THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

A. Raymond Randolph

Columbia Center for Oral History

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with A. Raymond Randolph conducted by Myron A. Farber on January 15 and January 16, 2013. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

VJD | Session One

Interviewee: A. Raymond Randolph | Location: Washington D.C.

Interviewer: Myron Farber | Date: January 15, 2013

Q: This is Myron Farber on January 15, 2013, interviewing A. Raymond Randolph, senior judge of the United States Court of Appeals for the D.C. Circuit, with regard to Columbia's Rule of Law oral history, with its focus on Guantánamo Bay detention camp and related matters.

Judge Randolph, the first thing I want to do is apologize for Columbia not having come through with a scholarship for you when you were a young man. I have been authorized to promise you a check for $1,600, but I don't have that check with me. It may be in the mail, directly from Columbia. But we'll get to that in a moment, and what occasions that.

Before we start, David Briand, who is the project coordinator at Columbia on this project, asked me to ask you if you had ever gone to the mat with Donald [H.] Rumsfeld. [Laughter]

Randolph: I think he was ahead of me.

Q: It turns out he was ahead of you. He wasn't far away though.

Randolph: No. He went to Princeton, didn't he?

Q: Right. But he graduated, I think, in the fifties. But isn't there a White House gym? When he was chief of staff or something, he never called you over and said, "Let's have it out"?

Randolph: No. [Laughs]

Q: Okay. Every profile of him mentions his wrestling capabilities. It never fails.

Randolph: We practiced with the University of Pennsylvania when I was at Drexel [University]. The campuses abut each other. Every day we would go over to Hutchinson Gym and practice with the University of Pennsylvania wrestling team, and the reason for that was that the coach of Drexel wrestling was the twin brother of the coach of Penn wrestling—the Frey brothers, from New Jersey. As a result of that, we basically had a meet almost every day. Penn won the Ivy League, and Drexel, that particular year—our wrestling team went undefeated for the first time, and the last time, in the history of the school.

Q: Actually, you are from that area of Philadelphia, are you not? Isn't that where you were born and raised?

Randolph: I was born and raised in New Jersey. It's across the Delaware River from Philadelphia. I think my father was born in Philadelphia. The family on my father's side had a very strong connection with Philadelphia.

Q: Essentially in a rural area?

Randolph: Where I grew up?

Q: Yes.

Randolph: It was very rural, yes.

Q: To the extent that you could still be called a farm boy?

Randolph: I think so. I didn't work on a farm and we didn't live on a farm, but our house sat up on a hill and we looked out over Abbotts Dairies, which at the time I think was the largest dairy farm in New Jersey. There were three very large mansion houses and barns scattered on this huge property, through which a creek—actually a river—called Big Timber Creek ran. That was my playground when I was a kid. I had a boat, and the few neighbors that we had, the boys there—we went over and fished, and hunted, and chased the bulls, or had the bulls chase us.

Q: What is this, shades of Tom Sawyer! [Laughter]

Milk was delivered in bottles at that time, was it not?

Randolph: Right. We still get milk delivered in bottles.

Q: Here?

Randolph: Here. My wife represented South Mountain Creamery, which is a dairy farm near Hagerstown, Maryland, and they deliver fresh milk in bottles, butter, and wonderful ice cream, etc.

Q: They did, or they do?

Randolph: They do. Every Tuesday.

Q: In your neighborhood?

Randolph: In our neighborhood, yes.

Q: Well, let me know if something comes up for sale out there.

But your father—what kind of work did he do?

Randolph: He was an interesting fellow. He started out as a professional photographer and did covers of magazines, etc., but couldn't make a go of it. During the war he worked at the Navy shipbuilding yard or something—I don't know what it was—and became a machinist. He did that for most of his life, until later. Then he became an inventory specialist for Owens Corning Fiberglass.

Q: This is World War II, of course.

Randolph: Yes.

Q: Were you born at this time?

Randolph: 1943.

Q: Somewhere I picked up that your father had a labor connection, a labor union connection.

Randolph: He got very involved with the unions. I don't know exactly when that occurred. I think the early 1950s. He eventually became president of the local union.

Q: Did that have any influence at all on your thinking over the years about labor unions?

Randolph: Well, it gave me a feel for it. I don't know if it influenced my thinking. I went to law school with the idea of becoming a labor lawyer. Then I veered off that track at some point. I can't remember when. Maybe between my first and second year of law school.

Q: But he was—it was a labor union associated with a national union. Was he a local official associated with the national union?

Randolph: It was the Glass Bottle Blowers union, as I recall, and each plant that manufactures—in that case it was Owens Corning Fiberglass. I don't know if they're still in existence, but each plant had their own local union. He was the president of the local union for the Glass [Bottle Blowers Association], which is a national labor organization.

Q: He didn’t call you and say, "Look, Ray. This is your life. We're going to make you president of the AFL-CIO [American Federation of Labor and Congress of Industrial Organizations]” or whatever existed at the time?

Randolph: No, no.

Q: I guess you went to high school in that area, before Drexel?

Randolph: Right. I was in the first graduating class of a regional high school that was built. It was called Triton Regional High School. It was regional because at that time they had to bring in kids from a very, very large area, because it wasn't densely populated. It's very densely populated now.

Anyway, I was in the first four year graduating class that was produced. I graduated in 1961 from Triton.

Q: And what did you think you would be doing then? College was certainly in the cards. Where?

Randolph: I was undefeated in wrestling in my last year of high school, so I thought I'd use that as a ticket to college. My high school wrestling coach, whose name was Al Palone, was friends with whoever the wrestling coach was at Columbia at the time. My grades were pretty good and that wasn't a problem—anyway, between these two coaches they arranged for me to get a scholarship to Columbia. So I didn't apply to anybody else. I was in and that was it. I thought that was a good idea. Unfortunately, there was a miscommunication about the amount of the scholarship. The coach from Columbia—whom I never met; I talked to him on the phone—told me it was a $1,600 scholarship. I just assumed it was $1,600 a year. The papers didn't come through, and I was getting a little nervous as the spring wore on. So I called him and I said, "Listen, I haven't gotten the papers."

"Don't worry about it. Everything's fine. I'm just a little slow getting them out."

I said, "Well, I'm nervous because unless I get the $1,600 a year scholarship, I can't go." There was this long pause—I still remember it—and he says, "Well, we offered you a $1,600 scholarship, but it was $400 a year." I thought, "Oh, no! I can't possibly afford Columbia." So, once again, my wrestling coach in high school knew the coach at Drexel, called him up, and I wound up getting a combination of scholarship and loan for at least my first year at Drexel. The scholarship continued, so that's how I wound up at Drexel.

Q: Do you have any idea what tuition at Columbia would have been around that time?

Randolph: I really don't know. The only number that I remember is that at my first year of law school at the University of Pennsylvania the tuition was about $1,000. So I imagine that Columbia was not far off that.

Q: So $400 a year wasn't going to do it.

Randolph: That wouldn't cut it for me.

Q: Well, I take it then that Drexel had some pride in its wrestling team. Is there such a thing as varsity and junior varsity?

Randolph: Yes.

Q: Were you a starter in the wrestling matches?

Randolph: Yes.

Q: Every time I use the word "wrestling" I have these terrible memories of being thrown around the gymnasium by these toughs in high school, or what have you, who were probably on the wrestling team there and using me for torture.

Randolph: Well, the good thing was there were weight classes. It was an incredibly disciplined sport back then. It still is, but, physically, it was probably the most demanding sport that I could

think of. But one of the other aspects of it was that everybody dieted. You would start the season at whatever your normal weight was—I don't remember what mine was back then—150 pounds or something—and you would go on a diet which consisted not only of restricting your caloric intake but also dehydrating. I think my natural weight in college was about 160, and I wrestled, as I recall, at the weight of 137. So I lost twenty-three pounds to get ready for the season. Then you had to keep it off. Before every match you had to get weighed in, and there were always these scenes that occurred with people getting on the scale and missing it by a quarter of a pound or something, and then putting on rubberized sweat suits and going into a steam bath and doing jumping jacks to get rid of just that extra weight. Then what would happen is that after you weighed in—which was several hours before the match occurred—you drank heavily sugared tea, chocolate, and oranges, to try to get your energy back up for the match.

But everybody had to do it, because everybody was doing it. If I were wrestling at 160, I would, in effect, be wrestling somebody whose natural weight was 185 or something.

Q: Are there different holds, or whatever? I really don't know this field. But just like in football you have different positions, or in basketball you have different positions—in wrestling, apart from weight, is there something else that defines what category you are?

Randolph: No. In the Olympics there are different styles. There's freestyle, which is basically what we did. But there is also Greco-Roman, and I think there's another sort of—

Q: Did you do this for four years?

Randolph: No, I just did it for two.

Q: Why did you give it up?

Randolph: It was just too much. I couldn't really balance the academic demands against the demands of wrestling, particularly during the season, which ran from December to March. You're dehydrated, so you're kind of floating. During the week you don't have much energy because you've expended it all in practice every day. It just got to be too much for me.

Q: What were you studying?

Randolph: I started out in business administration, for reasons I don't recall. That lasted about three months, and I found it terribly boring. Then I didn't know what to do. Drexel had this course called Commerce and Engineering. I don't know whether they still have it. But it was a combination of engineering courses and some finance, statistics, etc. So I took that, and I guess three years into it I realized that I had come to the point where I had to veer off into a specialty of sorts. I had a lot of friends who became physics majors and eventually doctors. During that summer of my third year I thought, "Well, that's what I want to do," and I came within a hair of becoming a physics major, but decided not to. But I often thought that after I graduated, if I went back, I could have gotten a degree in chemical, electrical, mechanical, or civil engineering by going maybe just another six months, because I had all the fundamental courses—calculus, analytic geometry, thermodynamics, and electrical engineering, etc.

Q: You could have ended up at Bell Labs or something. Instead, you went off to law school.

I know that when I graduated from undergraduate school, there were many people who went to law school because they didn't know what else they wanted to do. I suppose that's still true today. How about with respect to yourself, though? Had you decided on law school for a good reason?

Randolph: Well, I had reasons, one of which was I read this book, *Felix Frankfurter Reminisces,* one summer, probably in my third year of college. It was an oral history done by Columbia University, by Harlan [B.] Phillips. I think it was over a seven-year period. I became fascinated with it. Then another thing happened. I was working on a co-op program, and I'd go to school six months and then I'd work six months in a job that Drexel arranged. They had a whole list of employers who would come down and interview you, and I got hired by General Motors to work at a plant they had outside of West Trenton, New Jersey. It was called the Ternstedt Division. At that time, a lot of the outside equipment on General Motors cars was not integrated; it was add-ons. For example, door handles, and bumpers, etc. The Ternstedt Division was the hardware division of General Motors. So I got hired as a management trainee, to go up there and basically just walk around with management and learn as much as I could, and spend some time in the engineering department there—as a result of which I decided I didn't want to be an engineer.

But anyway, at one point—when was JFK [John F. Kennedy] assassinated?

Q: In 1963.

Randolph: Sixty-three. Well, it was 1963 and General Motors at that time was running full tilt, three shifts a day, eight hours, twenty-four hours, and the foremen were falling like flies. They were getting ill; there were ulcers; the pressure was just enormous on them. So they ran out of warm bodies to be foremen. I was nineteen years old at that time. They asked me to be foreman of an assembly line. All of this is a prelude to what led me to law school. I had forty people, most of whom were women, working for me on this conveyor belt, with various people on both sides of the conveyor belt doing various and sundry jobs. They were making outside door handles for Buick, Pontiac, Chevrolet, not Cadillac. There was one—there was another brand. There were these little buttons, you'd put the spring on, and you'd do this and so on and so forth. Then there would be an inspection down at the end, and there would be a person at the end of the line who was packing this stuff as it was coming down.

So to make a long story short, what happened was I decided to rotate people on the line, thinking that this could be terribly boring, year after year, just to be standing there putting a spring on a sprocket as it comes down an assembly line. I immediately got hit with forty grievances. It never occurred to me to talk to the people first, which was a huge mistake, and I set some kind of world speed record for grievances in General Motors history.

So I sat the people down afterwards and said, "What's the problem?" And they said, "Kid, if you think it's more interesting to put lubricant on a sprocket than to put a spring on it, you've got another thing coming. We get pleasure out of this by gossiping across the conveyor belt about sports, or about who's cheating on whose wife or husband, or what's going on in the local sports

of the high school, or golf, or whatever. When you rotated us, suddenly we lost that, because we had to think. We got nervous. 'Don't miss that spring! Don't miss that—!' If we're doing the same thing we've been doing for years, we don't have to think."

So I said, "Okay. Everybody back to their stations." As a result, I settled more grievances in the shortest period of time. Everybody withdrew their grievances. The line ran wonderfully. So the next year I came back and the people in management said, "How about you working in labor relations rather than going out and working on the line?" So I said, "Yes. Fine."

So I attended all the bargaining sessions and I investigated grievances, and the investigation of grievances was what really intrigued me. Because General Motors had a common law. There was a retired Supreme Court Justice, [Charles E.] Whittaker, who was the chief arbitrator, and he handed down written decisions. So you'd look these up—and there were also decisions from other plants about the placement of fans, or what the average decibel level should be for a decent working environment. So I investigated the grievances, I'd write them up and bring them back, and I thought, "You know, I really like doing this." So that's why I wanted to be a labor lawyer. That, plus *Felix Frankfurter Reminisces*.

Q: You could have been a reporter, actually—

Randolph: Same thing.

Q: —investigating and handling all these grievances.

So you applied to law school and ended up at Penn. Did you apply elsewhere, or just to Penn?

Randolph: I applied to Penn and Villanova [University].

Q: Both in Philadelphia.

Randolph: Because General Motors told me that they would hold a job open for me during every summer in between college and law school, and then in between the years of law school. And I thought, "I don't want to go to Chicago, or Harvard, or Yale. I want to stay close to the Philadelphia area because I could commute from Philadelphia to West Trenton." It was not a great commute, but it was drivable. So I decided to stay. Then I was offered a fellowship at Villanova. It was very tempting. They offered me free tuition, free housing, free books, plus some sort of a stipend. I would have had no out of pocket expenses. Then I got admitted to Penn, and Penn offered me a thousand dollar loan, and that was it. When the moment of truth came—

Q: That was as cheap as Columbia.

Randolph: The loan would have covered the tuition, but I made the choice of going to Penn, despite the lack of—not the lack, but the less financial support that they offered.

Q: Was that okay with your father, or did that matter at all?

Randolph: I don't think I even consulted them, my parents, about this.

Q: Did your mother ever work?

Randolph: Yes. I don't know what she did—they were high school sweethearts—and I don't know what she did back when they first got married. But she worked in a dress shop in the hometown Glendora for a while. Not very long. A few years.

Q: I remember that term, high school sweethearts. It has a sentimental pull on me. I'm so sorry, actually, I didn't have a high school sweetheart that I could remember.

In any event, Penn, at that time, on a par—as you look back on it, would you say it was on a par with, let's say, Columbia Law School, or NYU [New York University] at that time, or even Yale or Harvard?

Randolph: Well, there was a joke that went around. It was not far off because Penn was really quite well thought of as one of the most mythic—the joke was that the only thing that Harvard and Yale could agree on was that Penn Law was number two. [Laughter]

Q: Now what was the approach to it? Was it the Socratic approach that they had at Penn or—how would you describe it?

Randolph: I think the first year at least was almost entirely Socratic. The courses were civil procedure, property, criminal law, not criminal procedure, contracts. I'm missing one. They were the top four. And they were taught entirely Socratic. After the first year was somewhat of a mix of lectures and Socratic method.

Q: Do you recall any professors you had who made a mark on you at all?

Randolph: Yes. Paul [J.] Mishkin, who was at Penn at the time, along with Tony [Anthony G.] Amsterdam and [Robert A.] Gorman, who was the contracts professor, was also a labor law professor there. All played, or had a great deal of influence on me. Paul Mishkin and I stayed close. He eventually moved to Berkeley. He became well-known for a number of his writings on jurisdiction. He taught federal jurisdiction, using the famous Hart & Wechsler casebook, which is still being published in its X-number of editions. I don't know.

Q: Is that Herbert Wechsler?

Randolph: Herbert Wechsler, yes, from Columbia.

Anyway, Mishkin taught from that casebook and then eventually became one of the editors when [Henry M.] Hart [Jr.] and Wechsler retired from revising it. I went to what was a very, very touching program at Boalt Hall, as they call it at Berkeley. Just a few years ago, I was invited out there by Jesse [H.] Choper, who was a Penn graduate, and quite a leading authority in a number of areas of law, including First Amendment. And John Yoo, who clerked here on the D.C.

Circuit and then became famous or infamous for the torture memos—they put a program on for Paul, who was still teaching but right on the verge of retirement. It consisted of law professors from all over the country who came and presented papers dealing with various subjects that Paul Mishkin had written about over the years. I think I was the only non-law professor who was invited to participate in the conference. This was the last time I saw Paul. We had breakfast over at his house—which was lovely—then there was a wonderful dinner. I did a little talk that evening. It was not long after that—maybe within the year—that Paul passed away.

Q: Well, I guess Tony Amsterdam was teaching criminal law, criminal procedure law.

Randolph: Criminal procedure.

Q: Right. Did you make any friends in law school that you kept up with, particularly?

Randolph: Well, I guess Peter [A.] Gross was my closest friend in law school, but Peter and I have sort of drifted apart. He became general counsel for Home Box Office, and is retired from that and living in upstate New York. The last time I talked to him was about a year ago. But we've kept up over the years. There's another fellow we had a good time with—Ellis [M.] Ratner. He was from Connecticut and went to Trinity College. And I guess if I got a list out, I could—

Q: But looking back again at it, would you say, given all the experience you've had since then, that that was a solid legal education you got there?

Randolph: I thought it was an excellent legal education. Quite. I was very pleased with the professors and the demanding nature of the courses. They're rather different now in law schools. I've taught for the last thirteen years at George Mason Law School—which is quite a good law school, very much on the rise. It's moved into the top forty, I think. I also taught at Georgetown. But one of the things that the students of today really can't appreciate is that in the first year you went the entire year, from September through April, without an exam in each course. Then, during one week at the end of the semester, you took your exams in contracts, and property, and civil procedure, and criminal law, and whatever the other course was—I think there were five—and that was your grade for the year, when you took that exam. So you really didn't know where you stood—whether you were really getting it or not getting it, and there was no writing, either, that you engaged in. And when you went and sat down and got these exam questions—which were not true or false or multiple choice; they were essay, all essay questions—and you had to write rather rapidly, maybe three-hour exams. I remember walking out that week and thinking I didn't have a clue as to how I did.

Q: Turning to your father for a moment, he was a Democrat, I gather; a union man; a Democrat.

Randolph: He was, yes.

Q: Are your family generally Democrats?

Randolph: By and large, yes.

Q: And during law school—was it during law school or during college that you sort of converted, at least in your mind, from being a Democrat to being something else?

Randolph: Myron, I never really thought about having the scales fall from my eyes, or a conversion, or any of that sort of thing. Apparently, I was perceived as a conservative member of the 180 class of 1969 at the Penn Law School, and one of the jokes that's told about that class is that there were three conservatives in that class of 1969 and all three of them became federal judges. [Laughter]

Q: Did you ever read Scott [F.] Turow's *One L*, about the first year of law school? Scott Turow is best known for a novel he wrote—he's a lawyer in Chicago—called *Presumed Innocent*.

Randolph: Right. I read that.

