

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 3rd day of October, 1996, shortly after noon.

Mr. Kapp: I am aware of the fact that sometime in the very early 60's you left Hogan & Hartson and entered the Kennedy Administration. I wonder if you can tell us how it happened that you joined the Kennedy Administration?

Mr. Prettyman: I'd be happy to do that, although I probably ought to mention two cases that I had just before I went in, if that's okay with you.

Mr. Kapp: Yes, go ahead.

Mr. Prettyman: Simply because they were each important to me for different reasons. In 1962 I was appointed by the District Court to represent a gentleman named William Fulwood, who was a Black Muslim at the District of Columbia Jail, and this was now in the very early stages of the Muslim movement among African-Americans. He had recently become a Muslim, and he was attempting to have possession of the Koran and to wear Muslim medals and so forth, and the prison authorities denied him that right. We had extensive hearings before Judge Burnita Matthews, who was a female judge from Mississippi, and she held, I believe for the first time in this country, that indeed Muslims have the right to practice their religion, to carry their medals, to have the Koran and so forth, in

prison, and she entered an order to the prison authorities to that effect. And that, of course, has had wide-ranging repercussions since.

The other case was one that I argued just before I left the firm, and that was my first case in the Supreme Court. As I recall, the Chief Justice called to ask me if I would take that case, and it was quite an insignificant one in the law -- it probably has never been cited since -- but it was called Andrews v. United States and I, of course, agreed to argue it and did. I won that case on a very narrow issue as to whether the Court of Appeals had jurisdiction over an attempted appeal by the Government of a District Court order remanding a matter for a hearing because the defendants had not been given an opportunity to speak at the time they were sentenced. I recall vividly that I was absolutely petrified before that argument began, and in fact I thought I was going to get sick, except that the person who was arguing in front of me sat down early and that got me on my feet and I was saved.

The Kennedy connection as I have outlined previously went back to law school where I knew Bobby Kennedy, and then, of course, he subsequently became the Attorney General. I got a call one day, I believe it was from Lou Oberdorfer, who was then head of the Tax Division at Justice and later a Federal District Court judge, and he explained that the President and the Attorney General were extremely upset about the 1113 Bay of Pigs prisoners who had been captured and were in prison in Cuba, following the Bay of Pigs disaster, and they wanted very much to get them back. In fact, even though we were well into December, they

wanted to get them back by Christmas. If the Government conducted this as a Government operation, the stakes were going to go way up, and there were going to be all kinds of difficulties and bureaucratic obstructions and all the rest. So they decided to get together a small group of Washington attorneys, bring them down to the Justice Department, and let them operate out of there, but operate as a private venture. Jim Donovan, a New York attorney, had been negotiating with Castro over the return of these prisoners, going to Cuba quite often. And now John Nolan was going to join him on occasion, and I, and a few others, were going to be working out of the Justice Department attempting to solicit the goods from around the country. My particular job would be to obtain the transportation -- the trains, the planes, a boat, etc. -- in order to get all of the donations from around the United States into Oppalocka, Florida, and then from there on a ship and a few planes over to Cuba. The negotiations were still going on, but the basics had been agreed upon. The negotiations had started out with tractors and ended up with miscellaneous items but principally medical supplies and baby food.

I gave up my practice within a few hours and moved into the Justice Department, and we virtually lived there for the next ten days or two weeks. Then, when we began taking care of the unbelievable number of problems that developed, I moved to Florida and got myself a Holiday Inn room right near the Oppalocka Airport and near the pier where the ship that I had gotten was going to be loaded. When I say unbelievable problems, this has all been written about in books, but,

just as an example, we were going to send drugs to Cuba. If you were going to ship even a single drug, you had to fill out voluminous forms, and there was simply no way with this tremendous amount of material we were sending that we could possibly have filled out all those forms, even if we'd had months instead of a few days to do what we were doing. So we talked directly to the Government people who were in charge of that, and we just cut through all the red tape and decided that we'd use one form, one piece of paper, that would try to list every drug, and that would be it. We'd just list anything that was going, and we somehow got approval for that. It's amazing when you're working for the President and the Attorney General what you can cut through if you have to.

Because companies were getting a tax break for the goods they were donating, they caught on very quickly to the fact that they could get rid of a lot of things in dead storage and send them to Florida and take a tax deduction. And consequently, in addition to some wonderful supplies we were getting, we were also getting a lot of junk. You know, everything from snuff to toenail clippers and everything in the world, and that became quite a problem. Finally, Castro got wind of the fact that he might very well be embarrassed by what was coming, so on the night before the ship was going to sail for Cuba, he sent agents over in the middle of the night. And I heard about this just before they got there. I went down in the hold of the ship and had everything repacked, so that the good stuff was on top. The agents arrived, and the press had no idea they were there, and as a matter

of fact never did learn they had been there. These agents looked things over in the ship, and they thought everything was fine, but on the pier itself, because goods were now coming in from all over the United States even as we were with them, they saw some things that they definitely didn't want. And they would go around and say, "Well, we want this, but we don't want this and we don't want that." But basically they were pleased. They came back to my hotel room and called Castro from the Holiday Inn and reported to me that they had told him that he was not going to be embarrassed and that everything was OK. The police got those agents out of there very quickly and sent them back to Cuba.

Well, the next morning, I got this frantic call from the pier, and our people who were loading the ship said that they couldn't operate like this, goods were still coming in, and they didn't know what to pack and what not to pack. They didn't know whether something had been approved or disapproved. There was no way we were going to get out of there that day if we had to make a decision in regard to each and every delivery. So I told them to just go ahead and pack everything and we'd worry about it later. So they stored everything on board ship. And I called the Attorney General, and I said, "We have a little problem," and I explained to him that Castro was going to receive a lot of good materials but that he was also going to receive some things that he definitely didn't want. And in his characteristic fashion, Bobby said, "Well, Barrett, you better go down there and explain to him why." And the next thing I knew I was on an airplane for Cuba.

