appeals judge. It was less formal in those days, and I had had Justice Jackson down to Virginia Law School to speak, had gotten to know him that way, and so I applied to him and at the interview he let it be known that while my law school record was important -- and I had done well in law school -- the most important thing for him was a personal relationship. He had had two clerks the year before, one of whom was later to be Chief Justice -- namely, Bill Rehnquist -- and Jackson had decided that for whatever reason he did not want to have two law clerks any more. He said he would only have one, and if I were willing to do the entire job, I could have the position because we obviously got along very well. He had an interest in politics, as did I. We just talked the same language, and it was very quickly apparent that we enjoyed each other. So needless to say, it took me approximately four seconds to determine that I was prepared to do all the work, and this meant filing memos on some 5,000 cert petitions a year. It meant working on his opinions. He drafted almost everything the first time himself. It meant arguing

with him -- he loved to argue about everything so as to clear his mind, both before argument and after, during the writing of the opinion and after.

That was a thrilling experience, working at the Court. There were only 18 clerks in those days. We all knew each other well. We would have lunch together much of the time. Quite often, at least once a week, we could have a Justice in to talk to us. Also, most importantly, totally unlike today as I understand it, the Justices themselves would go from office to office quite a bit, and I had a lot of contact with the other Justices. Justice Douglas, who didn't talk to many people, including his own law clerk very often, kind of took me under his wing, and we got along well. I also got along with Justice Black, who of course had had the run-in with my Justice, Justice Jackson, in prior years. And we got along extremely well, and I remember one day I went in and had a long talk with Chief Justice Vinson, when I was kind of wandering the halls. It was much chummier, if that's the right word, in those days, more relaxed than I understand it is now. And that's understandable because the load was not as great then, and they had fewer precedents to deal with. I don't really know how to explain it except that the whole atmosphere seemed to be more relaxed than I understand it is today.

So that was a wonderful experience, and of course I came in in the middle of Brown v. Board of Education -- that is, it had been argued once before I got there, and I had not been there very long when Chief Justice Vinson died, quite suddenly. And the case was set for reargument. The Court really was split. It was

not clear how that case would be decided. Everyone guessed that a majority would indeed strike down discrimination in the schools, but it was also quite clear that at least some Justices would dissent. It was not clear how many would. Justice Jackson in the middle of all this wrote what he called a concurring opinion, and I remember it so vividly because I had not realized he was writing it. He did not discuss it with me ahead of time. And he gave it to me, and I studied it very carefully and I remember it just like it was yesterday: I sat in my office on a Saturday and typed my memo to him myself; I didn't even want to give it to the secretary. And I told him very frankly what I thought of it, and I was terribly naive because it never, never occurred to me that anybody would ever see those sheets of paper except him and me. And in fact I gave it to him personally, handed it to him so there could be no lapse there. And I told him quite candidly that I didn't think much of the opinion, that it sounded more like a dissent than a concurring opinion, and then I just went through it and pointed out different things that I thought didn't hold up. Years later, when the author of Simple Justice, Richard Kluger, called me and asked to talk to me about that case, I said I was sorry but having been a law clerk I was bound by secrecy and could not say much, and he laughed and said, "Well, I don't need to ask you much because I have Justice Jackson's unpublished opinion, and I have your memo to him, and I only have a few questions." *[Laughter]* So my memo was given to him not by me, of course, but by the Justice's family, and he printed sections of Justice Jackson's unpublished