Q: It was made into a movie. But he wrote a book called *One L* about the first year of law school, which remains in print after many years, and I think everyone headed for law school now reads it. There are many people who argue today—many, some—that law school could easily be two years, not three.

Randolph: I don't know about that. I'm not an expert in legal education because I do it so sporadically. I go in and teach my course, then I leave, and students, if they need to talk to me, they'll come around. I just don't have a sense of how they progress today through first, second, and third year.

Q: But would you say that when you finished law school you had—I don't know how to characterize it—a more disciplined mind than when you went in? Or were you completely confused? Were you a different person, do you recall, when you finished law school, intellectually, say, than when you began?

Randolph: Oh sure, because I was older, for one thing. I think that made a huge difference. I think I was more analytical, in terms of analyzing situations and problems as opposed to mathematical equations, or doing any kind of science material. I hope I was. Otherwise, I just wasted three years, I guess.

Q: Were you still doing the grievances for General Motors?

Randolph: No, I stopped working at General Motors. I did work the summer between college and law school. Then after my first year of law school, one of the professors I mentioned, Bob Gorman, asked me to be his research assistant at Penn. It was a paid position during the summer because he was doing a course book on trademarks. I accepted that. To me, it was an honor. Then the third year, between the second and third year of law school, I toyed with the idea of going back to General Motors because the pay was good. But then I interviewed for and then got offered a summer associate job at Sullivan and Cromwell on Wall Street. I took that. But it was not a real pleasant summer for me because the Law Review itself—I was on the Law Review as managing editor of the Law Review—and it was way behind. We used to put out nine issues a year, one for every month of the school year, and by the time I took over I think the November

issue was coming out in June, or something like that. So I was determined to bring it up to date, and to do that I had to be in Philadelphia as much as I could, working on the Law Review. Some people worked during the summertime. We did manage to get it—so I commuted to Wall Street every day from Philadelphia on a rickety old train that usually broke down in Trenton or Princeton. It stopped in Princeton, it stopped in Trenton, and I think there was another stop in Newark. Eventually, you made it to New York and Penn Station. Then I'd hustle to Sullivan and Cromwell. I wasn't getting home until ten o'clock at night each day.

Q: Did you see yourself as a potential Wall Street lawyer?

Randolph: I didn't. I really didn't. That was not my cup of tea. I enjoyed what I did there. I worked on a number of cases. But I didn't, no.

Q: Now, according to the records at Penn that I've examined, you were number one in your class all three years.

Randolph: Yes. How did that happen? [Laughter]

Q: You ask the very question I was going to ask. How did that happen? Was there no one else there who gave you a run for the money?

Randolph: I don't know. I think it was hard work, and hard work undertaken out of fear of failure more than anything else. But I worked very, very hard in law school, and I was somewhat of an

insomniac back then, so I had that advantage. I could work until two o'clock, get up at six and be fine. And did, often. I often did that.

I can tell you, the first day of the first class that I took at law school, I thought, "I'm in the wrong place." Because Paul Bender, who became dean of Arizona State Law School—I have two law clerks out there now teaching at Arizona State Law School—but he was teaching civil procedure, and to me he was quite an intimidating figure. We knew two things about him—well, three. He graduated from Harvard, then he clerked for Learned Hand, a legend, and then clerked for Felix Frankfurter. So we had this young guy in front of us who had all these credentials. The first day of the first class he was talking about something dealing with ancient civil procedure, and he mentioned the Court of Exchequer Chamber in England. As an aside, he said—there were ninety kids in each class. We'd split up into two sections, so you're in this amphitheater with ninety kids—"Does anybody know anything about the Court of Exchequer Chamber?" Well, I certainly didn't. I went out and bought a Black's Law Dictionary immediately after this class. But one hand went up, kind of timid. He said, "Yes, sir," and he called on this fellow—whose name I still remember. He eventually worked in the tax division in the Department of Justice; his name was Michael [J.] Roach—and Michael stood up and started talking, and it seemed to me he went on forever about the Court of Exchequer Chamber. I thought, "I'm lost. I'm done. This is not for me." It was just so intimidating. Years later I asked Michael about this, and he confessed—he went to Princeton undergrad—that he wrote a senior thesis on the Court of Exchequer Chamber.

Q: After law school, somehow or other you made a connection that led to a clerkship with Judge Henry [J.] Friendly of the Second Circuit. How did that come about, and was that of consequence?

Randolph: Well, the way I understand that it came about—although I never asked Judge Friendly about this—I was just told by one of the participants in what I'm going to tell. Henry Friendly was very much an admirer of Tony Amsterdam, who was liberal, and Paul Mishkin, who was conservative. At one point, in some setting, maybe an academic setting or a social setting—I don't know which—but he said to them that if they both recommended someone from Penn, at some point, he would hire him. It turned out that they both recommended me. I applied to Henry Friendly, and then asked Tony Amsterdam and Paul Mishkin to write letters of recommendation. It's really amazing to me now, the chances that I took. I apply to two law schools; I get into Drexel on purely happenstance; I don't apply to colleges; and the judges I applied to—I applied to Justice [Byron R.] White, I think it was, and Justice [Potter] Stewart. Sometimes they hired directly out of law school rather than after an appellate clerkship, although that was unusual. Then I applied to Harold Leventhal on this circuit, on the D.C. Circuit, and Carl [E.] McGowan on the D.C. Circuit—which shows my taste, because they were both considered conservative judges. Then I applied to Henry Friendly, and that was it.

Henry Friendly called me up sometime in the fall of my last year, in November or October, and asked me to come up for an interview, and hired me. I was very fortunate, number one, and number two, it was an incredible experience for me because all I had done was read—you read appellate opinions all the time, is basically what you do, then analyze them, in law school, and

maybe write papers when you're in your second or third year, but you never see how the opinion gets constructed or what the arguments back and forth were by the attorneys and the evolution of thinking in a particular case. So that was a very valuable experience for me.

Q: I interviewed at some length Tony Amsterdam on the subject of capital punishment. He's still a very sharp guy. In any event, at that time—1968?

Randolph: Sixty-nine is when I graduated.

Q: So you clerked around 1969 to 1970?

Randolph: 1969 to 1970. Right.

Q: At that time, what was Henry Friendly's reputation?

Randolph: Well, he was, I think, at that time, considered the best appellate judge in the United States, without anybody being a close second—although two judges here liked to think of themselves as his equal, I guess. Skelly Wright and David [L.] Bazelon, who was the chief judge here.

I'll tell you a quick story. This happened to one of my colleagues here, too, who clerked for Henry Friendly—Merrick [B.] Garland. I never compared this story with Merrick until recently. We were on a panel dealing with the new biography—or the first biography—of Henry Friendly,

by David [M.] Dorsen, which is a marvelous book. Anyway, I recounted this story that after I had accepted the position with Henry Friendly, I wrote notes of thank you to Carl McGowan and Harold Leventhal here—and I assume I wrote them to the Supreme Court justices I applied to—thanking them very much but telling them that I had decided to accept Henry Friendly's offer. Carl McGowan wrote me back and said, "You've made the right choice," which I thought was incredibly gracious of him.

I got to know him much better when I was in the Solicitor General's Office. But the same thing happened to Merrick Garland. He interviewed here, in the D.C. Circuit, and then—

Q: Later?

Randolph: Later, much later. Maybe ten years later. It was not Carl McGowan; it was another judge whose name I can't recall that Merrick Garland had written a letter saying, "I've accepted this position with Henry Friendly. I'm very sorry. Thank you for the interview," and got a note back saying, "You made the right decision."

Q: At that time, was Learned Hand gone?

Randolph: He was. Yes.

Q: And Augustus [N.] Hand?

Randolph: Yes. Right. I think Hand left in 1961. Henry Friendly started on the Second Circuit in 1959, so he'd been on the court ten years when I arrived, and he had about a two year overlap with Learned Hand.

Q: Now there are some who say that Henry Friendly was the Learned Hand of the second part of the twentieth century in terms of appellate judging. Do you think that's true? From what you've seen, or what you know?

Randolph: Well, it's hard for me to compare. I saw and had read Learned Hand's final product and some of his opinions. I think Friendly was a much better opinion writer than Learned Hand. He had a very different style in the extracurricular writing than Hand did. Hand gave short speeches. He was a little idiosyncratic in his approach. He had a reputation of being a liberal. I was never really sure that that was accurate. I remember one story that Henry Friendly told me, it may have been the first week that he was sitting as a Second Circuit judge, and he happened to be on a panel with Learned Hand. They came into conference, finally, so Friendly is kind of feeling his way. He was basically an administrative lawyer at Cleary Gottlieb, the firm that he helped found, that did a lot of aviation work.

Q: You mean before his judgeship.

Randolph: Before his judgeship. So he had not a lot of experience—probably none—in criminal law. They had heard this criminal law case—I don't know if I've ever told this story. Anyway, Friendly and Hand are in conference together—I don't know who the other judge was—and

Friendly is talking and doing one of these "on the one hand, on the other hand," and "I'm having a very difficult time making up my mind in this criminal case," and Hand, from the way Friendly described it, absolutely startled him, because Hand banged his fist on the desk and said, "God damn it, Henry! Make up your mind. That's what you're getting paid to do." [Laughter]

Q: Now on the spectrum that is constantly used, and I'll ask you about it some other time, about liberal to conservative and what have you, how would you describe Friendly?

Randolph: I'd describe him as conservative, without any question.

Q: Moderate conservative?

Randolph: Yes, moderate.

Q: Would you say there was some similarity between him and, say, Frankfurter?

Randolph: Some, yes. He was very close to Frankfurter. Frankfurter was his mentor in college, and as I recall, in David Dorsen's book, he was sent to Frankfurter after he graduated from Harvard College because Friendly wanted to become a historian, and Frankfurter, in his typical way, talked Friendly into going to law school, saying, "Oh, you'll be a better historian. Why don't you do it for a year? Go to law school; then you can go become a history major."

So they were very close, and Friendly wrote about Frankfurter. One of Friendly's most famous pieces was "Felix Frankfurter and the Reading of Statutes," which is a really wonderful exposition of statutory interpretation.

Friendly didn't talk to me about Frankfurter very much, but I remember one thing he told me. There was a new biography that came out of Felix Frankfurter. I don't remember who wrote it, but I read it, and Friendly read it. Anyway, he said to me—this was during the clerkship—"You know, I, over the years, at various functions—scholarly presentations and dinners—I would introduce Felix Frankfurter and talk about his wonderful marriage to Marion [Denman], his wife." This is Friendly talking. He said, "It turns out I didn't know what I was talking about. Did you read this biography? He drove her crazy—literally. She wound up in a mental institution." Felix Frankfurter was just a beast with her.

Which reminds me of the story—this is off the track a little bit and I'm jumping years ahead, but it leaps into my mind. One of Friendly's favorite people and friends was Ed [Edward H.] Levi, who was, at that time, a professor at the University of Chicago. Ultimately, he became dean and then attorney general of the United States. I worked fairly closely with him, with Ed Levi, when I was deputy solicitor general back in the mid-seventies. There was a going away party. [James E. “Jimmy”] Carter had been elected, and it was in the attorney general's conference room, and we were all saying goodbye because Levi was departing. All the presidential appointees were at the party. Somebody came up—I remember who it was, but I'd prefer not to say. Levi came over to me. He knew I was teaching at Georgetown and one of the cases I was teaching dealt with a railroad strike, a Pullman railroad strike, and this, that, and the other thing. So he asked me—he

was smoking this big cigar, which you were allowed to do in government buildings back then—he asks me this question about whether I thought this particular Supreme Court case was really a commerce clause case. Now this is his going away party, which is very strange. In the midst of this intellectual inquiry, which kind of struck me as strange, a fellow came up and interrupted us. The fellow was from the SG's office [Solicitor General's Office], and he said, "I hear that Wade [H.] McCree [Jr.],"—who was a Sixth Circuit judge, I think, or Eighth Circuit, I don't recall—"is going to be named the new solicitor general. Do you know him well?" Ed Levi took a big puff from his cigar and said to this fellow, "I don't know anyone well." [Laughter]

Q: You mean like Friendly really didn't know Frankfurter's wife or the relationship.

Randolph: Exactly. That's why the story comes to mind. Every time I get asked that question—got asked that question, for the rest of my life, until this very day—when I get that question, I'm immediately taken back to the attorney general's conference room in 1978, I guess it was, or 1977, with Ed Levi's going away.

Q: You must have been twenty-six or something at that time. How old a man was Friendly at that time?

Randolph: I'd say he was in his mid-sixties. The reason I say that is because—let's see. Who was it that left the Supreme Court? I'd have to look it up. I can't remember now. But there was a vacancy that occurred and there was a great deal of speculation in the press, in the *New York Times*, about who Richard [M.] Nixon would nominate to replace whomever it was who had just

left the court. It will come to me. One of the centers of speculation was Henry Friendly, but everybody was saying, "Well, he's too old. He's sixty-something. Sixty-five," etc. So we went through a series of different prospective nominees, including G. Harrold Carswell, who was a district judge, I think, in Florida, at the time.

Q: District?

Randolph: I think it was. I'm not sure. And there was a fellow I later met, and actually sat at counsel table when I argued a case, a fellow named Herschel [H.] Friday, who was a bond lawyer from Little Rock, Arkansas, and a friend of John [N.] Mitchell's.

I'll tell you a quick story about Carswell. Carswell had been U.S. attorney—I think it was Florida—and Leonard [P.] Moore, one of Judge Friendly's colleagues, a judge from Brooklyn on the Second Circuit at the time, had also been U.S. attorney at the same time Carswell was. Moore was, as I said, from Brooklyn, but U.S. attorneys have conferences and meetings. So the day after Nixon announced he was going to nominate G. Harrold Carswell, we had a sitting with Leonard Moore. Back then—I don't know if they do it now. We don't do it here—the clerks went into the robing room and they robed the judge, which meant you held the robe up and the judge put his hands in. But it was wonderful because you listened to all the banter that went back and forth between the judges as they were getting ready to go out and hear the cases.

So I walked in with Henry Friendly. We took the private elevator at Foley Square and I'm helping him on with his robe, and Leonard Moore strolls in. He says, "Oh, I see the president has

nominated my good friend G. Harrold Carswell." Friendly didn't say a word. And Moore says, "He's a great man. He's a great man. He'll be a wonderful Supreme Court justice." Still, Friendly says absolutely nothing, but scowled. Moore began to get the message and said, "Well, of course, there may be a few people better than my friend Carswell," and Friendly said, "Yeah. About ten thousand." [Laughter]

Q: I never associated Friendly with much of a sense of humor. But that's not the case?

Randolph: Oh, no. He had a marvelous sense of humor, always very dry. Very, very dry. I often tell the story that that was the first time—I had joined the ABA [American Bar Association] when I graduated from law school. That was the first time I resigned, because the ABA gave Carswell a well-qualified rating. The second time I resigned was when some of the members of the judicial committee said that Robert [H.] Bork, my friend, did not have a judicial temperament. So I resigned from the ABA twice. I don't remember why I joined again, but I did.

Q: He was not a distant figure?

Randolph: Well, he was gruff. There's no question about that. While he was in chambers, it was business. He was there to do work, he did it, and he was very efficient at it. When I got appointed here—and I've mentioned this to some of my colleagues—that during the first years—I don't think about it much anymore, but I would be driving into the office and thinking to myself, "I want to have a Henry Friendly day today." He had a Henry Friendly day every day. He would arrive at 9:30, he would sit down, and he would write. At lunch, he wouldn't go out to lunch; he'd

have cheese and a Snappy Tom, which is kind of a Bloody Mary mix, and some crackers. He'd be reading Law Review articles during lunchtime. Then, in the afternoon, he'd be writing again, and he'd be writing Law Review articles or he'd be writing opinions, in longhand, on a white pad, and he'd have the door shut all the time.

Q: I guess that's what I mean.

Randolph: Yes. You'd get a buzz to come in. Sometimes he wouldn't even look at you, Myron. What he would do was he would have the pad—the white pad—it always had to be a white pad—in front of him, and he'd just do this. He'd hold the pen up in the air while he's looking down at a brief or whatever, and the signal was—that meant he was—

Q: —out of ink.

Randolph: —so you had to get him a new pen.

Q: In the end, he took his own life, did he not?

Randolph: He did.

Q: I forget when that was.

Randolph: 1986, I think.

Q: Was that a complete surprise to you?

Randolph: Yes. It was to me. With some people—I think he talked to some people about it, about doing it, according to David Dorsen's book, but he certainly never talked to me about it. Yes. It was a surprise to me, although I think I can understand it. It's really interesting, and maybe we'll get to this, but this draft of the first abortion case that was filed in a federal court talked about that. His draft mentioned assisted suicide, and suicide, and frailties, etc., etc. He apparently was becoming very frail, mainly at that time, I guess, because of his eyesight. He always had problems with seeing.

Q: His wife pre-deceased him, but not that long before?

Randolph: I think so. Sophie [Stern Friendly].

Q: Did you ever socialize, as a clerk, with him and his wife?

Randolph: I don't know how, but I knew that I met Sophie. I have some correspondence, not directly with her but from Judge Friendly, because I was going to go to England after I clerked for him and before I started in the Solicitor General's Office. Somehow or other she had mentioned the book, or he had mentioned a book to me, called *Turn Left at the Pub*. They used to travel a fair amount in the summer and they liked to take walks through countrysides. This *Turn Left at the Pub* was a guide to walking trails throughout England. I still have, somewhere or

other, at home, a list that Mrs. Friendly says, “These are the best things to do. Do this one in Winchester, and do this one in Oxford, and do this one in Cambridge," etc., written in pencil, so on and so forth. The only social event that I recall—if you want to call it a social event—even though he'd been on the court ten years, we had a little gathering of former law clerks, myself, and a fellow named Monty Grey, who was also clerking for Friendly at the time, a dinner at Pierre [N.] Leval’s mother's apartment on Park Avenue. Michael Boudin was there, who became first a district judge here in Washington—and hated it—and then became a court of appeals judge—still is—in Boston, First Circuit. Pierre Leval, of course, was a district judge. He was Judge Friendly's first federal judge. He eventually went to the Second Circuit. Then Peter [B.] Edelman. Peter Edelman is a professor at Georgetown. He was an aide to Bobby [Robert F.] Kennedy, maybe at that time.

I remember a number of things about that dinner. First of all, I could not believe how lavish—I knew we were going to Pierre Leval’s mother's apartment, but my idea of an apartment was a three room walkup. This was the entire floor of the building—

Q: —on Park Avenue.

Randolph: —on Park Avenue. There was a maid and a butler, of course, and there was a den, and there were a lot of animal skins thrown across the sofas—leopards, and lions, and whatever, and so on and so forth. Then we had this marvelous multicourse dinner, and I remember Peter Edelman passing around photographs of his newest child. I looked at it, and I was somewhat startled, but never let on. I found out later that Peter had married Marian Wright Edelman, who

was black, so this child, this picture of this baby he is handing around and I'm thinking, "The kid's black, and I don't get it." But I'm not going to ask a question or anything. Friendly, of course, fawned over it, "Oh, what a cute kid," etc. So that's the social—

Q: Where did the Leval money come from? Do you know?

Randolph: I don't know. There's a very famous letter that Friendly wrote that he sent to me in the Solicitor General's Office. I was a deputy by then. He sent me a draft, and I think [Daniel P.] Moynihan had a committee that he put together to interview possible candidates for the Southern District in New York, district judgeships. You would know this better than I do. So Judge Friendly was going to write a letter on behalf of Pierre. He sent me a draft. The letter became quite famous among the law clerks because, apparently, he sent it to a couple of others to ask for advice, but one of the points he made in the letter was that Pierre was very, very wealthy, and that was a good thing because he would not use the district court judgeship as a stepping stone to some high powered law firm and riches—because he didn't need the money, anyway.