We got down there, and Castro came out to the airport. Now the ship had sailed but had not yet reached Cuba. So he and I had a nice discussion. I did not bring up the problem I had been sent there to discuss. Instead, while he was talking to somebody else, I said to one of his lieutenants, just making conversation, "Where is Hemingway's house from here?" And he said, "Well, it's off here in the hills. Would you like to see it?" And I said, "I'm sure I would, but I think I'd better wait for the ship." He disappeared, came back and he said, "Come on, Fidel wants to take you." So we piled into these cars with all these tommy guns and roared off into the hills. We arrived at Hemingway's house, which was completely surrounded by a locked fence, and we couldn't get in. Castro was getting irritated, and these agents were running all over the neighborhood trying to find somebody with a key, and they finally found a gentleman who had been a kind of man-servant to Hemingway for twenty years and had worked with him right up to the end. He did have a key, and he let us in and took us through the house, which was exactly as Hemingway had left it before he went off and committed suicide in the Western United States. There was a bottle of booze on the living room table, and his weight each day written on the wall of the bathroom, and the slats under the bed for his bad back, and it was wonderful. We had with us one reporter, the captain of the ship, the Surgeon General, and myself, plus some of Castro's people. Anyway, we ended up in the kitchen, where the TV was, and the man-servant told us how Hemingway used to watch the fights in there, and they would bet on them. Castro,

who had been talking through an interpreter, began lapsing into English, somewhat broken English. He talked about his relationship with Hemingway, embroidering it significantly. As I learned later, he had met Hemingway only once. So it became rather warm, and Castro was very tired but he blossomed a little and we got along fine. We spent nearly the whole afternoon there, but we left finally and went down the hills, and on the way back to the pier he suddenly stopped his car, we got out, he walked out into this field, and there was a housing project over in the distance. He just stood there, and then you could hear in the background somebody yell, "Fidel, Fidel". And then people began streaming out of the housing project, and we were soon surrounded by hundreds of people, and he introduced us. Back down now to the pier, and they'd started to unload the ship, and fortunately almost the only thing you could see was baby food. It was just right up to the sky, and he was elated, and he ordered that the prisoners could start to leave right away, and in fact I think a flight might have gone out that night. But as a result of the way it developed, I didn't have to do a lot of explaining. I did get in the fact that because of the way we had to load, he might be getting some things he could throw away, but by then he was sufficiently pleased with what he'd seen. So we spent a rather wild night at the Havana Libra, and in the morning I was on a plane out of there.

That was one of the most emotional scenes I've ever been in. I was in this plane, a little prop job, and it was revving up down at the end of the runway, and we couldn't take off because MIGs kept coming in and landing and taking off.

While we were sitting there, this car careens around a corner and out to the plane, and the captain of the ship has just found out that the families of the prisoners -- so we're talking about thousands of people -- are going to be released too, and they were going to go back to the States on his ship. He was almost hysterical because he had, you know, a couple of toilets and no blankets, and there were going to be pregnant women and grandmothers and everything in the world on this ship. So I got him calmed down and told him we'd send food, blankets and medical supplies for his ship, and just to take it easy. So then our pilot went and revved up the motors again. There had not been a sound on this plane, not a sound. But when the wheels left the ground, pandemonium broke out. It was just wild. People laughing, screaming and crying, hugging you and breaking out cigars and all kinds of things. It was a very, very emotional time. When I got back it was Christmas Eve, and the President had us flown in a jet to Washington, and then he had a car take me to Baltimore, where I was going to spend Christmas with my then-wife and her family. A day later, the President called to thank me personally. So I thought that was the beginning and the end of my experience with the Kennedys.

Unfortunately, Bobby got the impression that because I had dealt with the transportation aspects of this venture, I was somehow a transportation expert. I knew absolutely nothing about transportation. But he called and said he had this problem at the Justice Department, where the people in his Antitrust Division who were supposed to be dealing with railroads and other transportation problems were

not even speaking to the people at the ICC and other agencies who were supposed to be handling the same problems, so everything had come to a standstill. It was a mess, and he asked me if I could come in for six months to be his Special Assistant to get this all straightened out. So I said I would, and I left the practice and became a Special Assistant to the Attorney General, theoretically to work on transportation problems. I say "theoretically" because as it developed, there were all kinds of other things to do as well. But what I did about transportation was a perfectly simple exercise. I simply got everybody in a room. I mean, I brought in heads of railroads, I brought in the chief people at the Antitrust Division, I brought in experts in the field. I just sat down with them, had a series of meetings, found out what the problem was, and wrote the Attorney General a memo with recommendations. And in three months it was all over, everything was fixed. So I made plans to go back. I had no plans to make my future with the Government; I wanted to get back to practice.

Well now, of course, Bobby was convinced [*Laughter*] that I was the leading transportation expert in the United States, which was ridiculous, absolutely ridiculous, because I really knew nothing about it. But he said that the President needed advice in this area in the White House, and would I go over and be a Special Assistant, particularly since the eastern railroads were in a chaotic state right then -- the breakup of the Penn Central, and so forth. So I agreed to go as Special Assistant to the White House. I had an office in the Executive Office Building, and

although I did indeed deal with transportation matters -- and in fact I was the President's representative on the Interagency Committee on Transport Mergers -- I also spent a lot of time on a myriad of other matters -- anything that happened to occur to Bobby. For example, if he had thirty minutes suddenly open up in his day, he'd call me and I would call a local high school and tell them we were on our way, and he and I would go out to an inner-city school here in Washington. He'd walk in on classes, or if they had time to get kids together in an auditorium, he would talk to them all about staying in school and how important the future was and how important education was. Which the kids of course just loved.