opinion and my, until then, unpublished critique of it. But that memo if you ever see it will give you an idea of the relationship between the Justice and me, because I could say critical things like that to him that I might not be able to say to some other Justice. I didn't have to smooth his feathers or stroke his ego or apologize for anything. We had a nice relationship, and in fact he asked me to stay on a second year as his clerk, which I said I would do. I heard the great argument in Brown v. Board of Education when it was reargued. John W. Davis and Thurgood Marshall and others. It was still not clear how the case would come out until suddenly Justice Jackson had a heart attack, a rather serious one. Chief Justice Vinson having died, Earl Warren was appointed to succeed him, and I happened to be in the hospital visiting Justice Jackson the day that Chief Justice Warren brought the first draft of Brown v. Board of Education by for Justice Jackson to see. I excused myself, and the two of them stayed in the room for a while, Warren left, Jackson called me in, and he told me to take the opinion and go down the hall and read it. I took the draft and went down the hall and came back. He asked me what I thought and I was quite thrilled. I said, "You know, it meets a lot of the problems that you had, as expressed in your unpublished opinion, and while it certainly doesn't contain a lot of law, it makes sense, it hangs together, it doesn't offend people, it reads well, anybody can understand it." And he said, "Exactly." He made a few suggested changes, which I took to the Chief Justice, and the Chief Justice rejected a couple of them for the very good reason that they implied -- they didn't say, but

they implied -- that striking down discrimination in the public schools could apply in other areas. Jackson had not meant that, but the inherent nature of the suggestions was such that you could take them to be read as applying in other areas. And the Chief Justice very wisely felt that this opinion should be narrowly written to apply to public education only. The Court could deal with other matters later; there would be enough trouble with the opinion, even with its narrow focus, without inviting further trouble.

In any event, the votes were finally in, the last hold-out was Justice Reed of Kentucky, and finally there was a unanimous Court. And Justice Jackson, against the advice of his doctors, was determined to attend the Court session when that opinion came down to demonstrate the unanimity of the Court. And so, unbeknownst to reporters, he came in the garage and went up through the back elevators and appeared on the bench that day. He had been kind enough to alert me that the case was coming down, which some Justices did not do, and some clerks were not present. But I was there, and it was a very, very emotional setting. Several routine cases came down before Brown, and then the Chief Justice said, "I have the opinion of the Court in number so and so, Brown v. Board of Education." The courtroom was packed because it was right near the end of the Term, and he read the opinion, not every word. You couldn't tell at first how it was coming out, and I understood later that the wire services began reporting that he'd started reading but the result couldn't be determined. And when he reached the key line,

instead of saying "we hold," he said "we unanimously hold," and when he said that the packed courtroom went "ahhhh", all in unison, everybody was so surprised. It was not too long after that that Justice Jackson suddenly died.

Mr. Kapp: Before you go on to that, I wonder if we can talk a little bit more about Justice Jackson's draft concurring opinion and your memo which Richard Kluger in Simple Justice characterizes as courageous. Can you just tell us briefly about the thrust of Justice Jackson's draft? I know it's quoted in part in Simple Justice, but it would be helpful I think at this point to tell us a bit about that.

Mr. Prettyman: Well, I haven't reread that in some years now, but what Justice Jackson essentially was concerned about was that the Court would castigate the South for segregation in the schools. And Jackson felt that if there was any blame to be placed, it should be placed entirely on the Supreme Court. The Supreme Court had set up Plessy, and had condoned for many years segregation in the South and elsewhere. The South had done what it had to do whenever the Court ordered it to do so, such as making law schools equal, and it was totally unfair to say anything that would indicate that the South was at fault. He also felt that the Fourteenth Amendment was totally ambiguous on this subject. That a decision based on the Fourteenth Amendment would have been wholly improper and unsupported, and that if the Court was going to overrule Plessy, it had to be forthright and frank in saying, times change; regardless of what it was like then,

this is the way it is today. Jackson had gotten the impression from various discussions among the Justices that they were going to castigate the South, but don't forget that those discussions went all the way back to when Vinson was Chief Justice. Jackson had not realized that Earl Warren, the politician, was going to fully understand that situation and after a thorough and complete review of the Fourteenth Amendment was going to cast it just the way Jackson would have liked to have seen it cast.