Q: And, of course, he hasn't.

Randolph: Right. Friendly might have been thinking of his friend Simon [H.] Rifkind, I think.

Q: Right. Right. There was some remark—refresh my recollection on this— someone asked Michael Boudin once what he learned, what he gathered from a year with Friendly, and he said

something about, "After a year with Friendly, you could never be intimidated by anyone." Did he say that? Or did you say that?

Randolph: He said that to me.

Q: He said that to you?

Randolph: Actually, as I recall it, he said, "After a year of clerking for Friendly, it was impossible to be intellectually intimidated by anyone."

Q: Is that so?

Randolph: I think so. I think it's true. Friendly was a genius. I don't think there are any ifs, ands, or buts about that—and I've worked with a lot of really very, very bright people over the years, but nobody could hold a candle to Henry Friendly.

Q: So of great value to you, that year.

Randolph: Very much. Yes.

Q: From there you went to the Solicitor General's Office. Now you had just clerked for one year for Henry Friendly—

Randolph: Right.

Q: —and here you are now, what? Around 1970, as an assistant solicitor general?

Randolph: Yes. Twenty-six years old.

Q: Were you among the younger there?

Randolph: They called me the—what was it?

Q: The kid?

Randolph: Richard [B.] Stone— no. It was "the newest vintage" among all the assistants in the SG's office at that time. Richard wound up teaching at Columbia. Tax was his specialty. I wound up there solely because of Henry Friendly. Because Erwin [N.] Griswold was the solicitor general, and Griswold was president of the Harvard Law Review the year after Friendly was president. At that time, to become president of the Harvard Law Review—it was all on the basis of grades. So the person who was first in his class automatically became president of the Harvard Law Review. Friendly told me that the year—don't get me wrong, I admired and was very close to Erwin Griswold, who was, himself, a very, very gruff individual. But anyway, Friendly told me that there was a great debate among the members of the Law Review about whether to continue the tradition of naming the person who was first in his class as president of the Harvard Law Review, and the debate centered on Erwin Griswold's personality. For one thing, he was a

teetotaler, and nobody particularly liked that back then, in the twenties. For another thing, he was, like I said, very, very gruff.

Two quick stories about Erwin, one of which ties into Friendly. There was a saying at Harvard that Erwin Griswold was so intelligent that he needed no personality. [Laughter] There was another saying. Erwin Griswold had been in the Solicitor General's Office and like Richard Stone and others after him, his specialty—we always had one person who argued the tax cases. So Griswold argued every tax case during the period that he was in the SG's office. Then it was announced that he was leaving to go teach at Harvard, and the story was that Charles Evans Hughes [Jr.], I think, was the chief justice, was talking to another justice, and this other justice says, "Do you know that Erwin Griswold is going to be leaving the Solicitor General's Office? He's going to teach at Harvard. And that," he says to Justice Hughes, "is going to cost the government one million dollars a year." Then Charles Evans Hughes says, "Yes, and it will be worth every penny." [Laughter]

So that story—somehow or another I found out that that story was not true. The reason it was not true was attributable to Henry Friendly's son in-law. There was an exhibit at Harvard. They had all these glass cases with mementos—it was a celebration of Erwin Griswold—and what's that fellow's name? He teaches at Penn. Anyway, Henry Friendly's son-in-law was a student at Harvard at the time, Harvard Law School, and him and a friend—the exhibit was in the library—snuck into the library late at night, jimmied open one of the cases, and in the case the statement was made, "When Erwin Griswold leaves the SG's office, it will cost the government $1 million." What they did is they typed in, "And it will be worth every penny." [Laughter]

Q: This could easily be read and perhaps listened to one hundred and three years from now. Perhaps we ought to say what the Solicitor General's Office does.

Randolph: Well, the main function is to handle the government's cases in the Supreme Court, in briefing, oral argument, and in selection of cases for certiorari. The other function, which is less known, is that the SG's office is responsible for deciding whether to appeal any government loss in any district court in the United States. You have to get the approval of the solicitor general before the government can appeal. The other even lesser known duty of the solicitor general is that the government cannot ask for rehearing en banc, which is the full court rehearing, without the approval of the Solicitor General's Office.

Q: I did not know that.

So there you were. You were there, what? Three years, I think.

Randolph: Three years—1970 to 1973.

Q: Right. Was it a result of change in administration? Well, no. Because Nixon was reelected.

Randolph: Nixon was reelected. No, I had reached a point of diminishing returns as an assistant, I thought. I argued—I can't remember—maybe six cases, or whatever. I had never written a brief. One of the things I learned from David Dorsen's book, which I'll just relate to you—

Q: Sure.

Randolph: When I arrived, after being in England during the summer—it was in September, I think—I arrived in the Solicitor General's Office, two things occurred. One, they didn't have an office ready for me. It was very small. The office was tiny. There might have been eight of us doing all the government's litigation in the Supreme Court, and at that time the court was hearing 170, 160 cases a year. You remember that.

Q: Where was the office?

Randolph: It's on the fifth floor of the Department of Justice. At that time, it was wedged—it's on the corner of Ninth and Constitution. The fifth floor had the highest ceilings, and the nicest murals, and all the rest of it. The attorney general is down one corner—the attorney general is at Tenth and Constitution—and on the other corner was the solicitor general. The FBI [Federal Bureau of Investigation] with J. Edgar Hoover was down the hallway. The FBI didn't have a separate building at that time.

So what happened was, the SG didn't have an office for me, and they put me on the sixth floor, not the fifth floor. I wound up in the FBI file room in one of those glass enclosed offices. For the first day or two, I guess, I was filling out forms, and getting books, and doing this, that, and the other thing. I went to lunch—I was eating lunch at that time, which I don't do now—came back, and there was a cardboard box on my desk. I thought, "Well, nobody's given me any assignments

yet. I don't know what this is." So I open it up and I start looking through what they call FBI 301s—photographs and everything. It was the entire FBI report on the Kent State massacre. So I spent the afternoon—I don't know why it was there, but I thought I'd better read it. I spent the afternoon reading about this tragic event, and the National Guardsman, in the protest of the Vietnam War, they shot several students.

As the afternoon wore on, I was getting more and more fascinated, and suddenly an FBI agent burst into my office—I guess you could call it—and said, "You're not supposed to have that! Put those files back! You're not supposed to have that!" It was a mistake. They thought I was some kind of FBI guy, I guess, or something like that. So that was my introduction to the SG's office. The next day, Erwin Griswold walks in. He had found my office. He told me he had a hard time finding it. He had to walk through file cabinets and so forth. He had a file in his hand. He threw it down on the desk—literally threw it—and said to me, "If I don't get a first rate, persuasive brief out of you in this case in nine days, I'm confessing error in the Supreme Court."

Q: We should say what that means—because he doesn't mean confessing error in hiring you.

Randolph: No, but he might have thought that, too. But on behalf of the government, the SG's office would say that the lower court had committed an error rather than defending the lower court's ruling in favor of the government. And the case was one that became rather famous, notorious, called *Bivens v. Six Unknown Named Agents* [1971] of the FBI. It originated in New York.

Anyway, I knew this at the time, that Henry Friendly had really masterminded the case in the Second Circuit and appointed one of his former law clerks, a fellow named Stephen [A.] Grant, who was working at Sullivan and Cromwell as counsel for this guy, Webster Bivens, who was then serving time in the Atlanta penitentiary. The case dealt with the question whether you can get damages for violation of your Fourth Amendment rights in a search and seizure—a totally novel question, never decided by the Supreme Court.

I had correspondence with Henry Friendly back and forth about this case and I sent him a copy of my brief, etc., etc. I said, "This is an unusual case because there are two Henry Friendly law clerks, one on one side and one on the other." What I didn't know, and I found out from David Dorsen's book, is that Judge Friendly also had correspondence with Stephen Grant, advising him about how to argue the case. [Laughter] And Grant won. He won. He was working at Sullivan's Paris office by that time, came back, and won the case.

Q: Right. But there's some story relating to your first appearance before the Supreme Court to argue a case—something about a lectern and some cards you had, or something?

Randolph: I forgot about that.

Q: What is that story?

Randolph: Well, the first case I argued was a case called *Affiliated Ute Citizens v. the United States* [1971]. I had to wear two hats for that case. One, I had to defend the United States—and it

was a securities case, of all things. These Indians, Ute Indians in Utah, their reservation was abandoned and they were given shares, because on some of the trust lands, on what was back then oil shale—and people thought, "Well, maybe this is valuable, maybe it's not. We don't really have the technique to get the oil out of shale." They do now, but back then they didn't.

So these Indians were going around town and each one of them—members of the tribe and the mixed-bloods, as they called them—had these shares of stock. It just so happened that if one of the mixed-blood Indians was caught speeding, they'd go before the magistrate and the fine was one share of stock. If they wanted to go buy a car, a used car, it was one share of stock. So the issue in the case was whether a material omission by the purchaser of the share was in violation of what was called 10b-5 of the Securities and Exchange Act.

Well, that's neither here nor there to what I was about to tell. It was a difficult case to argue, because first I had to defend the United States for giving the shares to the Indians without any kind of trust imposed. Then I had to argue in favor of the Indians on behalf of the SEC [Securities and Exchange Commission] as amicus curiae against the bankers, dealers in cars, and all the rest of it, that they were defrauded.

I was, needless to say, somewhat nervous, so I figured the best thing to do was read everything I could about how to present a Supreme Court argument. I'd seen a number of arguments.

Q: You had seen.

Randolph: Oh, sure. I was up there constantly. But anyway, one of the things I read was *How to Argue a Case,* by John W. Davis, who was the greatest advocate of the twentieth century by most people's lights, at that time. He'd argued more cases than anybody else at that time.

Q: Is he alive still?

Randolph: I think the last case he argued in the Supreme Court was *Brown v. Board of Education* [1954].

Q: This isn't the Davis who ran for president is it?

Randolph: Yes.

Q: Did he run for president?

Randolph: He did.

Q: Because that was a long time ago.

Randolph: Well, he was solicitor general back then, and then founded Davis, Polk [& Wardwell] Law Firm.

So I read this article, and what he advocated was that you have these 3" X 5" cards for notes of cases, outlines, etc., and you take them up to the lectern. Davis must have been arguing in a different setting, because he wouldn't have given that advice. But I took it, and I went up there with a stack of 3" X 5" cards to the Supreme Court and stood at the lectern. The lectern cranked up and down so you could get it to the right height. But it had a really excessive pitch to it. It must have been on a forty-five degree angle. I put the cards down on top of the lectern and they slipped down to my bellybutton, and they were impossible to see from that point. Not only that, it became totally awkward to pick one up because then you'd lose eye contact with the justices. It was absolutely terrible advice.

Q: How did that case fare?

Randolph: We won. We won. A quick story is that I was with the SEC attorney, writing the amicus curiae part of the brief, and there was a fellow named Paul Gonson, whom I got to know. We're trying to figure out how to present the argument. The difficulty was, in a material omission case, that it wouldn't have mattered what this banker or the car dealer told to the Indian about the value of the share; the Indian wouldn't have paid any attention to it anyway. Here's the price for my used Pontiac, and the banker the same—it wouldn't have mattered. So I wrote this thing that said the test cannot be whether, if these particular individuals were told all the information, that it would have changed their investment decision in selling the share. It can't be that because that would mean that the more gullible the investor, or the owner of the shares, the more you could defraud them. The test has to be an objective one. What would a reasonable investor, in these circumstances, have considered material to the investment decision?

So Harry [A.] Blackmun wrote the opinion and—it was the first experience I'd had along these lines—he copied my brief word for word. He didn't change a single word. He was newly appointed by that time.

Q: He incorporated it.

Randolph: There's a question whether that's plagiarism or not, without attribution. [Laughter] Without attribution. I often wondered about that. Dick [Richard A.] Posner has a book about plagiarism and he talks about that.

Q: Anyway, Blackmun wrote it—

Randolph: After that, there was some outpouring of Law Review articles from Harvard and all over the country—the presses must have been running full tilt—trying to decipher exactly what Justice Blackmun meant when he said, "The test has to be an objective one. It can't be that the more gullible of the—." They were trying to figure out these words, how you turn that into a legal doctrine. I often laughed when I read these things. I did read them because I wasn't really quite sure, and I'm the one that wrote it! [Laughter]

Q: Now, you left the office in 1973. To my utter disappointment, now that I've learned it, you went into private practice.

Randolph: Why was that disappointing?

Q: I don't know. I think academe and judiciary are very impressive. There's something about private practice that seems awfully routine.

Randolph: I interviewed at the University of Pennsylvania and the University of Chicago. Phil [C.] Neil was dean at the University of Chicago and I met him at a party here. I was in this building, in this annex, so it had to be within the last five years, and invited him and his wife to come up and visit me. But Phil was the dean of the University of Chicago and he took me out to dinner with Dick Posner to try to get me to go there. I don't know. I like to battle. I like to win, of course. But I like to be on the line about what—so teaching fulltime, I don't know. Bob [Robert H.] Mundheim I remember interviewed me, along with other faculty members at the University of Pennsylvania Law School. About the only thing I remember about the interview—do you know who Bob Mundheim is? He became dean at Penn. He was not dean at that time. I can't remember who was. Jefferson [B.] Fordham, or maybe—

Q: Louis Pollak?

Randolph: I don't know if Lou had come on. But Mundheim asked me, "So why do you think you want to teach at Penn?"

I said, "In a word?"

He said, "Yes."

I said, "Hutchison Gymnasium."

He said, "That's why I came here." It's the gymnasium where I practiced wrestling. It was one of these old time gyms. It had that musty odor. It was right down the street from the University of Pennsylvania Law School.

Q: Now when you left the SG's office in 1973, this was—

Randolph: I have to tell you one quick story, because I mentioned that J. Edgar Hoover—when I eventually got an office in the SG's corridor, which was maybe six month, four months, I can't remember—1970, 1971. My office was the last in the wing of the Solicitor General's Office and it abutted the FBI offices. We used to keep our doors—at least I did. I always kept my door open. I got into the office pretty early, and every morning at about nine o'clock, J. Edgar Hoover would leave his office and he would walk down the hallway, he'd make a right hand turn along the corridor that is parallel to Constitution Avenue to have a meeting with John Mitchell, who was the attorney general. The story I'm about to tell you is notorious in the SG's office. As a matter of fact, several of the last solicitor generals called me over to tell the story to the staff.

Anyway, Hoover would always stop at my office. I was behind the desk and he would say, "Good morning." I would say, "Good morning, Mr. Director," and then he would continue down to John Mitchell's office. I was somewhat less dignified than I am now, and I saw in the *New*

York Sunday Times an advertisement for a fake marijuana plant. I thought to myself, "Well, let's see if the director of the FBI has a sense of humor." So I went and bought this plant. It was one of these rubber things, but you really had to get up close to it to realize it wasn't real. I didn't know what marijuana—I'd never smoked marijuana in my life, but I'm told by—

Q: Unlike your colleague [Douglas H.] Ginsburg.

Randolph: I'm told it was very realistic.

So I put the marijuana plant next to the open door of my office. The first day J. Edgar Hoover walked by, he stood there and he said, "Good morning." I said, "Good morning, Mr. Director." And he went strolling down to John Mitchell's office. This happened two days in a row, and I thought it was odd that the director of the FBI didn't comment. Maybe it wasn't a realistic plant. Anyway, on the third day there was a wonderful fellow who was a messenger in the SG's office named Jerome Brown, a black guy that I became very friendly with. He would bring briefs and certiorari petitions. Jerome, who remembers this very, very well, has his cart out in the hallway and he's got a handful of briefs, bringing them in to me, and he sees the plant and he says, "My God! You've got a pot plant in here!" and the briefs go flying. [Laughter] So I was convinced that the plant was realistic enough.

Jerome—I've got to tell you—I went to his retirement party. I can't remember who was SG back then. Oh, it was Ken [Kenneth W.] Starr who was solicitor general. They had a retirement party for Jerome, and this story, which became sort of famous in the SG's office—I had to tell it at

Jerome's retirement party. But Jerome is an interesting fellow, because he was just a messenger. He had no real formal education other than high school, and when the Solicitor General's Office began converting to computers, Jerome went to night school to learn everything he could learn about computers, and he became the lead technical guy of the Solicitor General's Office until his retirement. Isn't that marvelous?

Q: Retirement at an older—much older age?

Randolph: Well, when Ken Starr was solicitor general, it would have been 1980 something, the first [Ronald W.] Reagan administration.

Q: But Hoover never commented.

Randolph: He never blinked an eye. "Good morning." [Laughter]

Q: In any case, when you went into private practice it was not long after Watergate exploded. Nixon resigned in 1974.

Randolph: The break in was 1972, during the reelection campaign.

Q: It was June or July of 1972.

Randolph: And Archie Cox [Jr.], from Harvard, had become the Watergate special prosecutor, as they called them back then. He was assembling a staff in the spring of 1973. That summer, in late spring, the Senate Watergate Committee began holding hearings. It was sometime in early July. By this time I'm in private practice, because I left in May. It was in early July that Alexander [P.] Butterfield disclosed the existence of the secret, voice-activated taping system within the Oval Office. Then all hell broke loose.

Q: Yes. But in the ensuing couple of years, did you have any connection with any Watergate investigations or Watergate prosecutions?

Randolph: The firm I went to, it was also very small. It was called Miller, Cassidy, Larocca, and Lewin. Jack [Herbert J.] Miller passed away a year or two ago, and John [J.] Cassidy—two of my closest friends. John is godfather to our children. But that firm, which had Miller, Cassidy, Larocca, and Lewin. Then there was Bill [William H.] Jeffress and Marty [Martin D.] Minsker. Jeffers clerked for Justice Stewart, and Minsker clerked for Justice [John M.] Harlan. A fellow named Tom [Thomas D.] Rowe, who became a professor, he clerked for Justice Stewart. He was a professor at Duke. Still is. And then myself. I think I was the eighth person. But between the eight of us, we had more Watergate clients than any other law firm in the United States. Some of them were pretty obscure. One was a fellow named Tim [M] Babcock, who was a former governor of Montana, who got involved in raising cash money. There was Ralph [G.] Newman, who was the appraiser of presidential papers from Nixon's first term that Nixon donated and took a big tax deduction. He was in trouble because the claim was that he over estimated the value. There were a bunch of [H. R.] Haldeman aides. There was Richard [G.] Kleindienst, who was

the former attorney general. He was not involved in Watergate, but he was involved in what they called the ITT Scandal.

Who else? Oh, then, eventually, Richard Nixon walked in the door.

Q: Oh, really? Looking for you?

Randolph: Looking for Jack Miller, who was a Republican and former head of the criminal division in the Bobby Kennedy administration. These were all Kennedy justice guys—Miller, Cassidy, Larocca and Lewin.

Q: As you mention that—before we get Nixon walking in the door—these were all Kennedy aides, as you say, in the Justice Department. Why did you connect with them? They didn't know your background, you didn't know their background?

Randolph: I knew a bit about them, but my connection with them was Nat [Nathan] Lewin, who became a real good friend. He argued a number of cases in the Supreme Court when I was an assistant solicitor general, and I was very impressed by him. I thought he was marvelous. I liked the idea of being in a small firm. I figured that I'd be thrust into the battle much more rapidly than going with a hundred-man or two hundred-man firm.