He also thought that it was horrendous that there were so few play facilities in the worst sections of town, and he got the idea that we ought to build a playground with donations. So I found a whole city block up at 7th and P Streets NW that was being used to store abandoned cars -- whenever the police would haul a car off the street that wasn't claimed, they would just throw it into this block. So we had the cars taken out, and I got O. Roy Chalk interested in it, and we began building a playground. And since we didn't have much money, I got things donated, such as a fire truck, where you could climb up into the seat and slide down. And of course the usual basketball hoops. We built a soap box car roll, where you could roll down a long slide. We got trucks. The largest vehicle ever carried on the streets of Washington was donated; it was a huge tugboat, and we had a terrible time getting permission because when they carried it past the Capitol they were afraid it was

going to fall into the subway that Congressmen use to get back and forth from their offices to the House and Senate. What I thought would be the hardest item to obtain turned out to be quite easy. I very much wanted an airplane in there, because these kids in the neighborhood, of course, had never been anywhere near an airplane. I had been told that in order to get a used airplane, you had to wait eight years. There was a long, long waiting list for these planes, because there was a great demand and not that many of them available. I called an Air Force general from the White House and told him that the President and the Attorney General were interested in this playground and in getting a plane in there. And he said, "Well, how many do you want?" *[Laughter]* And I said, "I'll take two," doubling my ambition, and he said in this very apologetic voice, "Mr. Prettyman, I am terribly, terribly sorry, but I don't think we can get them there until Thursday." And I said, "Well, if that's the best you can do." *[Laughter]* So on Thursday we had the two airplanes, and it really was getting to be a very, very wonderful playground. When we were building it, Bobby and I took Cary Grant out to see it. He was in town for a Stay-In-School Benefit that Ethel Kennedy and a group of us had engineered. Needless to say, he got a lot of attention.

Not long after the playground was completed, President Kennedy was assassinated. I believe that the first public event that Robert Kennedy attended after the funeral was the opening of this playground. I remember there was one humorous aspect of that. He wanted to walk there and back from his office, and we were

very fearful. If you remember that period, those were nervous days. We didn't know what was afoot as to whether there were a lot of assassins out there or what not. So we were going to have a lot of police with him, and he said he did not want any police with him. He didn't like to have police around, so we dressed the police up in civilian clothes [*Laughter*], and the pictures of him walking back show him and his huge dog, Brumus, and then these people who looked very ill at ease in their tight-fitting suits, who were all policemen.

But in any event, we had something like 10,000 kids at the opening of this playground. You couldn't get in there. It was just incredible, wonderful. That story has a very sad ending, in the sense that later, as kids began to get hurt -- as they do on all playgrounds -- the city began to get nervous and began closing various features down, so that the next thing you know it was a very sterile place. It's still there, and technically it's still a playground, it still has a plaque with the names of the people who had contributed, but it's not what it was, and it's all very, very sad.

The other thing I was engaged in with Bobby during this time was a pool. One of the schools we visited was Dunbar, and while there we saw a beautiful indoor swimming pool that they had closed down. And he wanted to know why it was closed, and they said that they didn't have any money to repair it. So he asked how much it would cost. And they said something like \$35,000. It had been closed for over a year, and you can't imagine how this hits a Kennedy mind. The police

told us, after all, that when that pool was open, the crime rate was way, way down, because they opened it even in the evening. Parents, as well as kids, could come to use it. It was always used, so there were virtually no criminal offenses in the neighborhood, and as soon as the pool closed, the crime rate shot up. And here for lack of \$35,000 they were allowing this pool to remain closed. So Bobby told me to get the money, get it open. What I did, I called up a Catholic bishop here in town and told him that a Jewish group and a Presbyterian group were each going to contribute, and I needed \$10,000. And then I called a Jewish rabbi and told him the same thing, and I called a Presbyterian minister, and so indeed they all contributed. We opened up that pool and Chuck Connors, "The Rifleman," came to the opening, and the kids of course loved that, and we made a big to-do of it. But that was the kind of thing I did.

I also got this idea that since Bobby was so interested in kids staying in school, we ought to have an open letter to school children from their sports heroes, and we drafted a letter directly to the children saying that you've got to stay in school, this is important, here's what it will do for you. If you drop out you probably won't be a success, and so forth. I just ran across these letters the other day. I thought nothing of it at the time -- they were stuck away in an old box -- but here are letters from Mickey Mantle, Maury Wills, Rocky Marciano, Arnold Palmer, Stan Musial, Jackie Robinson, Gene Tunney, Wilma Rudolph, Y.A. Tittle and, you

know, just a whole group of great sports figures of that time giving their permission to use their names. And so we distributed this in the schools.

Mr. Kapp: Was your impression of the Attorney General changed in any way during this period?

Mr. Prettyman: Yes.

Mr. Kapp: Could you talk about that a bit?

Mr. Prettyman: Well, I did not have that clear a picture of him early on because while I had seen him quite a bit down in Virginia, we were both working hard and the only time I saw him socially was when it was connected with an event, such as a Legal Forum dinner. I had the impression of a pretty conservative fellow who didn't do terribly well in his classes, but I had no distinct impression of him as a personality at that time. As I got to know him, I suppose he changed more during the course of my acquaintanceship with him than anyone else I ever knew. It was like watching a flower grow in fast forward. You could see changes every day. He learned. He absorbed information. He had a great deal of empathy once he became aware of a problem. He was not aware of the extent of poverty even here in Washington, much less throughout the country, until he traveled and saw it. He was not aware that his own Justice Department had practically no Negroes in it, as we called them then -- Blacks and African-Americans today. He changed that very quickly once he found out, but at first he didn't know. There were so many things that he did not know because he had led a fairly sheltered life, with a very, very

well-to-do father. But he learned and he cared, and there was nothing phony about that. He really woke up to things that were going on and that ranged all the way, as I say, from poverty to Vietnam, where he was slow coming to realize the nature and extent of what we were involved in. But once he understood, he spoke out. So I would say that my impression of him changed dramatically, and particularly in the later years, when I helped with his Presidential race, I got even stronger impressions of him. Because in the meantime, while a Senator, he had changed some more, had learned a lot, had espoused new issues and had become a fuller person. He had become a completely integrated whole, a fascinating man. I guess the most interesting political animal I ever knew because, like Nixon, he was basically shy, had very little small talk, concentrated on his duties, worked hard, always wanted to be doing something, accomplishing something, and yet he had people wild about him. I mean I'd never seen anything like the crush that we ran into when we ultimately started his campaign.