I neglected to mention that during the period before the opinion, a special committee of law clerks was appointed by the Chief Justice to do, how shall I say it, "side work". A part of the committee looked into the Fourteenth Amendment and wrote a complete and thorough history, finding everything on both sides in relation to the issue. The Court was also interested in the practical effect of doing away with segregation, and it asked me to do some maps of typical towns, to show where black people live and where white people live and where their schools were located, and so forth. And I did a series of those. I remember particularly Spartanburg, South Carolina. I had to get all kinds of materials together and do my own map, which showed where people lived in conjunction with schools. After I got through, they circulated those maps among the Justices, and each one would place his initials at the top to show that he had seen them. So that was the kind of thing going on, really outside the contours of the case. But the Court was concerned about what it was doing, what the result would be. I think it's fair to say that

neither the clerks nor the Justices knew whether blood was going to flow in the streets, whether there were going to be riots or a revolution or whatever, and that's why Earl Warren worked so hard on getting it unanimous, because he knew that if there was even a three-line dissent from one Justice, the people who were against this result would grab onto that dissent and try to use it to their advantage. So he was very clever in imposing on all the Justices to give up their last remnants of dissent and to join in this opinion.

Mr. Kapp: And what was the thrust of your memorandum to Justice Jackson?

Mr. Prettyman: I thought two things. First of all I thought the Justice gave short shrift to the intelligence of the American people. I forget exactly what he said, but it seemed to me that he was saying in effect that people would never agree with this. And my point was that, of course they would agree with it once they saw that it was proper, the thing to do, and what they were called upon to do -- that people loved the country and they were not going to see it grow apart on the basis of this decision. My other problem with it was this: He was, of course, one of the great writers in Supreme Court history. But this opinion was not well written. It did not hang together well. And I think that was because he did it out of anger and not out of cool perception. So there was a list of things that I thought were wrong. Again, I have to emphasize that Jackson was a great reader -- he had read everything. But he had virtually no schooling, and he never graduated from college,

and he only went to one year of night law school. His schooling was in the books. He read everything and he learned to write and to speak -- he was a great advocate -- through reading and listening. But the result was that while his writing was dramatic, and he had wonderful similes and metaphors and so forth, his writing was sometimes not quite grammatical, so that your job as clerk was to make sure that he used the language correctly. I really hesitate to say that, but it was as if Churchill wrote as he did except that he didn't understand all of the rules of grammar. So Jackson was a wonderful writer, but he did require editing and he knew it, and he depended upon me to do that so that he would not be embarrassed. Which was one of the joys of the job, because I'd been on a newspaper and on law review, and I could edit. I could never, never begin to write the wonderful sentences that he did, but I could take the ones he wrote and make sure they were just right.

Mr. Kapp: Do you recall at the time what your assessment was of the Court's opinion in the Brown case and what you expected with respect to the impact of that decision?

Mr. Prettyman: Well, I've already indicated that no one knew what the impact would be. We had no idea. On the one hand, people could simply accept it and move on, which we thought was highly unlikely. Or they could object for a while, strenuously, vociferously, but then settle down and accept it. Or they could say "no way," and, as I say, have blood in the streets. We really had no idea. I certainly didn't. The reason I liked the draft opinion -- and it was very similar to

what ultimately came out -- was that it seemed to me it had a rather calming feel about it. It didn't attack anyone. It simply said, look, we've had a long history, we've gone through a lot, things have changed, no matter what you might say about what Negroes were like 50 years ago or 100 years ago, you look at today's world, and in today's world it simply is not permissible to separate people in school solely because of their race or color. It was just that simple, not very complex at all. I personally have always thought that the most momentous decision in Brown v. Board of Education was the decision to take the case, because once it was taken I simply did not understand how five Justices in 1954 could say that it is permissible solely on the basis of race and for no other reason to force people to attend separate schools. That to me was inconceivable, and yet several of the Justices were prepared to rule exactly that way right up until the end.

Mr. Kapp: Well here we are, I guess 42 years later and looking back with the perspective of time, have your views with regard to the opinion changed in any way?