So I called Nat up and I said, "I'm thinking about leaving." We had a lunch with everybody in the firm, and I decided that was the place for me, and it really was. I just had the greatest time. One

quick story. In the summer they put me on a case—by they I mean the firm. It was a case in Springfield, Illinois. It was the *United States v. Nimmo* [1976], and it was a tax fraud prosecution that involved the building of a golf club in Mexico. The subscribers to this new fancy resort were people like Frank Sinatra, Robert Wagner, and a lot of famous people. It was a place called Tepoztlán near Cuernavaca.

One of the problems was that all the documents relating to this golf club venture were destroyed in a fire. But anyway, I went down there and came back with the material. So I was working on that, and we were getting ready for trial. The trial wound up lasting about three or four months, in Springfield, Illinois, in the winter of 1974. I remember it well for a couple of reasons, not the least of which is that that was during the Arab oil embargo and it was difficult to get around in those days. There were long lines at gas stations, the planes were not flying on a regular schedule, and this, that, and the other thing. We went out there. I wrote an opening argument. Nobody told me how to prepare a case. We had all these exhibits. Because when I went down to Mexico I befriended a woman who was a girl Friday on the project, and interviewed her. I said, "It's really a shame that all these papers—." [James E.] Nimmo was a big investor. He was an insurance guy from Springfield, Illinois. "It's really a shame," I said to this woman, "that all these papers were destroyed in a fire." I spent an afternoon with her at her villa. She was rather wealthy. It was dinnertime, and she said, "I trust you."

I said, "Well, I'm glad. I may have to call you as a witness to come up and testify because what you're telling me is directly contrary to the government's theory of tax fraud; that Mr. Nimmo wrote off $1 million of loss."

She said, "No, no. That's not what I mean. Although I was instructed not to do this, I kept a copy of every single document." So I flew back with cartons filled with all these documents that were supposedly destroyed, and that—Lewin and I—we made a strategic decision. We thought, "Do we go to the prosecutor and tell him that we now have proof positive that our client didn't commit a fraud?" We both decided that, if we did that, all he would do is change his theory of the case.

So we're flying out there and I've made up all these—this is all leading to this. Of course, I've never tried a case in my life, but what a way to begin. But I've got Nat Lewin with me and also Jack Miller, whom I wrote that opening argument for.

I'll never forget this. We're in the plane, and Jack Miller and Nat Lewin are sitting side by side and I'm in the seat in front of them. I turned around to them and I said, "Boy, I'm sure glad you guys are with me, because I don't know *anything* about trying a case before a jury. I don't even know how to pick a jury. Nothing." Then it suddenly occurred to me. I asked them, "By the way, how many cases have you tried, Nat?" There was a pause, and he said, "This is my first." And I said to Jack Miller, "How many have you tried?" and he said, "None." So the client sent Miller home after the first day, and Lewin and I tried the case for three months, and we got an acquittal on all counts. It was unbelievable.

Q: Three months in Springfield.

Randolph: Yeah, lovely.

Q: Did you ever go to Lincoln's grave?

Randolph: His house. Yes.

Q: But he's buried—

Randolph: I went to his house so many times because there was nothing else to do in Springfield on the weekends.

Q: Have you had a chance to see this movie called *Lincoln*?

Randolph: Not yet. I've heard it's excellent.

Q: I have reservations about it. But in any event, Nixon walks through the door. Not literally.

Randolph: After he resigned. Right.

Q: You mean literally walks in the door?

Randolph: No, no.

Q: But a case came up where he's the defendant? A civil case?

Randolph: There was a question whether—by that time the prosecutor was Leon [Leonidas] Jaworski, and the question was whether he should be indicted. So what Jack Miller did was engineer, with Gerald [R.] Ford [Jr.], who became the vice president, because the vice president had to resign as a result of taking bribes while he was governor of Maryland—Spiro [T.] Agnew. He accepted bribes while he was governor; he was also accepting bribes in the White House, in the vice president's office.

So Agnew resigns and Gerald Ford, who was then I think speaker of the House, becomes appointed vice president, and Ford becomes president when Nixon resigns. So Jack Miller negotiated with the people in the White House, including President Ford, to get Nixon a pardon. Which is what happened.

Q: Which of course remains controversial.

Randolph: Well, for some people. I think it was best. What did Ford say? "Our long national nightmare is over."

I represented Nixon in the first civil case that was brought against him after he left office. He was sued by a New York attorney named Henry [B.] Rothblatt—and F. Lee Bailey [Jr.], who was just recently in the news, I see, because F. Lee Bailey was famous for the Dr. Sheppard case. He got Sam [Samuel H.] Sheppard off. He's been disbarred, but that's neither here nor there.

Rothblatt had this weird theory—he and Bailey were both representing the Watergate burglars—and he was told by the Watergate burglars that he would get paid by people in the White House. So Rothblatt didn't get paid, and he brought suit against Richard Nixon, Mitchell, Haldeman, [John D.] Ehrlichman, claiming that he was the beneficiary of a third party contract between the Watergate burglars and the White House, and demanding his legal fees.

So I moved to dismiss and won, and Richard Nixon was very grateful. Apparently, when he left office he went to San Clemente, he must have had a freight train taking all these trinkets and things out of the White House. He gave me a pair of presidential gold cufflinks with the presidential seal on them. I didn't have a cufflink shirt then, so I went out and bought one so I could wear them. Then, unfortunately, I made the mistake of taking the shirt off and just loosening the cufflinks and sent it to the cleaners. The cufflinks disappeared.

Q: Nixon probably got them back.

Randolph: I'll tell you one other quick story. He opens his library—the Nixon Library. It was out in Yorba Linda or San Clemente.

Q: Somehow Yorba Linda sounds right.

Randolph: I didn't go to the opening. I think I had an invitation, but I had a court date that conflicted with it. But Jack Miller and John Cassidy were going. I asked them to do me a favor.

I'd just finished reading Whittaker Chambers' *Witness*, that Nixon played a central role in—that propelled him into the national spotlight. I said, "Listen. When you go out there to the opening of the library, would you please ask the president to autograph my copy of *Witness* for me?" It was a first edition.

So they go out, they take the book, they come back, and I don't hear from them for a little bit. So I call Jack up. By this time I'm back in the Solicitor General's. I said, "Where's my copy of *Witness*?"

He said, "Well, we've got a little problem."

I said, "What's that?"

He said, "When I gave the president your copy of *Witness* to autograph, he said, 'That's wonderful. A first edition! We've been looking for one. We don't have one in the library. Do you think Ray would mind if I kept this?'" And Jack said, "Oh no, that's fine." [Laughs]

Q: Did you ever get to read *Witness*?

Randolph: I did. I did. Nixon was very gracious and sent me—so I have an autographed copy from Richard Nixon.

Q: That's an extraordinary book, *Witness*.

Randolph: It's an amazing book.

Q: Actually, Chambers' life is extraordinary, but the book is well done. Most times it's not well done, this kind of thing. Years later I was invited to lunch in East Hampton, I guess it was, in that area, during the summer. We were out there, and I found myself sitting at lunch—maybe there were twelve people having lunch—next to Alger Hiss. I didn't know he was going to be there, let alone that I would be sitting next to him at lunch. To my great regret, I didn't have the balls to ask him about the case. Somehow or other it came up that he had been a clerk to [Oliver Wendell] Holmes [Jr.], and that Holmes had served in the Civil War, I think. This was such a span of time—we got to talking about that and what have you and all. But afterward, of course, I suppose it wouldn't have been fair to ask him about the case.

Randolph: Years later, I represented—

Q: He was from Baltimore, like I was.

Randolph: Oh, you're from Baltimore? I didn't know that.

I did a fair amount of pro bono work, all of which I had to reveal when I filled the forms out for the Senate Judiciary Committee. But it was unusual pro bono work, because what I did was I represented FBI agents who got in trouble—paternity suits, automobile accidents—and these

guys didn't have a lot of money. They couldn't afford counsel oftentimes, and I would get attorneys for them.

Anyway, a great controversy erupted here in Washington in the wake of the Vietnam War, and it was called COINTELPRO [Counter Intelligence Program]. Do you remember that? It's a counter intelligence program by J. Edgar Hoover where they shadowed activists and so forth.

Q: He forgot to mention that you walked past a marijuana plant.

Randolph: Right. So a bunch of FBI agents—the circle will close here—a whole slew of FBI agents were named in a civil damage suit under the *Bivens* theory, and since I was fairly well-known to the FBI, they asked me to represent them in the district court here and eventually in the court of appeals. Which I did. But that's just by way of background.

One of the lead defendants in the case was a fellow named Courtland [J.] Jones, and I got to know him fairly intimately during the course of the investigation. Courtland Jones was the special agent in charge in Washington for a long period of time, and for one reason or another—I think I must have mentioned *Witness*—Courtland revealed to me that he was the FBI agent in charge of finding the Woodstock typewriter. The Woodstock typewriter, as you know, was important because they didn't have Xerox machines back then. Alger Hiss was working in the State Department, and the allegation was that he would come home every night, and either he or his wife or both would copy these top secret documents, and the way they'd do it was they'd

duplicate them by copying them on a typewriter. The documents were called the Pumpkin Papers and were found in Whittaker Chambers' pumpkin field on the eastern shore—

Q: It was in western Maryland, wasn't it?

Randolph: Was it? I thought it was in the east. There was microfilm that Chambers had taken and shipped to the Soviet Union. He was the courier, the in-between man. He met Alger Hiss behind St. Matthew's Cathedral here in Washington. But the FBI documents examiner—whom I got to know, by the way—they were clear that these documents were typed on a Woodstock typewriter because they could tell by the type, and one of the letters—I can't remember which. It might have been a "w" or something—was off center. So it was not only a Woodstock typewriter, it was a distinct Woodstock. It had its own fingerprint.

So this group of agents—a guy named Glass, whom I got to know, and Courtland Jones, who was in charge, and Hoover assigned them the task of finding the Woodstock typewriter. Alger Hiss admitted, because other people had seen it, that he had a Woodstock typewriter, but he didn't know what happened to it. They looked high and low. They went all over the place. They went to dumps; they went to the woman who kept house for Alger Hiss. No Woodstock typewriter.

So the way Courtland tells the story, one night they were over in Virginia, where they lived—

Q: Where "they" lived?

Randolph: —where Courtland lived, and where Glass, and I can't remember the other agents. They had a Saturday night poker game. They're sitting around—and they'd also been clever enough to go to the gas company, the electric company, anyplace where they thought Alger Hiss—if they couldn't find the typewriter they'd do the next best thing—they'd find documents that maybe he'd typed up, protesting a bill or something like that, and they come up totally empty handed.

So they're playing poker and having a few beers, and one of the agents says, "You know, Hiss's kid I think went to Landon School," which is a private school in Bethesda, Maryland, "and if he typed up anything during this period of time, it would have been his letter to the headmaster of the Landon School, asking them to admit his son." Hiss's son. And one of the other agents said, "I know the headmaster of the Landon School." So they call him on the phone. And on the next morning, a Sunday, the agents descend on the Landon School, and the headmaster says, "Old letters—we don't throw them out for years, and years, and years." They're in one of these barn-like structures they have on the campus there, and, "You guys are free to go up there and look." So they did. They went through box, after box, after box, and finally, Courtland Jones grabs a box, and there it is, *the* letter, and it's signed *Alger Hiss*, and it's clearly done by a Woodstock typewriter, and the "w" is off-center.

So on this Sunday they call in the FBI document examiner to do a report, which didn't take very long. Then they called the director, J. Edgar Hoover. Courtland is sitting outside the office, nervous as hell. He goes in and says, "Mr. Director, we've got him."

"You found the typewriter."

And Courtland says, "No, we didn't find the typewriter, but we've got the next best thing." He shows the original letter from Alger Hiss, with the "w" off center, and the way Courtland tells it, Hoover looked at it, and looked at it, and looked at it, and he says, "Good work, Courtland. Now go find the typewriter." [Laughter]

And you know what happened. There was a hung jury. Lloyd Paul Stryker was the attorney for Alger Hiss in the first criminal trial. It was a perjury case in the southern district in New York, I think.

Q: Yes. He is for sure in the southern district.

Randolph: The typewriter did not appear. Then, at the second trial, the defense puts a Woodstock typewriter on the defense counsel table, and argues that, "Ladies and Gentlemen, you've heard a lot of talk about the missing Woodstock typewriter. Well, here it is," and dared the prosecution—it's almost like the O.J. Simpson glove. "We dare you to type something out." And they didn't. The prosecution never even touched it. Because they weren't sure that the typewriter they were seeing on the desk was the real one, and if they did a report, and they did a document, and it turned out not to have the missing "w"—but Hiss got convicted.

It turned out that he gave the typewriter to his brother, Donald [Hiss], to hold. I think that's the story.

Q: Right. Right. Fascinating case. It's amazing even now. I think it was Allen Weinstein who wrote a book on the thing many years ago—well it's been surpassed, that book.

By the way, now somehow or other I learned that you are a fly fisherman.

Randolph: Yes.

Q: Also—and we'll end this today—you were, at some point, a special assistant attorney general in Montana. Have you ever fished in Montana?

Randolph: Many times.

Q: Well, do you know this book by a University of Chicago professor—

Randolph: *A River Runs Through It*?

Q: *A River Runs Through It*. Have you ever read that? Someone gave me that book years ago. I'm not a fisherman. It must be sitting around the house somewhere—

Randolph: Norman [F.] Maclean.

Q: It's apparently a real classic.

Randolph: The ending is, "The river was cut by the world's great flood and runs over rocks from the basement of time. On some of the rocks are timeless raindrops. Under the rocks are the words, and some of the words are theirs. I am haunted by waters." That's the end.

I resented that book.

Q: Enough to learn that.

Randolph: Some things stick with you. It's a wonderful book but—first of all, it was made into a movie, and after the movie—. I used to go to Montana—well, that whole area of the country—the Henry's Fork, and the Snake River, and the Madison, with friends of mine. We used to go every year. After that movie came out, based on the book, *A River Runs Through It*, there wasn't elbow room out there. Everybody was a fly fisherman. The population of fly fishermen just exploded. There was, literally, somebody every fifty yards along the Madison, in Yellowstone Park, along the Henry's Fork, the Snake, and all the other rivers that we used to fish. So I stopped going out there. I've been back since, but—

Q: Right. I was in Missoula not long ago.

All right. We'll wind up for today, and we'll continue tomorrow.

Randolph: Good.

[END OF SESSION]

VJD | Session Two

Interviewee: A. Raymond Randolph | Location: Washington D.C.

Interviewer: Myron Farber | Date: January 16, 2013

Q: This is Myron Farber on January 16, 2013, continuing the interview. This is session two with Judge A. Raymond Randolph of the United States Court of Appeals for the D.C. Circuit in Washington. We're in Judge Randolph's chambers, which may have been the chambers of Judge Robert Bork.

Randolph: No. We're in an annex here. The annex was built, I think—well, completed maybe—four or five years ago. This is a brand new building.

Q: We're getting a little ahead of the game a little bit, but did you ever occupy his chambers here?

Randolph: When I first came to the court I did. But not for long, maybe a year or two—his old chambers.

Q: Now when we left off yesterday, I think I had you going back to the Solicitor General's Office in 1975, when you returned there—without a marijuana plant—to become the deputy to then Solicitor General Robert Bork. Bork had been in that office for a few years, I think, by then, had he not?

Randolph: He started in June of 1973, the end of June 1973, and I returned in January of 1975.

Q: So this is a couple of years after the famous Saturday Night Massacre episode, in which he figured, also.

Randolph: That was in October, I think, of 1973.

Q: Right. Okay. You knew Robert Bork before then, I assume?

Randolph: I met him once before when he came down to the Solicitor General's Office. The staff, with Erwin Griswold, we took him to lunch. It was rather unusual circumstances, his appointment, because he was nominated and confirmed in the spring of 1973, but Erwin Griswold, who was the solicitor general at the time, talked him into not starting until the Supreme Court term ended at the end of June. So he came down after he was nominated and confirmed. Like I said, we took him to lunch. It was interesting. A friend of mine named Danny [Daniel M.] Friedman—for reasons I can't remember—I was reading a book at the time. I don't know if you've ever read it—it was Sigmund Freud, and it was called *Jokes and the Unconscious*. I think that's what it was, *Jokes and their Relation to the Unconscious.* One of Sigmund Freud's theories was that spontaneous jokes, anyway, reflect a lot of unconscious thinking—subconscious, unconscious—and they're blurted out. Everybody's heard, "I was just kidding." Every time I hear that I think of this book, where Freud sort of debunks that theory.

Anyway, I was reading the book at the time Bork arrived. We were coming back from lunch and one of the deputies—just a wonderful fellow who's now passed away. He became a judge on the federal circuit. Danny Friedman and I were walking together and suddenly we didn't see Bork anyplace. I turned to Danny and I said, "Where did Bob Bork go?" and Danny said, "Oh, I think he's lost in the dinosaurs," because we were walking through the Natural History Museum to get back from the luncheon place. I immediately knew what Danny Friedman thought about Bob Bork. It was very revealing. [Laughter]

Q: You were there for two or three years working for him. Then you had, is it fair to say, a close friendship with him for the years after?

Randolph: Yes. I had no relation with him before that but then I grew very fond of him, as did everyone in the office during that time that I'm aware of.

Q: When the Carter administration came in and he left, and you left in the beginning of 1977, you were going to form a law firm with him. Isn't that correct?

Randolph: We were. We had plans to do it, with the backing of Kirkland & Ellis and a fellow named Howard [G.] Krane. There's an interesting Bork story about that. Bork, when he was a young man, him and another graduate at the University of Chicago whose name was Dallin [H.] Oaks, who is now one of the top officials in the Mormon Church, and eventually became a Utah Supreme Court judge, or justice—but they were young associates in the Chicago office of Kirkland & Ellis. Kirkland & Ellis, which they didn't know when they got hired, had a policy of

not hiring Jews. There was a fellow that Bob Bork and Dallin Oaks knew named Howard Krane, who applied as a young associate at Kirkland & Ellis, and the firm refused to hire him for one reason only—his grades were spectacular, but he was Jewish. Bork and Dallin Oaks led an uprising of the associates in Kirkland & Ellis. They were all going to go on strike unless the firm hired Howard Krane. Eventually, the management of the firm relented and hired Howard Krane. This is the same Howard Krane who ultimately became the managing partner of Kirkland & Ellis, during this period of time, in the seventies. He was also the best man in Bob's marriage to Mary Ellen [Pohl] in 1982, I think it was.

Q: Right. Right. As I understand it, Bork went back to Yale to occupy the, I think, newly created [Alexander M.] Bickel chair there at that time. And you went into private practice.

Randolph: I was enamored with the idea of starting a law firm, so that's what I did. I didn't go back to Miller, Cassidy, where I'd been from 1973 to 1975, but I still maintained good relations. But I started a law firm, and we started out with just three people. We eventually grew and went through a couple transitions.

Q: Were you involved with Pepper Hamilton at one time there?