I might tell you one little vignette about him [*Laughter*], which says a lot. When he was running ultimately, and I realize we are pushing ahead here in time, but when he ran for President he was worried about the fact that businessmen despised him, hated him, feared him, and he talked to me about it, and I told him, first of all that I would draft an article that he could run in Business Week or some place like, making people less fearful of him. I did that, and it was published with him on the cover. And I said the other thing I'll do is start bringing

distinguished business people by to see you, one at a time, so you can just chat with them, and they will see that you don't have two heads, and the word will get out that maybe you're not as bad as they had thought. Great idea. So the first person I brought in was the then-President of Capitol Records. We represented Capitol Records, and I didn't have time to talk to him before the meeting, but I met him in New York and took him up to the U.N. Plaza, where Bobby had an apartment. And we went in and sat down, the three of us, and I waited for the conversation to begin and there was dead silence. Bobby just sat there, had no idea what to talk about, and I realized that the President of Capitol Records wasn't even sure why he was there -- his name was Livingston, a wonderful guy, but he couldn't figure out what was going on. And so I had to finally break the silence and get small talk going, and it was terrible. It was just awful. Finally, I showed Livingston out [*Laughter*], and in the hall he said, "What the hell was that all about?" [*Laughter*] And that was the last business person I brought by to see the Presidential candidate.

But Bobby was very courageous. One day when he was in the Senate, he, Ethel, some of their children, another couple and I went on a sailing trip in a borrowed boat. A big storm roared up and in the middle of it a Coast Guard cutter came as close to us as it could -- not very close -- and a voice over a bullhorn announced that Bobby's daughter Kathleen had been injured by a horse. Bobby jumped overboard into a terrible surf and disappeared. Thank God he turned up

and somehow got to the cutter. The seas were so bad that the cutter's front window shattered on the way back, and the boom on our boat broke.

I was also there in Steve Smith's New York apartment when the decision was made that Bobby would run for President. That was funny because we were all sitting around debating what we should advise him to do when he walked in and announced he was going for it.

Mr. Kapp: When you were in the White House did you have any substantial contact with the President?

Mr. Prettyman: Very little, very little. We'd see him at meetings and a couple of times in the hall and things like that, but no, I didn't deal one-on-one with him hardly at all. Virtually all of my work was with the Attorney General and through Mike Feldman.

Mr. Kapp: Just going back one step here to your day in Havana. Did you develop any kind of impression of Fidel Castro as a result of that contact?

Mr. Prettyman: I am ashamed to say that the overwhelming impression I had was that he wasn't going to be with us very long. I really thought that the display of guns, his tiredness, he just struck me as a man on the way out, and of course here we are 30 years later, and he's the one who's still around. All the rest are gone. I would never have guessed his durability. He is an intelligent man, a man I think very aware of himself and history, and in fact with an inflated idea of himself and history. He had a great deal of pride, and I thought the way he spun

out the Hemingway connection was interesting -- the fact that he would bother to make that relationship a lot closer than it had in fact been -- why he did that is interesting to speculate about. But based on that short experience, I can't give you an in-depth analysis of him but I certainly had an impression of a leader who I thought was in some trouble but in charge, no question about that.

Mr. Kapp: You were in the White House at the time of the assassination.

Mr. Prettyman: I was in the Executive Office Building, I had placed a call to someone on the Hill and I can't for the life of me remember who it was, but as soon as I started to talk they said, "No, no, don't worry, we know all about it." And I said, "What do you mean?" And they said, "About the President being shot." And that was the first I'd heard. It had just happened apparently, and I put down the phone and walked across the street to the White House -- you know, there's a little roadway there between the Executive Office Building and the White House -- and I walked in and it was like a death camp. It was just awful. People were crying and sitting and staring, and there was great confusion. I remained there and was there when Lyndon Johnson arrived in a chopper late that evening, and walked over to the President's office. I remember very well, and I tell you as shocked as everybody was by the original news, the sight of him as President coming to the President's office was, if anything, a greater shock. It brought the whole thing home in a way that nothing else could have.

Mr. Kapp: Did you continue on in the White House after Lyndon Johnson arrived?

Mr. Prettyman: I think I was either the first to resign or certainly very close to it. I did not know Johnson. He did not know me. He wouldn't have been interested in any of the things I was doing. As you know, he and Bobby did not get along, and of course I had no interest in getting into government in the first place. It had all just been a series of flukes. And so once I saw the situation, I got out and went back to the practice.

Mr. Kapp: When you originally went over to become part of the Administration, you worked on a series of railroad issues. Did that have any influence on your subsequent law practice?