Mr. Prettyman: Not in regard to the opinion. I think that the opinion was exactly right for the time and place, both in terms of result and in terms of how it was written. There's been a lot of commentary about how it should have been more legal, it should have had more footnotes, it should have talked more in terms of legal philosophy, and so forth. I think that's exactly wrong. This is an opinion that anyone could understand, and if you disagreed with it fine, but there it was on

its own terms, not very convoluted. And incidentally the famous footnotes were strictly an afterthought. The opinion in no way depended upon them. I think it was right for the time, and it essentially accomplished its goal. I don't think anybody could have foreseen how events would have unfolded thereafter. After all, the concept of the opinion was simply that government -- federal or state, city-wide, county-wide or whatever -- could not force people to separate. But that, of course, quickly evolved into integration and busing, which were not foreseen at the time. That in turn led to the era of affirmative action, and of course now we're in an era of reaction to that: the Justice Thomas view that race cannot be considered at all, even to help people who have been disadvantaged and discriminated against. So in a strange way we seem to be coming full circle, and I have no idea where all this is going to lead, but no one could have forecast in those days, in 1954, that we would have come anywhere close to how all this has evolved -- certainly not me.

[Laughter]

Mr. Kapp: You had started to note the death of Justice Jackson and the events that occurred in its wake for you. I wonder whether you would tell us about that.

Mr. Prettyman: I assumed, of course, that when the Justice died, I would be moving very quickly back into practice, or not back into it but into it for the first time. And I began to make plans to that effect. But Justice Frankfurter intervened. *[Laughter]* I had also had him down to Virginia, and he and I had

become very good friends during my Jackson clerkship. He had spent a lot of time in my office. He got the impression that if he could convince me of a point, I could convince Justice Jackson of the point. So instead of going to Jackson, he would come to me very often. And of course that wasn't true at all, I wasn't able to convince Jackson of anything that he didn't believe but Frankfurter enjoyed it, and so when Jackson died, as soon as John Harlan had been appointed to replace him, Frankfurter sent word to Harlan that he ought to use me, that I was experienced and so forth. In the meantime, it took Harlan almost five months to get confirmed, and during that whole period, from the time that Jackson died until Harlan came on board, Frankfurter used me as his third law clerk. He already had two, and I was his third law clerk and we worked together wonderfully. A lot different than Justice Jackson. Justice Frankfurter had a photographic memory, he could go to a row of books and pick out a particular volume and then turn to a particular page and find exactly the citation he was looking over. Just extraordinary to work with. He would dictate in a funny fashion, not just to his secretary but to his law clerk, and he loved to argue about everything. He was an amazing man, very energetic, not loved by all of the other Justices. I once asked him why Justice Douglas hated him so much *[Laughter]*, and he said, "Because he knows I despise him." There were antipathies on that Court, and some not as disguised as later antipathies. So I worked with Frankfurter, and that was during the period when they were struggling with the decree in Brown. In the meantime, I had met Justice Harlan,

and he had written to me and asked me my views on this and that. You know, just on where the case was going and what I thought about it.

He arrived on the scene, and I finished out my second Term with him. He was very different from the others. He had come from a large New York law firm. He was used to working with the best and the brightest. He didn't care anything about personality. He wanted the smartest people. I could never have gotten a job with Justice Harlan if it had started the other way around. *[Laughter]* He demanded the best, he was intellectual. But although that sounds kind of cold, he wasn't, he wasn't cold at all, it was just that he was more workmanlike than Frankfurter or Jackson. He was a lawyer's lawyer. There was not much emotion in his work, in the sense that things that bothered Warren and Douglas never bothered Harlan. He went straight to the heart of the legal matter as he saw it. He wrote well. He was perhaps more pedestrian in a way than Frankfurter and certainly more so than Jackson. But it was good stuff. It built upon itself, and people have admired his opinions I think quite correctly. It was a formal relationship to begin with and then, as his eyes began to fail later, and his wife became ill, we became quite good friends, and the relationship mellowed. I remember I took him to the Alfalfa Club Dinner once, and he just had a wonderful time even though his eyes now were definitely failing, and we sat in his home afterward long into the night.

All three Justices were extremely able persons. You would have expected one out of the three to be inferior in some respect, but it just wasn't true. They were all marvelous men, and each should have sat on the Supreme Court.

Mr. Kapp: Was your relationship with either Justice Frankfurter or Justice Harlan such that you could have written the memo to them that you wrote to Justice Jackson, do you think?