Randolph: I was. We got two pieces of business, and there were only five of us by that time. Stephen [M.] Truitt was a partner. It was a choice of either hiring a bunch of people, because these two pieces of business we got were huge. I was hired by the state of Utah to defend the state against lawsuits brought by every major oil company in the world. They were drilling on

the Navajo Indian reservation in southern Utah, and the claim was that they were exempt from severance taxes and other taxes that the state was imposing because they were on a federal Indian reservation. The amount of money involved was enormous—hundreds of millions of dollars. At the same time that client walked in the door, my partner, Stephen Truitt, was hired by the Iranian Oil Company to bring a suit against Ashland Oil because during the oil embargo, Ashland had taken possession of the shipments from Iran and never paid for them. That turned out to be an enormous case. They wanted us to take the case on a contingent fee, and I talked Stephen out of doing that. I said, "We've got to do it hourly," because we searched every state to find one state where the statute of limitations hadn't run—because the Arab oil embargo was back in the early seventies, and here we are in whatever it was. I don't remember the year, but it was at least ten years after that. The only state we found where we could sue Ashland Oil Company without running into a statute of limitations was Mississippi. So here we are, an arm of the Iranian government, suing Ashland Oil in a Mississippi federal court. It didn't seem to me like a case that would turn out to be a winner. So I said, "Nah, we're not going to take it on a contingency. Do it hourly." Miracle of miracles, he won the case—hundreds of millions of dollars.

Q: This is the Shah's government we're talking about. Isn't that correct?

Randolph: No, this is—well, let's see, 1980.

Q: Oh, maybe not.

Randolph: No, I think the Iranian Revolution was 1980, and I think we're talking after that.

Q: I think, actually, the hostages were in 1979. But in any event, you practiced for a good decade before you joined the bench. During that time, in 1987, several years before you joined the bench, Bob Bork was nominated for the Supreme Court. Do you recall vividly that episode? And has it been fairly portrayed over the years, do you think?

Randolph: Well, it depends on who's doing the portraying, whether it's been done fairly or not. I recall the period quite well. He was nominated in the summer of 1987, and the hearings were not to begin until sometime in September. I had just moved to Pepper, Hamilton & Scheetz, merging our firm because we didn't want to hire associates with these cases looming. We worked very closely with him, also lining witnesses up and preparing for testimony, etc. We used to meet at Bob's house in the Palisades of Washington. Ultimately, he moved to McLean, Virginia.

So we spent a good part of the summer meeting. There was a group of us, including Lloyd [N.] Cutler, who was a very prominent attorney in Washington, whom no one thought was a Republican. He was an advisor, a Democratic advisor. At one point I think he became White House counsel in the [William J. “Bill”] Clinton administration.

Q: He did.

Randolph: But Lloyd thought the world of Bob. So we spent all these evenings getting ready. So you talk about portraying—immediately after he was nominated, Ted Kennedy came out with this outrageous statement that "Bob Bork's American is back alley abortions and rogue police in

the night," and so on and so forth. I think he was abused during the hearings. I think there were a lot of lies told about him, and the White House basically abandoned him during the workup to the hearings and during the hearings themselves. The White House, particularly the president, was preoccupied at the time with the Oliver [L.] North matter—whatever they called it back then.

Q: Iran-Contra.

Randolph: Iran-Contra, right. So we complained at one point—we had a meeting over at the White House, and we complained about it. Then Howard [H.] Baker [Jr.], who was the chief of staff, all he did was he came to the hearing one day and sat there. That was about it. It got so bad that I wound up basically running the show out of my offices at Pepper, Hamilton. The White House was referring all the telephone calls to me; nobody at the White House would take any press calls, or calls from interested citizens, letters or anything else. I was putting in fifteen, eighteen hour days working on it.

Q: Well, was he being pressured to withdraw from the nomination?

Randolph: No. I'm hesitating because I don't think I've ever told this before. There was a period of time after his testimony when some of the senators started announcing that they were going to vote against him. And it was Democrats coming out saying that. I had a good friend who was a leader up on the Hill, in the Senate. His name is David [L.] Boren. Dave and I were very close friends. We played poker together every once in a while, along with Jim [R. James] Woolsey

[Jr.], who became CIA director, and a few other people. And David eventually introduced me at my confirmation hearing—even though he was a Democrat, and I was nominated by a Republican president. But I called David up and I said—I remember the conversation—I said, "I know I can count on you when the chips are down. I need a Democrat to come out in favor of Bork." So he did, and he was one of two only who ultimately voted for Bork.

Q: You invoked that because of the poker games?

Randolph: I said I could count on him when the chips were down. That was my little joke.

Anyway, the pressure was mounting, and it was pretty clear he was going to get defeated on the floor vote. So one evening—I don't know what brought this about—but the question was whether he should withdraw. The White House was not—they just weren't involved. Nobody at the White House was putting any pressure on him, but you could see the hand writing on the wall—an interesting phrase.

Q: Had he already testified at this point.

Randolph: Oh, yes. He had finished testifying. And I testified. There were other witnesses that came in.

So we met over at Bob's house in the Palisades. It was me and my wife, Lee [Eileen J. O’Connor], Bob and his wife, Mary Ellen, George Will, and, I think, maybe, Bob Jr. was there as

well. We went into his den and talked about it. Bob was going to have a press conference the next day at the White House and everybody thought he was going to announce his withdrawal. Well, we all agreed Bob shouldn't withdraw. Put it to a vote. Don't withdraw. Make them vote. Let them face the consequences, if there were to be any.

I went back into the den, I wrote up a statement, and the next day we went to the White House. I was there in the Map Room, and it was just Bob, Mary Ellen, his wife, and me. The president came in, and Bob told Reagan, "I'm not going to withdraw." Reagan said, "Fine. Good." Bob walked out to the press room and read the statement—"I'm not withdrawing"—which you can find in any of the books that have been written about it. Ethan Bronner, who is a reporter for the *New York Times* now, wrote, I thought, a very fair book about these events.

Q: He was for a period of time, recently, was in Israel. He's back now.

Randolph: He interviewed me a number of times for the book.

Q: During the eighties—

Randolph: There are a couple of things I remember. Little vignettes. I remember I talked to my son about this just a few days ago, after Bob passed away. I asked him whether he remembered—I think he must have been all of—. Let's see, 1987, he was twelve. My son was twelve. I took him to the hearings one day, because I thought it would be a great experience. He told me he remembers it vividly. He remembers going up in the elevator with Alan [K.]

Simpson, who's about six foot ten, and [John] Trevor [Randolph] at the time was probably about five and a half feet tall. He had some book with him. Trevor had some book with him. He went to St. Alban's School. It was something about the Greek commonwealth, or some classic book that Alan Simpson knew, and was very impressed.

So I remember that, and I remember the day before the hearings started. Bob was here, in this courthouse, so I called him up and I said, "What we ought to do, it's a nice day in September, let's take a walk up to Capitol Hill and just take a look at the room—what the room's going to be like, so you have some feel for it." So we did. We walked up there. We go into the—is it the Hart Office Building? I can't remember. It might have been the Russell. Anyway, we opened the doors to this vast room, and it was fairly dark. There were low lights in there, and there was a fellow, an aide of some sort in there. He's the only person in there, and he's got his back to us. He's rearranging the chairs for the audience, etc. He suddenly turned around and he saw Judge Bork there. And he said, "Judge Bork! Judge Bork! We'll be seeing you tomorrow." And Bork said, "It's tomorrow?" [Laughter] It was typical of his wit.

Then another time, during the hearings, we were walking down whichever office building it was. We were walking down the corridor, and who comes walking the other way with a gaggle of people around him but Ted Kennedy. This is after this thing got started and Bob testified. And I'll never forget what Kennedy said to him. He said, "Nothing personal."

Q: But it was highly personal to Bork.

Randolph: Well, it was nothing but personal. Joe [Joseph R.] Biden [Jr.] was the chairman of the Senate Judiciary Committee, and he was involved in a scandal at that time because he plagiarized the speech of this English politician, which doomed—Biden thought he had a chance to be nominated as president. He obviously didn't get it. He withdrew after those events.

Q: Now those hearings. People have referred to the *borking* of Bob Bork. I really should make a note that at the time of the hearings, he was a judge at this very courthouse, at the court of appeals.

Randolph: And had been confirmed. He went through the Senate Judiciary Committee and was confirmed as solicitor general. He was then nominated, whenever it was—1980, I think, or 1981, somewhere around there—for a seat on this court, and also had confirmation hearings.

Q: Right. But people referred after to him having been, or others having been *borked* in this kind of a hearing. Later, one Elena Kagan, who is now on the Supreme Court, wrote a piece in the University of Chicago Law Review, I believe—it was a book review or something there—in which she described the post-Bork confirmation hearings as “vapid and hollow,” and "they just don't amount to anything anymore." Is that so, do you think? And was it because of Bork? When were Clarence Thomas's hearings?

Randolph: In 1991.

Q: So it was after Bork.

Randolph: Yes. You mean his hearing for the Supreme Court. Yes. That was 1991.

Q: In other words, the confirmation hearings since that time, whether it's Thomas or Bork—are they worth even doing? I mean, they have to be done. But do they yield anything? Do they yield any insight into which way the court—that justice or the court—is going to go?

Randolph: No, I think it's like shadow boxing. I don't think there's anything of substance that comes from them. I'm not sure they do any good. They're a showcase for the senators who want to show off and prove to the world that they're really very knowledgeable about the Constitution. But I don't think they amount to much. I attended my own confirmation hearing—

Q: —under duress.

Randolph: —under duress, yes. My confirmation hearing didn't amount to a hill of beans. But there's a reason for that. I mentioned before my friends Jack Miller and John Cassidy. What I didn't mention is that they—particularly Jack Miller, were the personal attorneys for years for the Kennedy family, including jams involving Chappaquiddick and Palm Beach. You name it, Jack was deeply involved. After I got nominated, Jack Miller and John Cassidy called me up and said, "What are you doing for lunch?"

I said, "You know I don't eat lunch."

"So you're not busy."

"No, I'm not busy."

"All right," they said, “we're sending a car around for you. Just be there, it will probably be there in fifteen minutes."

I said, "What's this all about?"

They said, "Don't worry. We know what we're doing."

So the car arrived, I came down. It was on 19th Street. They drove up to the Senate office building. I said, "What are you guys up to?" They said, "Don't worry about it." So we take the elevator, we go up, and the next thing I know we're in the anteroom of Senator Ted Kennedy's office. We walk in and Ted Kennedy greets both of them—and these are old friends of his. I told you that Jack was head of the criminal division in the Kennedy Justice Department. There are some small-talk greetings, and then Jack Miller puts his arm around my shoulder and says, "Senator, this is Ray Randolph. He's one of my closest friends, personal friends. I've known him for years. He's just been nominated to the D.C. Circuit." Kennedy got up from behind his desk, came over and shook my hand, "Very nice to meet you," and we walked out. That was it. So the next day—I knew some of the senators. I knew Alan Simpson on the Judiciary Committee, and I knew Orrin [G.] Hatch. I got a call from one of Hatch's assistants. He called me up and said, "What the heck is going on?"

I said, "I have no idea. What are you talking about?"

He said, "Well, we just went down to Biden's office to get you a hearing, and we thought we'd have all kinds of grief. And who the heck do we see there but [Thurgood] Goody Marshall [Jr.]." This is Thurgood Marshall's son, who worked for Ted Kennedy. "We said, 'Goody, what are you doing here?' He said, 'I'm trying to get some guy named Randolph a hearing.'" [Laughter]

So my hearing—I was nominated in May, the hearing was a few weeks later, and I was confirmed early in July. That's the way the system works.

Q: Is Jack Miller still with us?

Randolph: No, he passed away.

Q: That was 1990. You were nominated by George H.W. Bush. Was that something you had sought?

Randolph: Oh, no. It sort of came out of the blue. I got a telephone call asking me to come to the White House. I met with [Clayland] Boyden Gray, whom I knew, who was White House counsel at the time. I think it was Boyden, and there was somebody else there too—I can't remember who it was—and he asked me if I would be interested in the court of appeals or the district court. There were two openings, one on the court of appeals here and one in the district court. I said,

"I'm definitely not interested in the district court and I'm probably not interested in the court of appeals." I didn't think anything more of it, and I got phone calls, and there was some back and forth, I can't remember—would I come? We had lunch a couple of times at the Navy mess. I broke my habit of not having lunch. I said no a couple times, and one of my reasons was—I thought I might like it, but one of my reasons was that I didn't think I could afford it. Because I had two kids; one is, our daughter, was in National Cathedral School, and our son was in St. Alban's. They were both going to go to college, and how in the heck can I do that on the salary of a federal court of appeals judge? And my dear, sweet wife, who is herself a lawyer, and quite a good one—and also a CPA [Certified Public Accountant]—did a spread sheet. By this time it's sometime in 1989, late 1989, and Congress had just passed a pay raise for judges. I think it was 1989, and it guaranteed a cost of living increase. So Lee did this spread sheet all the way out to when the kids would finish college, to show me that, with our combined salaries, we'd be fine. So that convinced me to do it. Right at that very moment I was being recruited by another very large law firm that dangled hundreds of thousands of dollars in front of me.

The irony of it all is that, first of all, during the Clinton administration—which came in 1992—they canceled the cost-of-living increases for federal judges. We didn't get them, and we didn't get them again and again. We didn't get them this year. A lawsuit was brought, and it was just decided this fall, questioning whether that was unconstitutional, because the pay of a federal judge, under the Constitution, can't be diminished while they're in office. The federal circuit ruled that that was unconstitutional—the failure to give the cost of living increases—which amounted to a couple hundred thousand dollars.

Q: Is that un-appealable?

Randolph: The government just filed a petition for certiorari in the Supreme Court. It's called *Beer v. The United States* [1976], I think.

Q: So no one's written a check.

Randolph: No, I'm not counting on it.

Q: Would it be retroactive?

Randolph: No. There's a six year statute of limitations, but it's cumulative, if you get the increase. As it turned out—I just want to finish this—we did quite fine, because my son got a full scholarship to Rice University and our daughter, after graduating from National Cathedral School, with seventy girls in it, decided she wanted to go to a Big Ten school, and she went the University of Wisconsin. The tuition was very reasonable there. I got a loan, so it all worked out.

Q: Was she there four years?

Randolph: Five.

Q: At Madison.

Randolph: Yes.

Q: Did you ever go up there to visit her?

Randolph: Oh, sure. What a lovely town.

Q: I almost went to school at Madison. They had a wonderful history department, as did Northwestern. But my interview for a scholarship, actually, I had to climb a hill to Bascom Hall, it must have been in February or something. I'm fairly light weight, and the wind came racing off that lake. When I realized Northwestern was on level ground—

Randolph: Northwestern is right on a river, there, too; or on the lake there, too.

Q: But Northwestern had Ray Allen Billington, who was a fabulous historian of the American West, and a disciple of Frederick Jackson Turner—and that was enough for me, because I was very interested in that field.

Anyway, how did you feel about what a judgeship on the circuit court, and appellate court, was going to entail? Apart from the money, you had to have evaluated, "My God, is this something I really want to be doing?"

Randolph: Myron, I was not sure it was something I wanted to do. One of the fellows I called up to get advice—and I did, I sought advice from a lot of different people—was Frank [H.]

Easterbrook, who by then—we were in the Solicitor General's Office together, which had had some incredible times. Frank and I worked with one of the briefs in *Buckley v. Valeo* [1976], a big election case, and the death penalty cases, etc. So I knew Frank and respected his judgment. He was on the Seventh Circuit at the time, and I still remember him saying, when I hesitated, he said, "Look, it's a lifetime appointment, it's not a lifetime sentence. If you don't like it, quit." And I thought, "You know, he's right. Maybe I'll try it."

The other thing—not to interrupt you—but there was an opening on the court of appeals for which I was—

Q: We're here for you to interrupt me.

Randolph: So that left still the opening of the district court, and you know who was nominated for that and confirmed, was Michael Boudin.

Q: For the district court?

Randolph: Yes, here. Michael was a partner at Covington & Burling. So Michael went on the district court and I went on the circuit court of appeals, and Michael was one of the most unhappy campers you could ever imagine. I used to see him every once in a while, and he really looked totally depressed. He didn't like it at all. He didn't like sentencing, he didn't like the trials. He had more of an academic bent, and eventually resigned from the district court here. But then was appointed to the First Circuit, where he's been a very happy camper ever since.

Q: Did he precede you as a Friendly clerk, or follow you?

Randolph: He was long before me, I think. He must have been one of the early ones. Let's see. He had to be there in the early sixties.

Q: Well, you came onto the court in 1990. At that time, there had developed an organization called the Federalist Society. I think it got started in the eighties, in the early eighties, maybe.

Randolph: I think you're right.

Q: By the way, I noticed yesterday, in a wine store, a bottle of wine for sale, *The Federalist.*

Randolph: I've seen that, but I've not tasted it.

Q: It has a profile of [Alexander] Hamilton on the label, and some quotation of some sort. I thought maybe it was put out by the Federalist Society.

Randolph: No.

Q: But in any event—was Bork associated with that?

Randolph: He was. He was an academic advisor, along with Nino [Antonin G.] Scalia. They were the two big advisors. It was started by students at Yale and the University of Chicago, I think.

Q: Yes. Yes, I think that's right.

Randolph: Nino was at the University of Chicago at the time, and Bork was at Yale.

Q: Now during the 1980s, when you were in private practice, was there a Federalist Society chapter, or whatever it's called, here in Washington, and did you have any involvement with it at all?

Randolph: There was, and I had zero involvement. I had no involvement.

Q: They wouldn't have you? [Laughter] What was that remark by Groucho Marx?

Randolph: Yes. "I don't want to join a club that would have me," or something like that. No, I eventually got involved with them but it evolved. One of the reasons it evolved was that they were just a fledgling organization at the time. It was mostly a student chapter here, a student chapter there. They had virtually no lawyers' division because it was all student-oriented. My first law clerk, Leonard Leo, came to me sometime in the spring as he was completing his year with me and said that he had been offered a position to build up the lawyers' section of the Federalist Society and wanted to know if I thought he should take it. I kind of gave him the same

answer that Frank Easterbrook gave to me—"Why don't you take it? Try it. If you don't like it, you can quit." He did, and he's still there. He is the executive vice president of the Federalist Society, and the lawyers' chapter, or division, of the Federalist Society is enormous. It is just incredible. The speakers they get—the Supreme Court justices and high officials from whatever administration is in power. It's just amazing. They have a banquet every year in November here in Washington, and there are thousands of people from all over the country who come. I'm very proud of Leonard. He really did a marvelous, marvelous job.

Q: Is there a simple way to say what they stand for?

Randolph: Yes. I think what they stand for is intellectual rigor in interpreting and discussing the Constitution, federal law in general. Now, international law—if there is such a thing, because they just opened a chapter in Paris. As a matter of fact, two years ago I went over to Europe and participated in a conference sponsored by the Federalist Society in Strasbourg, with a good number of European judges, so it's become international. But the Federalist Society is more of a debating society than anything else, and the panels that they form—they choose topics and themes for their student conference and for their lawyers' conference. They try to get both sides. It's not one-sided. Nadine Strossen is always on the panel. Whoever the head of the ACLU [American Civil Liberties Union] is, is on the panel. It's all at a very high level. The publications they put out—a good number of the publications are spinoffs of the statements that are made by the speakers at the various conferences.

Q: Another development in the eighties was the increasing usage of the term "originalism," which has a longer history. I don't know whether Bork or Scalia were particularly responsible for this, but it came increasingly into vogue, and is still associated with Scalia—although he has described himself as a fainthearted originalist—and even more so, perhaps, with Thomas. But what, to you, does the term "originalism," in constitutional terms, or constitutional interpretation especially—what does it mean to you in the real world of being an appellate judge? And is there a difference between—without getting too complicated—is there a real difference between, let's say, the original intent of the framers, or the original meaning of the man in the street, in the colonies of the time? Should anybody care? Apart from Scalia.