Mr. Prettyman: Well, it did in the sense that it got me involved in one or two matters which in turn lead to a number of other matters. The first one, I think, was on behalf of Western Pacific Railroad, and among the first things that came up was a case that they had in the Supreme Court. I worked on that, and then I worked on some extensive hearings involving the Western Pacific. I lived in Chicago at a hotel for almost a year where these very strange hearings went on in the Hilton across the street. I lived in the Blackstone Hotel, and the hearings were in the Hilton because there were so many lawyers you couldn't get them into a hearing room, so we had to hire out the main ballroom of the hotel to have our hearings. The hearing examiner was a wonderful gentleman but an alcoholic, since

deceased, and so we would start late in the morning and quit early for lunch, and come back late from lunch, and quit early in the afternoon. So it was tremendously expensive for everybody involved. He eventually broke his leg one night and was replaced by another hearing examiner who was very strict. Finally, the two of them sat together and disagreed on almost every single ruling. But as a result of all this, the case went on and on. It was almost a perfect example of how you should not try a regulatory case. But it was very easy living for me. I would get up late, have breakfast in bed and wander over to the hearings, and I would cross-examine somebody maybe once a week, *[Laughter]*, and it was an easy life, and I got to know and love Chicago. A great town. But, as a result of those hearings, the General Counsel of the Rio Grande Railroad, who participated in the hearings, later got me involved in hearings involving the Rio Grande. Then that railroad was eventually bought and bought again and ended up as the Southern Pacific, with a very wealthy gentleman owning it, and so it led to a series of cases that are still going on in the firm. We have been involved in a lot of railroad work, all coming out of that one little hearing with the Western Pacific.

Mr. Kapp: You said that you had resigned from the Administration shortly after the arrival of President Johnson and I know that you returned then to Hogan & Hartson. Can you tell me a bit about the nature of your practice on your return?

Mr. Prettyman: Well, I became a partner in July 1964. I had now argued several cases on appeal, and it had become clear to me that my heart was really in the appellate area. This is something I've always loved. To take a confused record, including all the mistakes that might have been made below, and somehow shuffle it up and recreate it into a coherent story and a coherent argument - this appealed to me tremendously. Incidentally, during this period in the mid-60's I had one of the strangest experiences I've ever had as a lawyer. I had been appointed to represent a Miss Johnson, who had been picked up at 2-3 o'clock in the morning on 14th Street in Washington flagging down cars. And instead of being charged with soliciting, she was charged with vagrancy. One of the key phrases in the vagrancy statute was "leading a profligate life," and I attacked the statute on about eleven constitutional grounds, including the fact that nobody knew what it meant. So at the trial, whenever anybody came to the stand, no matter what they were going to testify about, I would ask, "By the way, what does 'leading a profligate life' mean to you?" And of course the answers were all across the spectrum. Most people had no idea, and even if some people gave a wild guess, it was usually off the mark. But the policeman who arrested her said, "Well, I think it means doing something, you know, partially bad, kind of bad, over a period of time." And I said, "What do you mean by that? Do you mean like going out to the race track all the time?" And he said, "Yeah." And I said, "Betting on the horses on a regular basis?" And he said, "Yeah, that's right." And I said, "Well now, I

understand that J. Edgar Hoover goes to the races on a fairly regular basis and I assume he bets when he's there. Would you say that he's leading a profligate life?"

"Yes, sir, I would." *[Laughter]* Now this is in Superior Court, and of course the *Washington Post* never covers run-of-the-mill cases in Superior Court. But with my luck, on this particular day a reporter who had been covering another hearing had wandered into the courtroom and just happened to be there when this occurred. The next morning, there's a little piece in the *Post* about Hoover leading a profligate life.

I had two FBI agents in my office at 9 AM when I arrived for work, and they handed me a letter personally signed by J. Edgar Hoover in which he excoriated me for gratuitously injecting his name into a case by referring to his numerous visits to the race track. He said this was an unwarranted use of his name to obtain some cheap publicity. He continued: "The facts are that I only attend the races -- an entirely legal pastime *[Laughter]* -- on Saturdays and then infrequently. I am usually one of 20,000 persons present, which include officials -- Federal and State -- and of all branches of the Government. Why you should single me out of this large number can only be that you are vindictively inclined or are hard pressed to make a point completely irrelevant to the true merits of your case. In any event, I do not appreciate such despicable use of my name" *[Laughter]* Well, needless to say, I almost had a heart attack. *[Laughter]* I wrote him back and tried to explain that it was a great compliment, because I was trying to show that leading a profligate life could not possibly be what this officer thought it was, since the very reputable J. Edgar Hoover did what the officer thought leading

a profligate life was all about. But needless to say, I never heard back from Mr. Hoover. *[Laughter]* That was quite an experience.

I had some other cases at the time that were quite interesting. I now started getting a series of Supreme Court cases. I ended up arguing 19 of them, and I would love to get number 20, but I don't think I will. And these cases were all over the place; they dealt with no particular subject. I was getting some First Amendment work. I should also mention Jones v. Wolf, which was a seminal church-state case in the Supreme Court. I did some work both for free and for pay for the Reporters' Committee for Freedom of the Press. I was also beginning to represent some writers. For example, I represented Katherine Ann Porter for about the last 20 years of her life. I worked closely with Charles Alan Wright and Clark Clifford on the TWA case for Howard Hughes -- a case we won in the Supreme Court. And I represented Hughes, along with Seymour Mintz and others, in the Clifford Irving matter, when we put Hughes on the phone with a Time reporter to prove that the recluse had never heard of Irving. I represented Rita Hayworth for two years to prevent her from being taken advantage of by the media while she had Alzheimer's, and I met with the Aga Kahn and talked on the phone with Orson Welles about her situation. I represented Yasmin Kahn at the same time. And at another point I successfully represented a Boston Globe reporter accused of

masterminding the Indian revolt at Wounded Knee. So I've had some interesting clients, including Lloyds, the Methodist Church, Fotomat, the National Wildlife Foundation. I once did an internal investigation of Olin Corporation to determine whether one of its subsidiaries had been illegally shipping arms to South Africa. And I have already told you about the TV documentary on the death penalty that I did with Truman Capote.