Mr. Prettyman: I could have made the same points but I would have had to do it a little more diplomatically. Frankfurter would have turned around and torn my memo apart. *[Laughter]* Harlan would have been hurt at a few things. But I wouldn't have made different points if each of them had handed me the same draft; I just simply would have written it slightly differently. I always thought that my job was in no way to try to show a Justice how to vote or what he should feel about the case or where he was going. My job was to hammer him so hard that he would feel really good about how he was coming out. Even if he and I disagreed completely, by talking it through he would know more and more that indeed he felt this way and this was the way he was going and that the arguments against him wouldn't stand up -- that he'd beaten me at every turn -- and that was my job. My job was to face up to him and to fight with him, and if occasionally he would slightly change his mind about some point, that was fine. But that really wasn't the game. The game was to talk it out, because I found that each of these Justices quite remarkably talked their way through cases and by being challenged found that they

were even more right than they thought they had been. Or, if challenged, became a little less certain, and then wanted to do a little more work. But to challenge them was what my job was.

Mr. Kapp: Justice Frankfurter, of course, was a teacher by profession. How would you compare the three Justices from the standpoint of their role as teachers of you as a young lawyer?

Mr. Prettyman: Frankfurter taught directly. I mean he would challenge me, and he would say you're not aware of how this theory developed. You don't realize that fifty years ago it was something else and then this came along and that came along and here's where we are today. And now that you're informed, you of course can reach the conclusion that I had told you to take in the first place. *[Laughter]* Jackson was by example. Jackson talked with me mostly about politics and gossip and sometimes about the law. But Jackson was much more internal and guarded. I may have mentioned that when he was in the Solicitor General's Office, his own staff never knew what he was going to say in oral argument, and they used to troop into the courtroom to hear what he was going to argue. Even though they'd worked on the briefs, he had no moot courts and he never told them in advance. And so that's what it would be with me, that we would argue once the case came down to the end, and he was actually going to write it, we would argue back and forth. But otherwise he didn't explain things to me, so he did not teach that way. He taught by example. When I would read a sentence or a paragraph and I would

marvel at it, I would learn something from that. I learned about how his mind worked. For example, at the end of your cert memo, you put "Grant" or "Deny," which was your way of saying, not so much what you would do or what you thought, but what you thought the Justice would want to do. The vast majority of time you would get it exactly right. But I remember one case where he came in and threw my cert petition memo down on my desk and said, "This is outrageous." I'd written a short paragraph, and I couldn't figure what in the world this was all about. And he said, "Take it off the dead list" -- the dead list was a list they circulated of cases which were not even worthy of discussion at conference, but any Justice could take a case off the dead list, which meant that it would be discussed in conference. I looked at this memo, and it was about a boat had been out in the waters and a fire had started on deck. The people on deck, including the captain, took one look at the fire and jumped overboard and started swimming away. But the people below deck didn't know that the boat was on fire, so they just continued working, and finally when nobody came around they went up on deck, the wind had shifted, it wasn't as bad as they thought it was, and they put out the fire. And by the time the captain and others had come back with fire boats, the people below deck had claimed the ship. *[Laughter]* The fight was over whether the ship was legitimately theirs. As I remember it, the holding below was that they were not entitled to the ship. Now why this was a great federal question, why this so outraged Jackson, I never learned. Whether it was some event in his childhood in the bathtub, you know,

with a toy boat or whatever, he never told me. *[Laughter]* He never told me what it was, but it just set him off, and I understood from others later that he made a big fuss about it in the conference, and of course no Justice voted for it, and it just died. So you can't always guess how your Justice will vote -- that's what I'm saying. But on the other hand, most of the time you can.

Mr. Kapp: What about Justice Harlan as a teacher?

Mr. Prettyman: Yes, I would say more so than Jackson, not as much so as Frankfurter. For one thing, he didn't talk as much as Frankfurter. Frankfurter talked all the time; Frankfurter was wound up as soon as he arrived at the office, and he was going all day long. Harlan was more studious, he spent more time reading and thinking about things. But on the other hand, when you talked he would spell out his reasoning and where he was going and how he was getting there, and why he thought the dissenters, or whatever, were wrong. And I loved the way his mind worked. If you had a senior partner in your firm whom you particularly admired, he would have the qualities of a Harlan because he would be judicious, he would have good judgment, he would take it step by step, look at each angle and then come to the right conclusion. He was wonderful to watch and to listen to.