Randolph: Let me back up a little bit and take you back to my law school class in constitutional law. I remember being totally baffled about what constitutional law entailed. We'd have cases dealing with statutory interpretation, and I understood all that. That was the heyday of so-called legislative history. We'd have cases dealing with the common law, and I understood that. But when we got to constitutional law, I had a heck of a time trying to figure out what these courts were doing. This was also the heyday of the Warren court back in the late sixties. The Warren court had come down with numerous decisions of one sort or another and we'd discuss them in class. There was this strange mix of looking at the words, I guess, to a certain extent—although there were plenty of opinions that were deciding constitutional law without even quoting the provision of the constitution that was an issue. Then into the mix were a lot of policy discussions, and developments in the society, and one thing or another. How, as a law student, trying to figure out and write an exam insert when you have a constitutional issue, I found it just

almost impossible. I played the game to get the grades, but I walked away from that course totally baffled.

Which brings me to originalism. First of all, it is rare for a court of appeals judge to even have to think about that. The reason is because we've become—the Supreme Court has now more than 550 volumes of Supreme Court reports, and I am bound to apply those precedents. The precedents on the Constitution are thick, so what I find myself doing, instead of trying to come up with an original meaning—what I'm doing is interpreting the Supreme Court's statements and holdings about cases, so I'm not in that field. Now occasionally, rarely, I will get a case with a Supreme Court—a constitutional issue where the Supreme Court has not spoken. One example of that is the *Boumediene* [*v. Bush,* 2008] case, dealing with habeas corpus and Guantánamo. The Supreme Court had spoken to it in a case called *Johnson v. Eisentrager*, [1950]—but that is the exception. I can think of maybe one other case, in my twenty two years here, where I was confronted with a provision of the Constitution that the Supreme Court had not said anything about, and that was a case called—was it *United States v. Nixon*? Not Richard Nixon, but [Walter L.] Nixon, a federal judge in Florida, I think it was, being impeached for criminal offenses and complaining, in the case brought here that eventually went to the Supreme Court, about the lack of, or the rules that the Senate was following. There is a provision in the Constitution that says that the Senate "shall have the sole authority to conduct proceedings on impeachment." So we had to interpret that provision. Other than that, it's hard for me to think of—

Q: Yes. When the Bork hearings occurred, three years before you came on the bench—when the Bork hearings occurred, in good faith or bad, his critics accused him of a constricted view of the constitution. As you mentioned earlier, as Ted Kennedy put it, "He'll put us back in the back alleys in abortion," and this kind of thing. But they didn't just invent this. They drew, in part I believe, his own association with this originalist theory. This is where he was getting it from.

Randolph: Yes. But see, he had the luxury of being a law, or the—you know who Thorstein [B.] Veblen is, *The Theory of the Leisure Class*? Bork used to refer to professors as the "leisure of the theory class." [Laughter]

Q: That is wonderful. [Laughter]

Randolph: So he had the luxury and the leisure of being able to think big thoughts and not be bound by the Supreme Court precedent. He wrote an article in the Indiana Law Journal that dealt basically with the First Amendment—which is a subject near and dear to my heart, because I teach it—and that triggered a good deal of controversy because he basically came to the—he didn't really come to a conclusion. He said, "These are parting shots. I'm just thinking out loud." It was originally a speech, and he criticized a whole line of Supreme Court cases beginning with [Charles T.] Schenck falsely yelling "Fire!" in a crowded theatre—the Oliver Wendell Holmes case—and came to the conclusion that the First Amendment should have been restricted to political speech and nothing more, and any expansion of it really was beyond the framers intention at the time. That was not an original theory of his, by the way, because Alexander

Meiklejohn, a very famous law professor, had written about the same thing; and Learned Hand, also, was very much an originalist in dealing with the Bill of Rights.

But Bork had a way of expressing himself in a rather forceful manner, and unlike some of the other law professors that, for example, Felix Frankfurter idolized like Paul [A.] Freund and some of the others, who spoke in these majestic terms—again, that takes me back to law school. I couldn't understand what the theory was or how to decide it.

Anyway, Bork continued to develop his thesis after the Indiana Law Journal article. Understand he was not a constitutional law professor back then. He was hired by Yale to teach anti-trust and made a great mark in the development of anti-trust law. But he began to develop that idea. You mentioned the Federalist Society. One of his principal forums for developing it while he was a law professor was the Federalist Society. He gave speeches, and so did Justice Scalia. When I came on the court—to give you an idea, Myron, my secretary, Judy Carper, was Bob Bork's secretary when he was on this court.

Q: We ought to say that he left the court in—

Randolph: 1988, the winter of 1988. But Judy showed me internal documents from the court about what we call “carry-over” cases, because our courts sits from September to May, and then the summer months are catching up on the opinions. The number of cases that Judge Scalia—who was on the court then, too—and Judge Bork carried over were enormous. We're talking

dozens and dozens of cases, because they were out spending all their time giving speeches to law schools, and the Federalist Society, etc. I was just absolutely shocked.

So that's where he developed it, and with these speeches and things that I think were largely taken out of context during his hearings. But one of the themes that he struck, and that Justice Scalia struck, was that originalism has got problems. I recognize it, so did Judge Bork, and so does Justice Scalia. But it's the only theory that's consistent with a democracy for judges to follow because otherwise the judge is a free-wheeling politician, deciding matters on the basis of policy without any kind of background to be able to do it, and being totally unelected. And whatever he says—what the judge says the Constitution means—can only be changed by a constitutional amendment, or maybe a change in the personnel of the court. All of that is spelled out in great detail in Judge Bork's book, which he wrote after the confirmation hearings, called *The Tempting of America*, where he takes each different theory that the law professors have come up with—and it's always law professors—and demonstrates, I think, rather powerfully, what the failings of it are. He comes to then explain what originalism is.

But, like I said, there are problems with originalism and one of the problems is the nature of the Constitution. Constitutions are written in very broad terms and they are intentionally imprecise. So, to interpret them in the light of the current society—which you have to do with technology changes, etc., etc.—presents, often, a puzzle that there is no real good answer to. But you try.

I'll give an example. I mentioned the death penalty cases. If the framers of the Eighth Amendment, instead of outlawing “cruel and unusual punishment,” said in the Eighth

Amendment something to the effect that "the following punishments shall be illegal: cutting off of fingers, drawing and quartering, burning at the stake, the guillotine," and listed them all, then there's the *ejusdem generis* rule that says that if you list a bunch of things and leave a few things out, you're intentionally not including them. But what would you do with a provision like that and then suddenly electricity is invented, and somebody comes up with a punishment to electrocute somebody? Would you say, "Well, I guess it's okay because it's not mentioned in the Constitution"?

So that's one of the problems. There's also, if we're talking theory, there is also a disconnect—not a disconnect but, I think, a problem with Justice Scalia's theory. Because if you follow it, his rule on statutory interpretations is basically the old *Caminetti* [*v. United States,* 1917] plain meaning type rule and doesn't look at legislative history. As a matter of fact, he'll write a concurring opinion even though he agrees with the result if the writing justice in the majority has cited a committee report or something. But when it comes to the Constitution, he looks at everything. He looks, like other originalist scholars, at the writings of John Jay, and Hamilton, and [James] Madison [Jr.], and the Federalist Papers—and looks at the anti-Federalists, and looks at the newspapers of the time, and looks at whatever you can gather; whatever material you can gather.

How is that consistent with his statutory interpretation? He looks only at the words, and then in the Constitution, he looks at the universe? I don't think it is consistent.

Q: He made a remark one time. He said, "I'm an originalist, I'm a textualist. I'm not a nut."

Randolph: Who said that?

Q: He did.

Randolph: Who did?

Q: Scalia. That's right. No, no, I understand what you're saying. On the other hand, people like Breyer, Justice [Stephen G.] Breyer—people like the so-called "living constitutionalists"—what's wrong with their theory?

Randolph: It's undemocratic. You look at the words of the Constitution and you come to whatever meaning you think is appropriate for the society today. What you're doing then is setting policy.

Q: Yes, but in originalism, you—you, sitting here, in the Supreme Court, or the D.C. Circuit, in the year 2013—are telling us, in opinions, what the framers meant. Is that any better than saying what you think they would have meant today?

Randolph: I don't think the sort of living Constitution tries to translate what the framers would have thought today. That's an impossibility. What you do is try to tweak out, find as best you can what principle—

Q: That's what I mean.

Randolph: —is governing here, and then apply it to whatever the situation is today.

Q: That's right. Do you buy that?

Randolph: I do.

Q: Right. Well, doesn't Stephen Breyer buy that?

Randolph: I don't know what Stephen Breyer does.

Q: In 2005, you gave a talk at the—my god, at the Federalist Society—

Randolph: Where else? [Laughs]

Q: No, no. It could have been Heritage [Society]. But you gave a talk at the Federalist Society, and this was the Barbara Olson Memorial Lecture in 2005. Can I show you what I've marked off in red here? This is you recalling something that Judge Friendly had written. I attached it to something that Felix Frankfurter cited, that James [B.] Thayer had written in the Harvard Law Review in 1893. And it looks to me like both what you're quoting—and approvingly so, I believe—from Judge Friendly, and what Frankfurter is quoting from what Professor Thayer wrote in 1893, are basically getting at the same point, which is the paramount importance of the courts not usurping the democratic role of the people's representatives in legislatures.

Randolph: Yes. Well, that's certainly true with respect to *Roe v. Wade* [1973].

Q: As a principle, is that something you subscribe to yourself?

Randolph: Yes. That doesn't help you decide a case, though. You have that. I think it's more attitudinal. It's an attitude when you come into a case, that you, as a judge, are not all-powerful and all-knowing. It's tinged with humility, that maybe you don't know everything, and even if you do, is it your role to make it up? If the Constitution provided that abortions would be illegal, then you enforce that. But if you look at the Constitution and you can't come away—nobody's been able to justify *Roe v. Wade*, even the people that are against abortion or are in favor of abortion, allowing abortion—have been unable to come up with any kind of theory.

You know, it's interesting. Today is January 16, right? I have a trivia quiz that I give my law clerks every year. I say, "What three famous events occurred on January 22, 1973?" It's rare that they can even come up with one, but they've never been able to come up with all three. One of them was that *Roe v. Wade* was decided, another was that Lyndon [B.] Johnson died, and the third is my son was born.

Q: Oh, my heavens. Well, they're not going to come up with all three. They'll get two, but they'll never get about Lyndon Johnson. [Laughter]

Randolph: Nah, they never even get two. But every year the march occurs, right along the street we look out of, which is Pennsylvania Avenue, then up. The march begins somewhere around 14th Street and it goes on for hours and hours—it's really quite a spectacle, with banners and drums. It's just an incredible thing. It's not going to happen this year, by the way, on January 22, because the inauguration is going to take place on the twenty-first, so they're going to have it on Friday the twenty-fifth. But the interesting thing about that march, Myron, is that it comes by our courthouse. We look at it, and it goes right on by the Congress of the United States—because the Congress of the United States doesn't have any say in this issue now that the Supreme Court usurped it, and the march ends not at the Congress of the United States but at the Supreme Court building. Which is kind of a vivid demonstration of what I guess Frankfurter was talking about, and certainly what Henry Friendly was talking about.

Q: Let me just finish up anything relating to Bob Bork. I met him once. He's a figure of fascination to me, and I think he's an important figure. He had a lot of juice, which I like. If you just read this penultimate paragraph in a piece that Linda Greenhouse, who used to cover the Supreme Court of the United States for the *New York Times*—boy there's a Freudian slip—wrote after Bork died last month.

Randolph: I didn't know that she wrote anything.

Q: Well, you're certainly welcome to the whole piece.

Randolph: Well. Yes.

Q: Would he have made that tremendously big a difference on the Supreme Court had he gotten there?

Randolph: Oh, I think so. I think so. I don't think cases like *Lawrence v. Texas* [2003] would have come out the same. All you have to do is take a look at the cases where Justice [Anthony M.] Kennedy was the swing vote, because Justice Kennedy was the one who was nominated and confirmed to the Supreme Court afterwards. I think it would have made a tremendous difference.

There's some truth to what Linda—I know Linda, and I've always thought highly of her reporting. Her contemporary at the *Washington Post* was Jack MacKenzie, who I think went up to the *New York Times* as well and started writing on the editorial page. I knew him pretty well, too. I thought he did a great job. But anyway, I think there's some truth—as a matter of fact, memories are rising in my mind in talking to Bob about leaving the U.S. Court of Appeals. When she says that it freed him from inhibition—I think he was very, very careful when he was on our court in what he said and did and what he wrote, particularly in opinions and whatever. He told me that even before he was nominated to the Supreme Court he had pretty much decided to resign as a judge on the U.S. Court of Appeals because he found it was too confining. He was spending all his time—the way he put it to me, he said, "I find myself spending all my time deciding whether some commissioner of an agency was acting reasonable and I really don't want to do that anymore." In fact, he had not hired law clerks for the next year. So I think that was in the cards regardless. And the reason was that he wanted to devote more time to the intellectual

pursuits that he found fascinating and interesting, not just constitutional law but through a whole range of subjects, including anti-trust.

Q: Sure. But boy what a difference it makes between expressing those views at a meeting of the Federalist Society and being on the Supreme Court of the United States, particularly in a swing vote. There's a hell of a difference there.

In any case, between 1990, when you came on the bench, and 2000, and September 11, 2001, you were writing away here, opining away here.

Randolph: It's my job.

Q: Right. But can you give me a succinct appreciation of what kinds of cases you typically dealt with in that decade?

Randolph: Yes. First of all, let me say something I haven't said—that I would not want to be on any other court of appeals except this one. If I had lived elsewhere and been nominated for the Second Circuit in New York, or the Third Circuit in Philadelphia, or the Seventh Circuit in Chicago—it's not to my taste, because this court is very, very different. The docket is very, very different. We are, like the Supreme Court, a national court. We get cases from all over the country. People who heard the title U.S. Court of Appeals for the District of Columbia may think, "Well, I guess they just do cases that are centered in the District of Columbia," and that's just not true. The reason for the national scope is that all the federal agencies and departments are

here in Washington, so our court is an optional venue for almost every case that you can think of dealing with the federal government. Not only is it an optional venue, but we're also the exclusive venue for a good many statutes that have regulations that are national in scope. The reason for that is that Congress doesn't want the California Ninth Circuit saying one thing and the Seventh Circuit saying another. What you've got are, for example, EPA [Environmental Protection Agency] regulations governing air quality throughout the United States.

So that makes the job here, to me anyway, much more interesting. The big bulk of our docket is now and has been, for as long as I know, what's loosely called administrative law cases, but they involve constitutional issues, and statutory issues, and regulatory issues of one sort or another, not only from the agencies, the alphabet soup agencies—the SEC [Security and Exchange Commission], and the NLRB [National Labor Relations Board], and the FCC [Federal Communications Commission], and so on and so forth—but also from the various departments of government—the Department of State, or the Department of Energy, or the Commerce Department, etc. So what you get here, if you're paying attention, is just an enormous look at a panorama of government operations.

In the nineties, the docket was a little bit different than it is today, in one respect. I'll just finish this thought. It's that we had a lot more criminal cases that were coming to our court than we do today. There's a reason for that. The reason is that, number one, this is a federal city. Number two, unlike any other place in the United States, the United States attorney here has the option, often, for example in drug cases and many others, of bringing an indictment in the local courts—which are the superior courts—or the federal district court. So that had the following effect

during the nineties, at least for a period of time. The superior court did not have sentencing guidelines when I first arrived here. So the sentences that were being meted out across the street over here, in the superior court, were far more lenient than would have been meted out in the federal court. As a result of that, the attorney general and the United States attorney for the District of Columbia formulated a policy that had the effect of bringing a lot more criminal cases in the federal court, because of the sentencing guidelines, than today, the situation today. That's changed now, and the reason it's changed is because now the superior court basically follows the same sentencing structure that the federal courts do. When that happened, we lost a large number of criminal cases.

So that's been one change. The other thing is that—it's sort of a negative—our court does not have the kinds of cases that make up the bulk of the docket in every other circuit in the country. We hardly ever get mine run habeas corpus cases. The reason for that is if you get tried in the superior court of the District of Columbia, you've already had the federal review because they're basically a federal court, even though they're not Article 3 courts. We don't get cases dealing with the benefits review board. We don't get immigration cases, which make up a huge docket, a huge part of the docket of the other circuits. We hardly ever get diversity of citizenship cases, because Washington D.C. is a governing city; it's not really a center of commerce. The sorts of disputes you run into in diversity cases, which also makes up a great deal of the dockets of the other circuits, aren't there. We get all the good, and we get very, very little of the dregs of these cases that make up the dockets of the others.

On the other hand, the number of cases that we have can't be just measured by looking at the numbers, because a case here that we have may be equal to ten cases that another circuit hears in terms of volume, and preparation, and degree of difficulty. We have judges here—David [B.] Sentelle, for example, who's just retiring as chief judge, who is—

Q: Is he? I didn't know he was retiring.

Randolph: Yes, in February. Not retiring from the court; he's taking senior status, but stepping down as chief judge.

But he was on the district court in North Carolina, and Karen [L.] Henderson was on the district court in South Carolina. Janice [R.] Brown was a justice of the California Supreme Court, and all of them, particularly David Sentelle and Karen Henderson, also sat by designation on the Fourth Circuit, and they know what the difference is. They could get ready for a day's sitting in hardly any time, whereas you get hit with a couple of the big, enormous regulatory type cases that we get, and it may take you a week to get ready for one case. So that's an enormous difference, and to me, my taste is that that's part of what I enjoy doing. I don't know if that answers your question.

Q: For better or worse, you're going to be—if you went off the court today, you're forever going to be associated with a trilogy of cases that we'll soon get to. If those cases hadn't come along and you had retired tomorrow, is there another one single exceptional case that would be cited as, "This is what Randolph had to say. By god, he's right on the mark"?

Randolph: I can't think of—if I looked at a list I'd maybe have a case that I was particularly proud of. But to give you an example, there is one case that stands out because I got more press coverage, letters, telephone calls, than any other cases that I've ever sat on, including these Guantánamo cases, at least when it came out.

Q: What is that?

Randolph: Well, it was an FAA case, a Federal Aviation Administration case.

Q: In the nineties, I guess.

Randolph: It was in the nineties. Right. It was a case that, for lack of a better description, became known as the Naked Flyers Case—you know, a plane buzzing a town in the middle of the night in Florida and the police go to the airport where they thought it took off and they find a pile of clothing. Anyway, the FAA suspended this guy's license. I wrote that thing. I was snowed in and I had the papers with me. I remember writing it that week. It was reported in the *Herald Tribune*, and I got letters. One of the most interesting letters about that case—I got a letter from an administrative law judge who told me that he had been an administrative law judge for ten years or so, and he didn't mean this as a swipe at the D.C. Circuit, but he was never able to completely get through any of these big administrative law cases that the D.C. Circuit writes. But he said, "That case! I read it through from cover to cover." [Laughter]

Q: What was the outcome of the case? Do you remember?

Randolph: Yes. The fellow lost his pilot's license. It was sort of a mystery story. The case was *Lindsay v.* maybe FAA, or—[*Lindsay v. National Transportation Safety Board*, 1995].

Q: But it was popularly known as the Naked Flyer's case?

Randolph: The Naked Flyer's case. Right.

Q: You say that happened in Florida, but the FAA is here. That's how—

Randolph: That's another example of the nationwide jurisdiction.

Q: That's right.

When George [W.] Bush became president—is it your view that in *Bush v. Gore* [2000], the Supreme Court acted without political concern for the outcome?