Mr. Kapp: Was Capote himself involved in the interview process?

Mr. Prettyman: Oh yeah, yeah, he was. In fact he was supposed to do all the interviews. The problem is that some of these prisoners had a very adverse reaction to him because of his mincing ways and refused to talk to him, and I ended up doing a lot of the interviews. I think as it ended up, he probably did half and I did half. But he was present during all of them. As I have mentioned, we ended up in California interviewing then-Governor Reagan.

So my work was quite eclectic, quite varied, and there didn't seem to be any constant theme to it except that, as I say, the appellate work gained my attention more and more and I began to focus on it. One interesting case I should mention was called Jackson v. United States, and again I was appointed by the D.C. Circuit. Some of my most interesting cases, I find, have been those where I was appointed by the court. It was the case of a man who murdered his wife and assaulted another man when he found his wife and the other man in bed together. We somehow discovered that sitting on the jury was a man who previously had had

an affair with a married woman whose husband had caught and killed her. The juror had never revealed that. And we got the D.C. Circuit to reverse the conviction on the ground that it was an unfair trial to have on the jury a juror who had undergone precisely the same type of experience that was being tried to that jury. Amazingly, the panel that unanimously reversed included Wilbur Miller, who I don't think ever again voted to reverse a criminal conviction; Burger, very conservative; and Tamm, also conservative. So I always felt very proud of that ruling.

Mr. Kapp: What in your mind makes for good appellate advocacy? What would you say about that?

Mr. Prettyman: A complete knowledge and understanding of the record. Serious and long thought about a cohesive theory of the case. You'd be surprised how many people do not have a total theory of their case, and by that I mean a theory that is so complete that it will answer hypotheticals thrown at you in oral argument. Let me give you an example. The case of Plyler v. Doe was a case in which Texas had by statute denied a public education to undocumented alien children. And during the oral argument in the Supreme Court, the fellow representing the State of Texas was asked by Justice Marshall, "Could Texas deny those children fire protection?" He stammered around and finally said that he had no idea. I don't understand that. I don't understand how anyone approaching an argument in that case would not know that you're going to get questions about fire

protection and police protection and all the other things that a state normally provides for its citizens. How could you not know that? He did not have a theory of his case. It didn't make any difference whether the answer was yes, they could deny fire protection, or no, they couldn't, so long as he had some reasoning to back up his conclusion, but he had to have a cohesive theory of the whole case so as to show what the state could do and could not do and the reasons for it. Now that's what I mean by a cohesive theory of a case.

The other important element in preparation is to step back and look at your case from your opponent's standpoint and from the standpoint of a judge who wants to vote against you. So many advocates refuse to do that, because it's unnerving; they don't like to face the unpleasantness of realizing that they have holes in their cases. But all cases do. When I begin preparing, I start writing myself questions. They could be factual questions. They could be legal questions. They could be hypothetical questions. Anything that I don't immediately know the answer to. It's not uncommon for me to have over 300 questions by the time I get through the record. Those are questions that I want to have answers to before I stand up in Court.

I also have at least one moot court, and the purpose of that is so that others can throw questions at you that you haven't thought of. No matter how well prepared you think you are, there's nothing like having an entirely different mind directed at your case. Even strangers to the case will come up with questions that

you have not thought of. One of my most vivid memories is of a moot court. We had a new associate at the firm who'd only been with us a few days, and I invited him to the moot court just to make him feel part of the firm and so that he could see what a moot court was all about. And low and behold, I was arguing away when he put up his hand and said, "Well Mr. Prettyman, suppose that church had been sold to an unwitting buyer and this happened and that happened and so forth?" And I was absolutely stunned; it was a wonderful question. I had not thought of it. I had no answer to it at all, and I had to say so. Well, I had about a week to go and needless to say, in the shower and in bed at night and in every other spare moment I was thinking about that question, and I finally came up with not a perfect answer but the best that I could conjure up, and by golly I got all through the actual oral argument and was halfway to my seat when Justice Stevens said, "Mr. Prettyman, suppose that church had been sold to an unwitting buyer?" *[Laughter]* Almost in the same words that this kid had asked the question, and I was able to roll off my answer, very assuredly, giving the answer I had prepared, and sit down. But you know, if the associate hadn't asked me that question, I'd still be standing there. You learn from that, so I don't agree with advocates who say that moot courts take away their spontaneity. Quite the contrary, I think it gives you much greater spontaneity because you're more sure of yourself, you're more relaxed, you know the type of things that will be coming at you, and you're better prepared.

I think another thing is self-assurance. One of the things I so admire in John Roberts, one of our partners, is that once he finds out what side of the case he's on, he becomes absolutely certain, absolutely totally certain, of the rightness of his position. You cannot tear him loose from it, and he approaches that argument as if there could be no answer other than the one he has. I admire that because it gives pause to the judges who are opposed to that view, and it gives assurance to the judges who are on his side, and it's a good attitude.

Certainly it takes intelligence to be a good advocate. You have to understand the ramifications of your case, you have to understand where dissenting Justices may be trying to take you, what they're trying to set you up for in order to disprove their position to other Justices. You have to know when and where to concede and when not to; you have to know whether a question is friendly or not, and it's not always clear. I heard one judge say that you'd be surprised how many advocates fire on the lifeboats coming to rescue them. You know, that lawyers act as if every question has to be hostile, when of course it's not.

The broad view is just terribly important to see the case in context. It's not just this little factual situation. This has ramifications for other unrelated cases, other areas of the law. You've got to see how it all fits in. You've got to make sure, therefore, that you're not plucking away for a theory that the Justices can't possibly buy because it's going to get them into trouble elsewhere. You've got to be realistic. You've got to know which instincts to appeal to and which to stay away

from. It takes a very whole person to be a good advocate, I think, and of course you have to be articulate.