Mr. Kapp: Did you detect any differences between the three men in their approach to the judicial function?

Mr. Prettyman: Yes, as is obvious, Justice Frankfurter thought that most business before the Court should not be before the Court. He had what we today call judicial restraint as his lodestar. He objected violently to a lot of the cases the Court took. *[Laughter]* There was one incident, one day, where he was on the bench, and they used to write notes in those days. They had people up behind the bench who would take notes out to people sitting in front. And he sent me this note which said, in effect, "I have such disdain for this case and for our taking it that I am not going to ask a single question." There had been a story in, I think, Time Magazine about Albert Einstein and some jelly beans, and I don't remember what the purport of the story was, but he'd been all mixed up in some jelly bean controversy. So I sent a note back and said, "I'll bet you 25 cents and some jelly beans that you can't do it." Well, with that he turned his chair around so that the back of the chair was facing the fellow who was giving the argument. And he sat there and he stewed and he fidgeted and his chair was going back and forth, and he turned around finally and he didn't say anything, looking around the room. Then finally the advocate said, "If there are no further questions...," and got almost to his seat when Frankfurter blurted out, "Do you mean to tell me...," *[Laughter]* and asked a question. And with that he saw that I thought I had won the bet, and he sent me a note saying that the advocate had <u>finished</u> his formal argument, and therefore Frankfurter had won. And I sent back a note saying, "There's no way he'd finished his argument -- he didn't finish his argument until he had stopped talking.

He hadn't stopped talking, hadn't gotten to his seat, so I win." Justice Black, sitting next to Frankfurter, had become aware of this controversy and wrote me a note saying that the advocate had not finished his argument and "I rule that you win." At which point Frankfurter sent me a note saying, "Since when is one vote on this Court determinative of anything?" *[Laughter]*

Mr. Kapp: What about the approach to the judicial function of Justice Jackson and Justice Harlan?

Mr. Prettyman: Neither was in the Earl Warren school of judicial intervention, if you will. Neither believed in leaping into situations unless you were absolutely compelled to. On the other hand, they were not of the Scalia-Thomas-Rehnquist school of today either. They might disagree with others as to what was truly a federal question. But they did not hesitate to take a case and decide it when they thought that the public interest required it, that it was an important issue that the lower courts would be confused about. They were somewhat like Justice White in this respect, who wanted the Court to take more cases. They wouldn't have wanted the Court to take as many cases as he did, but they would agree that when the lower courts were in confusion, the Supreme Court was the only court that could take it on. And that indeed it had a duty to do so. But they did not think that virtually every issue required Supreme Court review. Neither of them thought that because an injustice had been done, the Supreme Court had to review it. Both of them looked at it more as how important was the issue overall, to what extent

were the lower courts in confusion, rather than has some individual been done a serious injustice.

Mr. Kapp: Did you have any kind of relationship with Chief Justice Warren when you were there?

Mr. Prettyman: Primarily in connection with the Brown case. I just happened to be the messenger there. I thought Earl Warren was a very tough man. I thought that beneath his geniality, beneath his care and concern for the underdog and for the oppressed -- which were genuine -- there was an iron will. His father, you know, was a railroad worker who was murdered, and they never caught the perpetrator. He was a very successful governor but had been behind putting the Japanese in camps, which I think he lived with for the rest of his life. I do not think that Earl Warren knew himself when he came to the Supreme Court, and the best evidence of that is the number of cases in which he voted on the conservative side when he first got there but in which he would not have hesitated to vote the other way once he learned who he was. And this happened to a lot of Supreme Court Justices -- I think, in fact, it's happening to Justice Souter. When you arrive at the Court, you are so used to being a political animal, having to answer to all kinds of people, or having courts over you correct you all the time, that you don't really quite understand what you yourself are when you're left to your own devices. When Earl Warren was early on at the Court, there was a case in which the police had secretly gotten keys to the house of someone who was suspected of wrongdoing, and when