Randolph: You know, I have never really thought about *Bush v. Gore*, believe it or not. I know the players and I know the outcome. I don't think I've even read the opinion because it struck me as a one-shot deal, and it involves something that I would never have to concern myself with—about whether the legislatures set the rules for election rather than the state court judges. That's what I thought the gist of the case was, but I'm not really that familiar with it. The one

magnificent thing—not the one, but one of the really great things that George W. Bush did after he came in in 2001 was nominate my wife to be assistant attorney general in charge of the tax division.

Q: That's right. Now what had your wife—whose real name is Eileen, is it?

Randolph: Eileen O'Connor, yes.

Q: Eileen O'Connor. What had she been doing to get that job?

Randolph: Well, like I said, she's a lawyer and a CPA, and she has written a good many articles and given speeches, etc. By the way, she's now head of the administrative law section of the Federalist Society. She was basically practicing in one of these mega-accounting firms. She was with Arthur Andersen, but then went with Grant Thornton. But to give you an idea, I attended her confirmation hearing before the Senate Judiciary Committee, and it was packed, standing room only.

Q: I'm sorry. She became the assistant attorney general for tax. That needs to be confirmed?

Randolph: Oh, sure. That's a presidential appointment. And has to be confirmed, because she headed the tax division. She had six hundred lawyers she was in charge of, bringing criminal cases and civil cases. So the hearing—I took my law clerks up there. I still remember it. Her confirmation hearing became kind of famous in the Department of Justice during what they call

“the murder board.” Do you know what a murder board is? It's kind of like a moot court. They were over there at Justice, getting her ready—and this will give you an idea of what my wife is like—and one of the attorneys who was playing, a senator or somebody, said to her, "I understand you're a member of this Federalist Society," and Lee said, "Yes. Do you want to make something of it?" Which is her attitude.

So the hearing—Myron, I've got to tell you this story. The hearing goes on, and Senator [Patrick] Leahy is citing one article after another, one speech after another that my wife gave, asking her questions about it, just on, and on, and on—and doing it in a rather nasty tone. My wife would say, "Well, can you give me the context of that? You're just reading a sentence or two." He'd say, "Well, we'll move on. We'll move on." But he was pushing, and pushing, and pushing. Finally, he said to her, "Now, Miss O'Connor," and this is all tax material, "you've written that the tax code is much too complicated, and it should be simplified." Then, again, in this nasty tone, "How would *you*, Miss O'Connor, go about simplifying the tax code?" And Lee said, "Well, Senator, the first thing I would do is run for elective office." [Laughter]

Q: From Vermont, or wherever—New Hampshire is he?

Randolph: So Leahy puts both hands in the air and says, "I’ve tried! I’ve tried!" And Senator Hatch has got tears coming down his eyes. The whole place erupted in laughter. From that point on, Lee—she had to go up there and testify a good number of times, but Senator Leahy didn’t push her again.

Q: Now was she in charge of the tax division for eight years?

Randolph: Seven.

Q: Seven years.

Randolph: Right.

Q: Okay.

Randolph: And she argued a case in the Supreme Court, by the way.

Q: But look at all that experience she had with spread sheets that you mentioned before. In any event, had she taken office by September 11, 2001?

Randolph: Yes.

Q: And where was her office?

Randolph: On the fourth floor of the main Justice, on the corner, right below the Solicitor General's Office. As a matter of fact, the tax division office, along with the attorney general and the Solicitor General's Office, is the finest office in the Department of Justice. She had a

magnificent—she could see the Supreme Court from her office and had a fireplace in there. It's just a beautiful office.

Q: And at that time, was she at work on that day, do you know?

Randolph: She was.

Q: And you at work here?

Randolph: I was, yes.

Q: We're sitting here, she's sitting there. How far away is the Pentagon?

Randolph: Far enough to see the smoke rising. Or close enough to see the smoke rising. I was sitting a case with Judge Henderson and Judge [Judith W.] Rogers and we were handed a note. You don't know what's going on in the world when you're in the courtroom. There are no windows and nobody's telling you anything. But one of the court personnel came in and handed us a note, and the note said that the Pentagon had been bombed and the State Department had been bombed. So we suspended the hearing, came back to the chambers, and the instructions were to vacate immediately. My wife was in the Department of Justice across the street from the FBI building, and I called her up and I said, "Lee, you've got to get out of there." She said, "I'm not leaving until I'm sure—." There were tax division offices. They're all over Washington. They're not all just in the main Justice building. She was, with two phones, one in each ear,

calling and telling people to get out, and making sure that everybody did vacate. She said that she wouldn't leave until she was assured that every one of the people in the tax division had already gone.

So we went home, Myron. I still remember that day. I remember coming in and hearing about a plane crashing into the World Trade Center, which brought back kind of a nostalgia for me, because they were just building it when I was commuting to New York to work at Sullivan & Cromwell. It was 1969 and 1968 when it was going up. But I thought, "Well, that's a crazy thing. It must be some little plane or something." But anyway, by the time we got home, this place was in total gridlock. It took forever to get home.

Q: Home being?

Randolph: Where we lived—Bethesda, Maryland. I didn't know what to do, so I went out and I started cutting the grass. I had a riding mower, and I started cutting the grass. Lee came running out and said that Barbara Olson was killed in the Pentagon crash, which was a shocker to us, because this was a Monday and we had just had dinner over at Ted [Theodore B.] Olson's house with Barbara on Saturday. Barbara was supposed to go to California the next day, Sunday, so the idea that she was in that plane on Monday—I just couldn't believe it.

Q: I'm a little confused here. You had dinner on Saturday night. That plane was diverted from Boston, wasn't it?

Randolph: On Monday. Yes. Oh, no, no. No. The plane that crashed into the Pentagon flew out of Dulles [International Airport].

Q: Oh, did it?

Randolph: Yes. Barbara was on it.

So we immediately—I immediately got off the tractor and we drove over to Ted Olson's house in McLean, Virginia. We didn't call, we just went. There were a lot of people there. So we spent the evening reminiscing about Barbara.

Q: How old a woman was she?

Randolph: She was in her forties.

Q: She was working as—

Randolph: She had been an assistant U.S. attorney and argued cases before me. At that time, she was a partner in a law firm that starts with a B. I can't remember—

Q: She was in private practice.

Randolph: She was in private practice. But she was also a radio and television personality. I think that's what she was going to California for, to record something or other.

So anyway, I still remember—Ted Olson has a very extensive wine selection. He has a big wine cellar with temperature control, etc., and he went downstairs and he pulled out the most expensive bottle of wine that he had. I don't know what it was. It was a first growth Bordeaux, and it was a Jeroboam, which is a very large thing—

Q: Certainly wasn't a Federalist Society bottle.

Randolph: No, it was not a Federalist Society. I said, "Ted, you don't want to—don't do that. Have it some other time." He said, "No, no." He insisted. I remember pouring glass after glass. Our friend Tim O'Brien—do you know Tim?

Q: The novelist?

Randolph: No. He was the legal commentator for ABC News for a long time.

Q: Oh, yes. Yes.

Randolph: I remember Tim holding his glass out, and he had broken the bottom stem off, and here goes a couple thousand or maybe more bottle of Bordeaux into this broken wine glass. I thought it was symbolic of something. I'm not really quite sure what.

Q: At that time, in ensuing months, let's say, as it became clear, or clearer, what had happened, who was responsible, and the United States sent troops over to Afghanistan to pursue Al-Qaeda—at that time, did you think there was going to be a role, inevitably, for the federal courts in all of this pursuit?

Randolph: Absolutely not. No.

Q: People weren't talking about that, saying, "We'll get our hands on this somehow or other."

Randolph: I couldn't imagine how anything involving a war in Afghanistan and an attack on the United States was going to turn into a federal litigation in our court. It was kind of unimaginable, to me anyway.

Q: Did you know David [S.] Addington at that time?

Randolph: I'd never met David. I know who he is.

Q: John Yoo?

Randolph: I knew John. John clerked for Judge [Laurence H.] Silberman on our court. I interviewed him for a clerkship and I was very impressed by him. He went to Yale. You can't tell much of anything about law school students at Yale by looking at their transcript because it's

pass/fail/honors. But I knew of John Yoo for another reason because he'd been a reporter for the *Wall Street Journal*—I don't know that I've seen that written—and he wrote what I thought was one of the absolute best pieces on, of all things, the deterioration of highways in the United States as a result of the trucking industry, particularly in the South, when the roads get soft. The reason I came upon and knew that article was because the last case I argued in the Supreme Court of the United States was in I think April. I think I reargued it in April, right before my nomination in 1990, and I was hired by the governor of a state that you may be familiar with—Arkansas—and the governor was Bill Clinton. I argued that case for the Clinton administration, and it dealt with trucking and taxes on trucks. I won. So I knew John Yoo. I didn't really keep up with him. I think he clerked for Justice Thomas after—

Q: I think so. Yes, I think so. Right.

Randolph: But I hear from him every once in a while. He just sent me a book. This one, which I haven't read.

Q: *Taming Globalization.*

Randolph: Right.

Q: My point is, Ted Olson, at that time was he solicitor general?

Randolph: Yes.

Q: Were you familiar with that part of Justice called the Office of Legal Counsel?

Randolph: Yes. That used to be part of the Solicitor General's Office. You know how I became familiar with it? Because when I first went to Justice in 1970, the office that was right next to mine—well, I had moved. I first was next to J. Edgar Hoover but then moved. There was a fellow in there that I got to know pretty well who was the head of the Office of Legal Counsel, and I thought a pretty good fellow. His name was William [H.] Rehnquist.

I'll have to tell you a story about that. When he got put on the court, and then the Nixon papers—remember the Nixon papers came out? They were transcripts of the tapes, the Watergate tapes, and they had a lot of expletive-deleted stuff? There was one little sequence where Nixon was talking about if the tapes ever went to the Supreme Courts, they were counting votes up, and Nixon on the tape or on the transcript was heard to say, "Well, what about that guy, Renchberg?" [Laughs] So, Myron, from that point on, from that point, Justice Rehnquist, God rest his soul—everybody in the SG's office, all the deputies and all the assistants and so on, we always referred to him as Justice Renchberg. I'm sure he knew about it. But there was always that danger when you were arguing a case before the court, you would get a question from Bill Rehnquist and say, "No, Mr. Justice Renchberg." I thought, "Oh, god, if I ever do that!"

Q: In any case, I can rest easy that over the next year or two you knew nothing about memos that were being written in the Office of Legal Counsel in the Justice Department.

Randolph: No.

Q: Your wife didn't happen to say, "You know, I ran over to John Yoo over there, and he told me blah, blah."

Randolph: No.

Q: In January of 2002, the first of what came to be known as the Guantánamo detainees were brought to Guantánamo Bay. They were widely depicted. First of all, there were photographs—I'm sure you saw them—of these people down there in orange jumpsuits, goggles and what have you, these detainees being brought off planes. Or perhaps you don't remember?

Randolph: I don't recall seeing them.

Q: They are photos that were repeated over, and over, and over the years, even though the place changed. They were portrayed that way.

Randolph: There were a series of demonstrations out in front of our courthouse where people were wearing orange jumpsuits, etc.

Q: That's right. So they were brought in January 2002, and they were repeatedly characterized by Dick [Richard B.] Cheney—did you know Dick Cheney?

Randolph: I knew Dick Cheney, yes. He sat next to me, because when I was special counsel to the House Ethics Committee—the committee on codes of conduct—Dick Cheney was, at that time—it was 1980, and he was a first-term congressman. So he sat in the junior seat, and my seat in the executive sessions was right next to Dick's.

Q: What was the issue there?

Randolph: I did two investigations. This is 1980. One, I went undercover to South Africa for the House of Representatives to determine whether a congressman, who had been entertained and wined and dined over there by a so-called university, really knew that the South African government was funding all their entertainment and so on. If they knew it, it was a federal criminal offense. The other thing I investigated for the House of Representatives was the Iranian revolution. The Iranian embassy here in Washington—it's hard to believe now—was the nightlife center of Washington D.C., with gala parties and all kinds of famous people—actors, actresses, etc. from Hollywood. It was run by the ambassador, Ardeshir Zahedi, and when [Ruhollah Mostafavi Musavi] Khomeini took over and ousted the Shah [Mohammad Reza Shah Pahlavi], they put in charge of the Iranian embassy a fellow named [?Rohani?], and in short order he made an announcement that—it was front page headlines—he had found evidence that the Shah and Ardeshir Zahedi were bribing American congressmen. So I conducted that investigation in addition.

Q: Is this when you met Dick Cheney?

Randolph: Well, I met Dick Cheney because what I was doing—well, I not only met him, we had these dealings—and one of the things I started doing was getting guest lists from the Iranian embassy and subpoenaing bank records from the American congressmen who frequented the embassy to see if there was any unexplained cash going into their accounts. Unfortunately, it seemed like every one of the congressmen's whose bank records I was subpoenaing was a friend of Tip [Thomas P.] O'Neill's [Jr.], who was the speaker of the house. I had to get approval from the committee to issue a subpoena—I couldn't do it on my own—and I kept getting voted down. I mentioned this to Dick Cheney a number of times, but one of my most vivid memories is—I was just a young guy—I was showing my emotion as the votes were coming in against me to issue subpoenas, and I kept sinking, apparently, lower and lower in my chair, and Dick Cheney grabbed me and said, "Ray, don't worry about it. In Congress, it's not whether you win or lose; it's how you place the blame." [Laughter] "It's not whether you win or lose; it's how you place the blame." No truer statement has ever been uttered.

Q: Now that was around 1980 and you've known him since.

Randolph: I see him, used to see him at various—

Q: You were close to Bob Bork. You were close to Ted Olson, were you not?

Randolph: Right.

Q: And Barbara Olson, not to Dick Cheney.

Randolph: Not to Dick Cheney. No.

Q: But in any event, when these detainees arrived, Don Rumsfeld, whom you profess you have never wrestled against, and Dick Cheney, and General [Richard B.] Myers, chairman of the Joint Chiefs I think, at that time, were describing these newly arrived detainees as "the worst of the worst," and they used other phrases. General Myers went so far as to say, “these were the kinds of people who would chew through hydraulic lines on planes to bring them down,” as they came toward Guantánamo. Famously, later on, Colonel Morris [D.] Davis, who was the chief prosecutor of the military commissions at one time, but who quit in protest, said that, “These people couldn't gnaw through a boneless chicken, much less a hydraulic line.” [Laughter]

In any event, did you follow that? At that time, did you follow the descriptions of these people as the "worst of the worst?" I don't want to put words in your mouth. You tell me. I'd like you to tell me what sense you had of who was down there at Guantánamo.

Randolph: I didn't have any that I recall. I read the newspapers, I guess, like everybody else does, and listened to reports and things like that. But I don't think it left a lasting impression on me about who was there and what they were like or anything.

Q: What they had done? How they had been chosen to be there, as opposed to somebody else?

Randolph: I didn't have any idea, really.

Q: This is before *Rasul* [*v. Bush,* 2004]. You're not that concerned, is it fair to say?

Randolph: Not concerned?

Q: Not *that* concerned. In other words, you weren't spending your time—even though Barbara Olson was killed in one of those planes, or for any other reason. Were you spending much time thinking about this?

Randolph: No.

Q: Okay. At that time, the detainees—

Randolph: You know, I'm thinking back now, Myron, and 2001 in the fall was a very trying time for me. My younger brother died in October, and he had been taking care of my mother. My mother had had a series of strokes and I was spending—I don't think I really got any opinions out that I can think of during that fall. I could go back and check. But my mother lived in New Jersey and now suddenly was alone. She had a history of falling, and strokes, etc. She couldn't drive anymore. So I was pretty much beside myself, and I was driving back and forth from this area to New Jersey, it seemed to me like three times a week. It was a three to four hour drive one way, and trying to figure out—reading about something I'd never heard of—which was assisted living. I had no idea. So I was spending all my time doing that. Finally, I got my mother one of these things you put around your neck, and if you fall you push the button and neighbors come. That

was happening with increasing frequency. Where there was one emergency after another. I can remember—I think the last time it happened was about mid-November, and I finally just sort of gave up because I couldn't talk her into going to an assisted living place. So I brought her here to our home and she stayed with us.

To make a long story short, I got her—she loved to play cards, and I got her into a card group at an assisted living place, and finally she said, "This is not so bad. I kind of like it." It was before Christmas, sometime in early December, I guess, that I spent a week moving her furniture, and saving things, etc. I hadn't thought about this, but none of what you mention rings a bell. I was concentrated just on that, solving that problem, not dealing with the law so much.

Q: In 2002, these detainees down there would eventually number, over time, 779—over time, over the years. But these detainees down there did not have contact with lawyers. In fact, in many cases, it was barely known by people where they came from that they were, in fact, in Guantánamo now. But in any event, something called the "next friend"—if you will tell history what that is, somehow or another some of these detainees got a petition or whatever it's called before a district court here in Washington. How were they able to do that if they didn't have lawyers?

Randolph: Well, what I'm about to tell you I have read. I didn't know it the first time the cases started cropping up in our court. Where I read this I don't recall. I think it was the newspaper. But the lawyer who argued the first group of Guantánamo cases before our court was a fellow named Tom [Thomas B.] Wilner. He was from the Shearman & Sterling Washington office, and

Tom was a classmate of mine in law school, and a good friend. We played golf together. I know his wife Jane. She had a series of shops—the Jane Wilner Collection—and sold home goods—sheets, pillow cases, and all that kind of stuff. Tom was a good buddy.

Q: Here in Washington?

Randolph: Yes. So what I heard, or what I read, was—you're wondering how they wound up with lawyers—that the first group of detainees that reached our court were all Kuwaitis, and the Kuwaiti government had hired Shearman & Sterling to represent them. So this was not a pro bono case. It was, in fact, a paid—and probably rather lavishly paid—series of clients that had these cases, or had these lawyers. I don't know if that answers your question or solves the mystery.

Q: At that time, who was the petitioner or the client? Is it the detainee? Is it the Yemeni government?

Randolph: Well, they weren't Yemeni. I think they were Kuwaiti.

Q: I mean the Kuwaiti government.

Randolph: I don't know who the client is, but I know who the petitioner is. The petitioner is, in fact, the detainee. But the petition for a writ of habeas corpus is brought by the next friend, which is an ancient form of action. I think I found a case that recognized it, and in the opinion—

not the *Rasul*. The case got renamed when it went up to the Supreme Court—but in my opinion in *Odah*, which I haven't looked at for a while, I think we recognized that that was a proper way of bringing the case.

Q: Okay. As you say, the *Rasul* case—what is known really, as the *Rasul* case everywhere, began in district court here, as *Fawzi Khalid Abdullah Fahad al Odah, et al, v. the United States of America* [*Al Odah v. United States*]. Do you recall who the lower court judge was—the district court judge on that?

Randolph: Was it Emmet [G.] Sullivan? Do you have a copy of the opinion there?

Q: Yes. In my hands.

Randolph: Well then it will say on the back of it—here. It should say.

Q: I've read some of these opinions where the district court is always referred to as "the district court," but not by name of the judge.

Randolph: Well, you know, I follow that tradition in this court of not naming, except when I think the district judge has done a really outstanding job and done things that assist us—like writing opinions in summary judgment cases, which they don't have to do. It was [Colleen] Kollar-Kotelly. Do you see in the first paragraph, where—may I borrow your opinion and I'll

show you where you look to find that answer? Oh. You've got a different appendix. Well, they took out the—it was Kotelly.

Q: Is that a man or a woman?

Randolph: A woman.

Q: Is it Colleen?