Mr. Kapp: Have you got a view as to the relative importance of the written brief and the oral argument?

Mr. Prettyman: There's no question the written brief is the most important element. It's all there, or it should be. It's the first thing the judge sees, it's the last thing he sees if he's writing the opinion. And if you have not convinced the judge by the time he or she has read your brief, you're probably in trouble. On the other hand, I have had a surprising number of judges tell me that in a surprising number of cases they have in fact changed their minds. I have heard the figure go as high as a third of argued cases, which I am inclined to question. But I've at least heard that. Judges and Justices have said, time and again, that they find oral argument extremely important, even if they do not change their minds; it often affects how the opinion's going to be written. It's going to affect what issues are going to be dealt with and at what length. A lot of judges say that they really did not have that clear of an idea of where they stood when they came on the bench, and oral argument helped them decide. So it's not just changing minds; it's helping them make up their minds. So I think it is important. It's also important because many people lose cases. More people lose cases than win cases. By that I mean, they go in and either wholly fail to make their point or make a concession that they

should not have made, and they thereby help convince the court that they're wrong.

So --

Mr. Kapp: You don't subscribe then, totally to the canard that cases are never won in oral argument but are frequently lost in oral argument?

Mr. Prettyman: I certainly don't agree that cases are never won, but I do think that more cases are lost than won. Yes, I do agree with that. But it seems to me you have to take the word of the judges. Lawyers are not very good judges of how judges reach their conclusions. You have to listen to the judges themselves, and most judges would say that oral argument is important. It may not be important in a couple of southeastern states where the judges have drafted their opinions prior to the oral argument. No, it's not going to make much difference at all. But in cases in the Supreme Court, and I think in most circuit courts, argument can be extremely helpful, and you should always ask for it.

Mr. Kapp: What in your mind makes for a --

Mr. Prettyman: Excuse me, you should always ask for it if you are the appellant or the petitioner. I don't mean that you should ask for it if your opponent who is seeking appellate review does not ask for it. Excuse me, go ahead -

Mr. Kapp: What in your mind makes for a well-crafted appellate brief? Can you describe your approach to brief writing?

Mr. Prettyman: Clarity, succinctness, accuracy, a little bit of a flair -- and I don't mean off the wall, I just mean the judges read so many hundreds of

thousands of pages that if you can be interesting, they love it -- when it's something that is well written and can catch their interest. They like a cohesive story instead of a jumbled presentation where they can't really tell what happened. They love honesty, and this is particularly true in oral argument when you confess that there's a particular point that worried you when you got the case and you found the answer and you hope that answer is satisfactory to the court. That's very appealing. But they love it when you deal directly in your brief with a very tough point, rather than ignoring it or, even worse, distorting it. If you can get their attention, if you can give them a reason, both in terms of fairness and justice and in terms of precedent, that they should decide for you, then you've come a long way toward getting to a favorable result.

Mr. Kapp: When you start on an oral argument, do you ordinarily have some particular goal or objective in mind? I mean obviously you'd like to win the case.

Mr. Prettyman: Five votes!

Mr. Kapp: Right. *[Laughter]* But there's not any sort of generalized approach in that sense?

Mr. Prettyman: I don't think so. You have figured out in advance where your most likely votes are coming from if you're going to get any, and particularly if it looks close you probably have a pretty good idea of who is on the fence, where the key votes are. So you want to say things that are going to appeal to

the decision-makers, the two or three that are going to make the difference. But I really can't say that there's any kind of generalized approach that you have in mind. You're just trying to give the best damn argument you can. Look, if you're in college and your roommate wants to go see one movie and you want to go see another but you want to go together, I mean you start in with an argument: Yeah, but the stars are over here, and I heard the plot was fabulous, and this director also directed this other great movie, and you come up with every single argument as to why you want your roommate to see this other movie. It's no different in oral argument in court. You are trying to convince. You are trying to make someone who either has no opinion or has an opinion against you rule your way, to give them every reason why they should. The whole game is to persuade. You can't persuade if you are not articulate. You cannot persuade if you don't have down-to-earth and important grounds supporting you. You can't persuade if you unfortunately have the kind of personality that judges don't like. There are a few advocates around who are so arrogant that the judges start in hoping they can decide against them.

*[Laughter]* That's not very persuasive. But other than that, I really can't say that there's some shiny key to all this.

Mr. Kapp: Any difference in approach between an argument before, let's say, the D.C. Circuit on the one hand, and the Supreme Court on the other hand?

Mr. Prettyman: There are certainly big differences. With the Circuit Court, assuming that you are not en banc so that you have only three judges, you should know how they have voted in the past on matters similar to this one so that you can gear your argument pretty much to what you think their views are. You obviously have fewer questions. There are fewer hypothetical questions at the Circuit Court level, because the judges of course are bound by Supreme Court precedent. If you have anything in the Supreme Court that supports you, you obviously want to make that argument very strongly, and in fact the oral argument may hinge on what that Supreme Court precedent means. What's the application here? In the Supreme Court, you have nine people coming at you instead of three. You have more questions, you have more complicated questions, you have more hypothetical questions because the Justices want to know where you're taking them and what the implications are for the law generally -- whether you're getting them into hot water, because, after all, there's nobody around to correct the situation if you do. The personalities, of course, are different, just as they are from panel to panel on the Circuit Courts. But personalities are very important. You have some judges who can't stop asking questions. You have some judges who never ask questions. And you have everything in between. So knowing your court is really quite important.

Mr. Kapp: Tell me what you think about the influence of amicus briefs. Do you think that they're generally useful, not particularly useful, can you generalize about them?