the occupants were not there, the police planted microphones all over the house, including the bedroom, and then listened in until they finally got what they wanted and convicted the occupants. Warren joined the Court in an opinion which affirmed those convictions, but separately he and Jackson suggested that the matter be referred to the Department of Justice. In other words, although there hadn't been a constitutional violation, this was questionable enough conduct so that the Justice Department should investigate it, which I'm sure it never did. But can you imagine Earl Warren five years later with a case like that? It would have taken him about 4-1/2 seconds to reach the conclusion that that was totally unacceptable and that the convictions had to be reversed. So he was emerging as his own man after he got there; he kind of took hold and found out what it was that he believed in. While he was the kind of person who would genially say "good morning" to the guards, he also was a man who could turn very quickly against somebody who made a mistake. And all I'm saying is that he was a much more complex personality than I think most people have recognized.

Mr. Kapp: Well, when you look at the long history of the Court and the great Justices of the Court, how do you feel Chief Justice Warren stacks up and how do you expect history will view him?

Mr. Prettyman: Well, I'm just not sure that history is going to be very kind to him. I think he did some wonderful things, and I think Brown itself stands as a monument that no one else probably could have created. Despite the apparent

simplicity of that opinion, I'm not sure anybody else could have carried it off. I think his heart was in exactly the right place. I think he stood basically for principles that I believe in. But I come from a family where judging means that you look at all aspects of the case and really try to reach the result that the law requires, rather than what the judge happens to be feeling. You can't govern your life or your business decisions or the other day-to-day matters that you engage in by feeling alone. I think there have to be rules. And I'm afraid that history may say of Earl Warren that he was reactive to cases, that he so much wanted the right result as he saw it that he was prepared to rule in ways that may have reached the right humane result in a particular case but that created a lot of chaos in the law generally.

Mr. Kapp: Do you have any sense of how your Father assessed him, again as a Judge?

Mr. Prettyman: None. I know they knew each other. I have a picture of the two of them in my office together, but he never told me that, as I remember anyway. But if I were to guess, I think my Father might have said something along the line that I've just said, because my Father was a different kind of guy. He himself felt that in some cases if the government or the authorities or the police have gone overboard, they needed to be corrected, and he might use a particular case in order to do that. But he did not believe that in each case you simply tried to reach a result that was necessarily fair. This is so hard to say, because I think the

layman's perception is that indeed the Court's function is simply to be fair, and of course in one sense it is. But what I mean is that sometimes in order to bring cohesion and stability to human affairs you have got to rule in ways that in some individual cases turn out not to be fair to the individual.

Mr. Kapp: When you look back here at your own career in the law, how do you evaluate the impact of your Supreme Court clerkship experience?

Mr. Prettyman: I don't know how to over-evaluate it. I mean it's just had such a tremendous impact on me in ways that I don't fully understand. I don't see myself doing something this afternoon and saying ah, I learned that from Justice Jackson. On the other hand, I think I have a broader view of the law; I have an understanding of what makes judges tick; I have some concept of what decides cases -- of what you shouldn't put in because it might offend somebody, as opposed to the telling point that is going to convince somebody. I have not only seen judges question advocates, but I have seen and heard their reactions, their innermost thoughts. I have seen Justices come from an argument and say, "That was outstanding and I hadn't thought of this, and I really think that this is important." Or I have seen them come from an argument saying, "Well, I was tending toward this way *[Laughter]* but the advocate disabused me of that idea." So I have a better feel for what's important and what isn't, and I think that's invaluable. In writing a cert petition, when you have personally written memos in well over 5,000 -- probably closer to 10,000 -- cert petitions, you just get a second feel as to what's

important and what isn't. You can guess which cases they are going to grant cert in or which they are not. And I don't mean for a second that I know all the time or anything of that sort. But I'm just saying that you get a better feel for it than if you haven't gone through that particular experience.

Mr. Kapp: How do you compare the operations of the Court today with the way the Court operated in the days when you were clerking?

Mr. Prettyman: The two things I think of immediately are, one, I have heard Justices today both privately and publicly complain of the lack of collegiality.