Mr. Prettyman: If it's an amicus brief from the Solicitor General, it can be extremely important. Extremely important. Sometimes that importance cannot be overstated. If it is an amicus brief from a large group of states, it can be very important. Sometimes an amicus brief from, let's say, a medical group in a case involving a technical medical procedure could be very important. It gives a different viewpoint, and it makes the Justices feel at ease in an area that they really don't know too much about. My own feeling is that (a) it almost never hurts to have the support of an amicus brief; (b) most amicus briefs are not worth very much; but (c) they don't really do much harm. So I encourage them in cases where you can get them -- at least from responsible people. You don't want just any screwball writing in on your behalf. But an authoritative organization all the way from the NAACP to the Chamber of Commerce, depending upon the case, I think can be of help, and the Court has referred to these from time to time. If you were to take a typical Term and look at all of the amicus briefs filed, my guess is that not over 10% made much difference one way or the other.

Mr. Kapp: What about the Circuit Court level?

Mr. Prettyman: You see very few of them, because Supreme Court precedent plays such a big role there. That's an interesting question I've not

thought much about it because I haven't seen that many of them, but I would guess that the import is lesser. I'll ask a circuit judge about that sometime.

Mr. Kapp: Maybe there's a difference between an en banc case and a...

Mr. Prettyman: Could be.

Mr. Kapp: ...case before a panel?

Mr. Prettyman: Yeah, could well be.

Mr. Kapp: Can you talk about cases that you've handled in the Circuit Court of Appeals for the District of Columbia? Any particularly memorable cases in that court?

Mr. Prettyman: Well, one very unfortunate one was U.S. v. Western Electric, where I was arguing for the telephone companies, and I was up against Larry Tribe. I made my argument, a tough point in a tough case, and Tribe got up and engaged in a long, long exchange with Judge Silberman. And it went on so long, way way past his argument time, that when he sat down I did something I had never done before in my career; I got up and asked if I could have some extra time. Judge Mikva was acting as Chief Judge, and he declined. And I lost on my key point; I lost the case. But I've always felt that that was basically unfair. It was one of those rare instances where Tribe went on so long -- everybody talked about it later -- that I should have been entitled to a little extra time. That was a very tough case. I argued the Teleprompter case here. One wonderful case I had did not get to the Court of Appeals. We got the first restraining order against the SEC

when we were representing Nelson Bunker Hunt, and it was in the middle of his Silver difficulties. That matter was settled after we got that restraining order, which the agency had not really heard of before.

Another case that was in the District Court rather than in the Court of Appeals was one involving John Lennon. I was representing Capitol Records on an on-going basis. John Lennon very late one night had gone into the Club Cavalaro in New York City and had sat down at a table. There were about six people at the table, and one of them was a Morris Levy. Levy was somebody who ran one of these record companies that put albums out on television; they are not distributed in the general market. You buy them only through television. And John Lennon sat down and began talking about a record he was then making of his oldies favorites, songs that he'd grown up on and was now redoing in his own style. But he was not terribly happy about how it was going, he was down. So Morris Levy said, "I've got the answer for you. Let me put this album out on television. It will make the same amount of money, if not more, and you won't get pilloried by the press the way you would if you put it out through the regular commercial market, because they don't review the stuff that comes out on television." Now everybody present agreed up until that point that that is what happened. But then one group said that Lennon replied, "No, no, I'm under exclusive contract to Capitol Records and I can't do that. I don't mind sending you a dummy tape just so you can hear what I'm talking about, but there's no way I can let you put it on TV." The other

people at the table swore that he said, "That's a great idea. I'll send you the tape and you go ahead and put it out." Well, Lennon in fact sent a rough dummy of the uncompleted tape to Levy, and the next thing he knew an album was on television, being sold. As soon as Capitol Records heard of this, it sent telegrams to all of the TV stations around the country, threatening suit if they didn't stop immediately, and Levy thereupon sued Capitol Records for interference with his rights. The trial centered around what had been said -- whether there was an oral contract. And as I say, half the people at the table swore one thing, and the other half swore the opposite. Although I did not represent John Lennon, I was on the same side as he was, representing Capitol Records, so his attorney and I went to his home, the Dakota, the large building that he was later shot outside of.

Mr. Kapp: Oh in New York, yeah.

Mr. Prettyman: Yeah, in New York. We went there on several occasions to prepare him for his testimony. And I must say, I didn't like John Lennon at first. I thought he had a very casual attitude toward the lawsuit and a casual attitude toward everything, I guess. But the more we went on, the better I liked him. By the time he got to trial, he was nicely dressed, and he had a pitcher of what appeared to be orange juice with him every day, which he put down under his seat. He and Yoko Ono came together and attended every day of trial, and we really became pretty good friends. One night, for my book collection, I rushed around Greenwich Village and found a book called *Lennon Remembers*, and I

brought it in the next day and he inscribed it for me. He made a wonderful witness. He was one of these witnesses who, if the answer wasn't going to hurt him, he would give it straight out -- hard, narrow, clean, articulate. If it was a question he didn't want to answer, he'd start in and you'd get totally captivated by what he was talking about, and he'd go on and on and on and by the end of it you forgot what the question was. *[Laughter]* He never even came close to answering it. He was also funny at times, he was street smart, was what John Lennon was. John Lennon was no intellect, but he was street smart as hell, and as I say, I ended up liking him quite a bit.

Mr. Kapp: How did the case come out?

Mr. Prettyman: The trial judge, who almost didn't know who the Beatles were because he was a great fan of opera and serious music, had several children who were insane about the Beatles, and he told us later that he went up about thirty notches in his kids' estimation just by the fact that he had had this trial. He ruled that John Lennon had not made an oral contract, that he was perfectly aware of being under exclusive contract to Capitol Records and would never have given away his record rights and did not do it. So he ruled with one half the people at the table. *[Laughter]*

*This concludes the interview held on October 3, 1996*