Mr. Kapp: Civility?

Mr. Prettyman: No, not that. The fact that they operate so separately, that they operate within their own offices. That there's so little communication except by writing. Most of them felt when they came on the Court that there'd be a lot of sitting around over lunch or over dinner or at the conference table, day in and day out, talking about things. Whereas there's very little of that. I do think that there was more of that in my day, although still not as much as the layman might think there was. But there was wandering between offices and they would have functions and they operated a little less as nine monarchs, and more as the round table.

The other really important distinction is in regard to the accessibility of the Court in those days. I mean that they had no detectors, they had very few guards, and I don't think it occurred to people that anybody could or would attack

the Court or any of the Justices. But today there are guards all over the place and there really is a serious fear that somebody might try to lob something in there and destroy the Court or the courthouse. And it means that whereas in the old days I could just walk anywhere, you know, open gates and go anywhere, now it's very screened off, and I personally think that one of the reasons that the Justices do not want cameras in their courtroom is for safety reasons. That is, the way it is today, virtually all of them are unknown. Justice Stephens can go out for a walk around the courthouse, and nobody knows who he is. Except for Justice Thomas, who has been in the spotlight a lot, most of them are never recognized, and I think they have a fear that if they became public figures -- in the sense that they appeared on the television all the time -- it would invite unwelcome intrusions and attacks that otherwise don't now exist.

Mr. Kapp: Do you think there's any more or less ideological conflict today than there was then?

Mr. Prettyman: It's of a different kind, perhaps at a different level, but essentially no. That is, I think that there were conflicts between, say, Black and Douglas on the one hand and Frankfurter and Vinson on the other; I can divide up that Court into various groups in the same way that you can divide up today's Court. There was civility, however, in those days that perhaps to some extent is lacking today. You rarely saw attacks in opinions, although one exception that immediately springs to mind, of course, is Justice Jackson's objection in the labor

cases to Black's participation that resulted in the Black/Jackson feud, and there Jackson was very intemperate. But the tone of the decisions, I think, was somewhat more civil in those days than in some of the opinions today. And I'm sorry about that, I hate to see it.

Mr. Kapp: At some point I know you edited or participated as co-editor of Justice Jackson's papers. Could you tell us about that?

Mr. Prettyman: He had drafted a book, and had come close to concluding the drafting, but he had not put in citations, and some of his work was just in draft form. The Supreme Court in the American System of Justice, which was going to be a series of lectures at Harvard, but he died before he could give the lectures, and his son, Bill Jackson, and I thought it was sufficiently finished so that we could conclude it. Which we did, and I think it gave a clear statement of Jackson's views about the role of the Supreme Court.

Mr. Kapp: Did Justice Jackson speak at all during your tenure as his clerk of his experiences at Nuremberg?

Mr. Prettyman: Very little. Occasionally something would come up, like some reference to his son at Nuremberg, or his secretary Elsie Douglas's experiences at Nuremberg. And very, very occasionally in a case, a reference to, well, that's the kind of things that the Nazis did as we found out at Nuremberg. Things like that. But in no detail. He didn't sit down and talk about what it was like to be the prosecutor in Nuremberg. I think it was a wonderful experience for

him, although whether he was disappointed by his cross-examinations in a few instances, I don't know. He was later criticized for that. On the other hand, his opening and closing arguments -- if you ever get a chance you should read them -- are among the finest examples of advocacy in the English language; they are just absolutely wonderful. It's interesting that he probably was not designed to be a trial man, even though he had practiced law in upstate New York, but rather designed to be an appellate advocate. Which he principally was as Solicitor General, and a wonderful one. I've written an article on Justice Jackson called "Solicitor General for Life" because that's what Brandeis said he should have been. And partly because he had a rather wry sense of humor, he sometimes seemed not to be taking the case *[Laughter]* terribly seriously, and I don't mean he wasn't, but what I mean is that he had a way of communicating events which made everybody feel that we were all in this together -- he and the judges -- and let's work through this, and he could say things with some humor and get away with it. A wonderful advocate.

This concludes the interview held on July 15, 1996.