Randolph: Colleen. Yes.

Q: In any case, she ruled. She, a single district judge, ruled how? Do you recall?

Randolph: I don't remember, no. I was going to try to do this from memory, but you're asking me questions that—

Q: Alright. You reversed her.

Randolph: No, we affirmed her.

Q: I beg your pardon, I am looking at something else. There's a lot of paperwork here.

Randolph: I'm looking at it now. And *al Odah*, which was the first case that was fathers and brothers of twelve Kuwaiti nationals detained at Camp X-Ray in Guantánamo, brought the action.

Q: That's right. Now she denied their habeas petition. She said that the detainees did not have jurisdiction. That was appealed through to this court here, this circuit court, and you were on a panel with two judges, Garland—that would be who?

Randolph: Merrick Garland.

Q: —who was also a Friendly clerk at one time, wasn't he?

Randolph: That's right.

Q: And Williams. That would be—

Randolph: Stephen [F.] Williams. Garland was appointed by Clinton, Williams was appointed by Reagan, and I was appointed by George H.W. Bush.

Q: And you rendered an opinion, a unanimous opinion—three to nothing—upholding the denial. Is that correct?

Randolph: Right.

Q: Now just for historical purposes here, these cases, at a lower court level, or district court level, are heard by single judge. When they're on appeal—laying aside en banc, later on if that ever arises—when they're on appeal they are typically by a three-judge panel.

Randolph: Right.

Q: How are those three judges chosen for a case?

Randolph: It's a random draw.

Q: Who does that drawing?

Randolph: The clerk's office.

Q: Is there something like a wheel or something?

Randolph: There is. What happens is—we're right in the process of doing this now. We set up a calendar for the next term, which will begin in September of 2013, and that calendar—the only thing that calendar has on it are the days that I will sit with whatever other two judges, for the entire year, from September through May. But there are no cases that are plugged into that. Then what happens—I will know in probably another week or two what days through September 2013 to May of 2014 I'll be sitting, and I'll know, also, what judges I'll be sitting with. What we do—

there is a very sophisticated computer program that tries to maximize the number of different judges that I'll sit with. If you have twelve judges, then you have—you can do the calculation—they sit in panels of three. The formula is twelve, by eleven, by ten. You multiply twelve, eleven, ten, and then you divide it by three, because it doesn't matter whether it's ABC, or CBA, or whatever. So that's the number of panels. And what does that come to? Two hundred and something. Then, after that's done by this computer program, the clerk's office starts putting cases into the slots on the basis that—it's a complicated formula, again. Certain cases have priority. Like preliminary injunction cases, by statute, have to go to the front of the line. The same with criminal cases. What the clerk's office does is start plugging the cases that are ready for argument into the sittings of the various judges. So we'll get a list generated of what cases are coming up, etc., etc., and the clerk's office also does a screening, because all of us have recusal lists because of one thing or another—because of stock, or close to a corporation, or—

Q: —or a wife in the Bush administration at a high level?

Randolph: Yes. I didn't sit in on tax cases for seven years.

In any event, so that's basically the way it works.

Q: In other words—so this is clear historically—there is no opportunity for a judge to, say, go down to the clerk's office and say, "You, Mr. Clerk. That's a hot case. I'm interested in that subject. Put me on that panel."

Randolph: Absolutely not.

Q: Absolutely?

Randolph: Absolutely not.

Q: Nothing like that has ever happened, as far as you've ever heard?

Randolph: I am absolutely certain that has never happened, in the twenty-two years I've been here.

Q: But on this *Rasul* panel, these three people—yourself, and Judges Garland and Williams—were chosen by the method that you described, and in *Rasul*, or *Odah*, as it was known at that time, was the first case, was it not, coming out of Guantánamo Bay?

Randolph: I believe so, yes.

Q: What did you rule?

Randolph: Well, we talked before about the idea of originalism. But we didn't have to go to that because the argument before us was of the habeas corpus statute, which has been in the same form for years and years and years—conferred jurisdiction on the district court to decide whether these individuals were being held in accordance with the law. And there was a Supreme Court

case directly on point, so, basically, what we did was what you learned to do in law school, and what you do as a judge. When you're a judge on what the Constitution calls an "inferior court," we have to follow the precedents set by the Supreme Court, so we analyzed the *Johnson v. Eisentrager* case and concluded that there was no significant difference between that case and this one. That case arose in World War II, after World II—actually during World War II, because the war didn't officially end until 1952, I think it was—and the Supreme Court there ruled that aliens, without any property or presence in the United States, being held abroad, number one, had no constitutional rights. And number two, were not entitled to the privilege of litigation in the United States under the habeas corpus statute, the very statute that had been invoked in our case, to establish jurisdiction.

Q: Well, actually—what *is* habeas corpus?

Randolph: Well, it's an ancient writ derived from English practice that requires the custodian of an individual prisoner to make a return and justify the legality of detention, or the custodian's holding of the prisoner. The way it was done—

Q: Why can't that just be done on a regular appeal?

Randolph: The way it was done, usually, in England, was that the body of the prisoner—which is where *habeas corpus* comes from—had to be produced before the court that issues the writ. Then, whatever the paper was that the custodian of the prisoner produced, saying, "I'm holding this individual for a violation of the king's statute such and so, etc.," that return would be

examined by the court, and if it were found to be proper, then the writ was dismissed. That was the usual procedure. The great innovation in English law, which has some bearing on some of these cases, was the habeas corpus statute of 1679, I think it was. Because what was happening in England, historically, was the jailors were ignoring the writs that were being issued by the courts in England. The courts would have to issue one after another, and then, probably, the third time around the jailer would respond. So to get around that, the Habeas Corpus Act of 1679, which was called the great bulwark of liberty back then, set up a series of fines. If the prison were five miles away—I'm just making these numbers up, because I don't remember all that detail—but if the prison were five miles away then the jailer had one day to produce him. If they were ten miles away, the jailer had five days to produce them. If they were one hundred miles away, the jailer had twenty days to produce him. And if the jailer didn't within that period of time—

Q: —produce the detainee?

Randolph: —produce the detainee. If the jailer didn't do it within that period of time, then the jailer was fined until he did produce him. So there was a pretty good incentive for the jailer to comply and produce the prisoner before the court, for the court to examine the propriety of his being held. That has significance. That whole history has great significance.

Q: We'll come back to that, actually. But when the matter of *Rasul* came before Judge Colleen Kotelly, she cited the *Eisentrager* case of 1950, the United States Supreme Court case in 1950. And you developed that even further on appeal, in your opinion that was rendered on March 11,

2003, in which you upheld her. Now clarify for me, if you can—this was a statutory matter, was it not?

Randolph: Exactly.

Q: It did not involve the Constitution.

Randolph: No.

Q: Correct me where I go wrong here. Could the detainees' lawyers have made it a constitutional issue? In other words, who decides—what we're looking at is Section 2241 of whatever it is of the U.S. Code—that is the Habeas Corpus Act. Who decides that? You? Colleen Kotelly?

Randolph: The petitions for writs of habeas corpus rested on the statute and the statute alone.

Q: Because?

Randolph: Because there was no other basis for jurisdiction. How does somebody who is being detained—somebody who is being detained in France on a military base. Do they file a writ of habeas corpus? If they do file a writ of habeas corpus, they have to invoke the court's jurisdiction in the first part of the complaint. So the court looks to see whether it has jurisdiction. *Eisentrager* held that it doesn't—that a court in the United States doesn't have jurisdiction.

Q: But when *Rasul* ultimately leads to *Boumediene* later on, it becomes a constitutional issue, does it not?

Randolph: It does.

Q: But it wasn't a constitutional issue in the first impression here, back in 2003.

Randolph: Right.

Q: And you cited extensively in your opinion the proposition that *Eisentrager* made it clear that these people didn't have a leg to stand on in terms of getting the habeas corpus privilege before a U.S. court, an Article 3 court.

Randolph: Right.

Q: Now, if we can do it very concisely, [Lothar] Eisentrager was a German, was he not?

Randolph: Right.

Q: After Germany surrendered, there were a score of German nationals, civilians, I believe, who were working for the German government in China, who were helping the Japanese figure out American troop movements. This is after Germany had surrendered. They were arrested by the Americans, they were tried by a military commission—stop me where I make a mistake—tried

by a military commission, convicted in China by an authorized military commission, authorized by the United States Congress, as a matter of course, and also approved, I think, by the government of China—whatever it was at that time. They were convicted, and they were transferred to Landsberg Prison in Germany—the prison that you have pointed out Adolph Hitler served time in, in the 1920s. Now we're in the 1950s. They were transferred to Landsberg Prison, they were held there, and this fellow Lothar Eisentrager, on behalf of himself and others, brought a petition for a habeas corpus in federal district court in Washington, D.C., the United States of America. That went up to the Supreme Court, and with Justice [Robert H.] Jackson writing the majority opinion, the court denied that habeas petition. Is that essentially the situation?

Randolph: Yes. Well said. You've captured it. That's precisely what happened, with a wrinkle here and a wrinkle there—maybe not a wrinkle, but I think of great significance is that the district court, or the lower court here in Washington—I think it was the court of appeals that did this. The reasoning of the court of appeals saying that they did have jurisdiction under—

Q: This court of appeals.

Randolph: Yes—that they had jurisdiction under the habeas statute was their reading of the Fifth Amendment. If you don't have any constitutional rights, then it's hard to see what habeas entails because the argument—the petition was that they were being held in violation of their Fifth Amendment rights because the military commission didn't try them correctly, and this, that, and the other thing—due process rights. As I recall, the court of appeals here held that these individuals being held in Germany had rights under the Fifth Amendment, and the reasoning was

because the Fifth Amendment applied to "any person" as entitled to due process, and these were "any people." That argument was flatly rejected by the Supreme Court—and you're right, it was an opinion by Justice Jackson, the former Nuremberg prosecutor—flatly rejected on the basis that, and I'm looking at what I'm quoting from—"If the Fifth Amendment confers its rights on all the world, it would mean that during military occupation, irreconcilable enemy element, guerrilla fighters, and werewolves could require the American judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment; the right to bear Arms, as in the Second; security against unreasonable searches and seizures as in the Fourth; as well as the rights to jury trial, as in the Fifth and Sixth Amendments. The reasoning of the Supreme Court was in direct response to the reasoning of the court of appeals, our court, that there was habeas jurisdiction because the Fifth Amendment conferred rights on 'any person.'"

Q: So the detainees, represented by Tom Wilner and others, these Kuwaitis—Al Odah and the others—they lost in the circuit court here for reasons you've stated, and they appealed to the United States Supreme Court.

Randolph: Well, it's not an appeal. It's a petition for a writ of certiorari.

Before we leave our court and get to the Supreme Court, you mentioned Tom Wilner, and I remembered something that had slipped my mind. His oral argument before us was, to put it mildly, strange. It was a very strange argument. As I told you, Tom's a friend, so I'm giving you an objective—he stood up and he said, "I don't have any presentation to make, but I'll answer any questions you might have."

Q: No?

Randolph: Yes. If you've got the transcript of the argument, I'm sure that is exactly what—

Q: He was the lead attorney?

Randolph: Yes. He presented no argument. He just stood up and said, "I'll answer your questions."

Q: I'll have to look that up.

In any case, it goes up to the Supreme Court on a writ of certiorari and the Supreme Court takes the case. And they decide it in June of 2004. What, essentially, did they hold? I mean, you had a lock on this thing, right? *Eisentrager* was clear as a bell. What happened?

Randolph: Well, my good friend Justice [John Paul] Stevens sort of maneuvered the case into a posture that the case was not in. I think the world of Justice Stevens, by the way, but what happened—Justice Stevens was a law clerk to Justice Whittaker—

Q: Justice [Wiley B.] Rutledge.

Randolph: Was it Rutledge? Okay. Yes.

Q: Who dissented in *Ahrens* [*v. Clark,* 1948]—

Randolph: Well, you know the story. There was a case when he was clerking, dealing with the jurisdiction under habeas, and his judge—Rutledge, I'm sure you're right—dissented, and then a number of years later the Supreme Court reversed in a case called *Braden* [*v. 30th Judicial Circuit Court of Kentucky,* 1973] dealing with the jurisdiction under habeas. The only problem with that—and that's basically what Justice Stevens got a sufficient number of other justices to agree to, so he had a majority. There are a couple of points. Number one, those cases—*Ahrens* and *Braden* were never mentioned in any brief that was filed in our court, despite amicus briefs from law professors. Nobody ever mentioned it. They were never cited in the briefs that were filed in the Supreme Court. Justice Stevens started asking—I'm told; I haven't looked at the transcript—about those cases, and the attorney who was then up arguing for the detainees didn't have a clue what he was talking about.

That's number one. Number two is that *Johnson v. Eisentrager* did not even cite the *Ahrens* case in coming to the conclusion that there was no jurisdiction under habeas corpus. And number three, the basis of *Eisentrager* was the Fifth Amendment proposition, the due-process proposition, that the individuals being held at Landsberg didn't have any constitutional rights and, therefore, because of that, could not bring a petition for a writ of habeas corpus.

Q: All right. But wasn't there a majority—I think it was six to three in *Rasul*—wasn't there a majority for also, in the Supreme Court opinion, for the proposition that Guantánamo Bay was a

place that was, if not exactly a sovereign territory of the United States, was a territory over which the United States had sufficient jurisdiction to enable these people to bring a writ? Wasn't that one of the elements?

Randolph: No. You have to understand, the determination of sovereignty is not, has not, and never was a matter for the courts to decide. That was a question that the political branches determined. There was a case—I haven't thought about this, Myron, in quite some time, but I think there was a case from Bermuda involving a military base, a U.S. military base in Bermuda, that was almost directly on point. We occupied the Guantánamo Bay under a lease with Cuba and tendered a check to them every year, which they refused to cash when [Fidel A.] Castro came in. But, nevertheless, whether Guantánamo was part of the sovereign territory of the United States was not a judicial question.

Q: Well, that's what you say.

Randolph: That's what the Supreme Court said in that Bermuda case. What is the name of it?

Q: But in *Rasul*, the Supreme Court says—the question is—these two cases, meaning *Rasul* and *Odah*, now called *Rasul*—"these two cases presented the narrow but important question whether the United States courts lacked jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad, in connection with hostilities and incarcerated at Guantánamo Bay Naval Base, Cuba." That's at the very beginning. On page six, "The question now before us is whether the habeas statute confers a right to judicial review of the legality of

executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction but not 'ultimate sovereignty.'"

If I understand what you're saying—what your colleagues would have said—is that the question of sovereignty is clear. Cuba exercises sovereignty over Cuba, and, moreover, it's not for the courts to decide, in any case, whether sovereignty is or not—that's for the political elements of the United States government, or other governments, to decide. But still and all, the Supreme Court didn't see it that way. And the strange thing is—I'd like you to take a look at this. I don't know where in the world how this came about. I was in Florida not long ago and someone showed me a book on Guantánamo, the history of Guantánamo Bay—not this particular issue—a history of Guantánamo by Professor Jonathan [M.] Hansen. It was a heavy volume. I just glanced at it and I came back to New York. I don't know why I've got this, but this is an article that this very same Hansen wrote in April of 2004 about the historical record in Cuba. If you look at what I underlined there, he is saying—and he's spent a lot of time investigating the history of Cuba—he is saying there, on the following page, that Cuba never exercised sovereignty over that part of the Cuban island called Guantánamo Bay. That historically, it isn't true, even though, under the Platt Amendment or something, it says "sovereignty," and even though we send them a check, the historical record is that they *never* had control, after the Spanish American War, of that area.

Randolph: It doesn't matter. It doesn't matter. Since you're showing me that—I just looked up the Supreme Court case I was referring to. It was called the *Vermilya-Brown Company v. Connell*, [1948]. It dealt with a naval base in Bermuda controlled by the United States under a lease with Great Britain. The Supreme Court held that was outside the United States territory, or

sovereignty, and the court compared the lease in Bermuda with the lease with Cuba for Guantánamo Bay, and the fact that it granted the United States, substantially, the same rights as in the Bermuda lease. And then the court held "the determination of sovereignty over an area is for the legislative and the executive departments."

So it's a clear holding—

Q: What year was that case?

Randolph: 1948. The other thing is—the reason I said it doesn't matter is because the Congress of the United States and the president of the United States, long before these cases arose, had already decided that there was no U.S. sovereignty over Guantánamo Bay; that it was Cuban sovereignty. And the way the Congress and the president decided that were two treaties, one executed in 1903 and one executed in 1934, both of which recognized Cuban sovereignty over that territory. So there it is. You've got a Supreme Court holding, clearly, that it's up to the political branches, and you've got the political branches making the determination. Later, of course, in later legislation—later than *Rasul*—the Congress of the United States, in a statute signed by the president of the United States, made it unmistakably clear that the United States doesn't have sovereignty over Guantánamo Bay.

Now the issue of control is another thing, but how do you distinguish that from the Landsberg Prison thing?

Q: Well, they did, didn't they? They did.

Randolph: They did?

Q: That's what the Supreme Court did. They held, in the end, that contrary to—they didn't reverse *Eisentrager*, if I understand correctly. They sort of pushed it over there in the corner and said, "Well, the circumstances of these German nationals who got a trial, an authorized trial, and presented witnesses, and had lawyers and all—that's different than the situation down there in this never-never land of who-knows-who's-down-there? And we're going to give them habeas rights because the U.S. exercises sufficient control over these people."

Randolph: What is this "sufficient control" over these people, I mean—?

Q: I forget the exact language. I'm trying to do this—you know what I'm talking about. They cited various factors that Jackson cited in his opinion in *Eisentrager* about the kinds of things, the reasons why these Germans did not have the privilege of the writ, and they sort of left it aside. It would come up later on, again.

The only thing I wanted to say, really, today, is that with regard to *Rasul*, with regard to *Rasul*, this opinion, in which they are saying, “Okay, these people can petition for writ of habeas corpus—”

Randolph: —under the statute.

Q: Exactly—"under the statute." This came nine months or so, or whatever, after your opinion, a year after your opinion in 2003, in the matter—it came a couple of months after the release of photographs from Abu Ghraib. Do you remember seeing those photos from Abu Ghraib?

Randolph: I do.

Q: And a discussion about them, and what—? Was this the first revelation, to you anyway, or as far as you know, just generally speaking, that U.S. troops were doing something to people in prisons that some Americans might object to?

Randolph: Well, that was certainly objectionable. I don't know if it's a first revelation. I think things like that may have well gone on during World War II. I just don't know.

Q: Probably during Vietnam, also.

Randolph: But where was Abu Ghraib?

Q: It was in Iraq. That's a whole interview. That's a whole interview about who was in Iraq from Guantánamo Bay. General [Geoffrey D.] Miller and others—that's another issue. What I'm saying is, do you think it could have influenced—

Randolph: Oh, I don't know.

Q: —the court?

Randolph: I don't know. What you have to understand about habeas corpus—influence? Who knows? But, the fact of the matter is that habeas corpus—and I could cite cases, if you gave me a little while—is not, and the Supreme Court has decided this on a number of occasions, cannot be used to complain about the conditions under which people are held. So what was going on—number one, it was in Iraq. And number two, habeas corpus couldn't have cured it at all because you can't complain about conditions of confinement. If you have a problem with conditions of confinement, you have to bring your case under the cruel and unusual punishments clause of the Eight Amendment, and not habeas corpus.

Q: Right. I appreciate your pointing that out. I didn't mean to confuse the two. In fact, it's my understanding that, to this day, the Supreme Court has not dealt with the issue of alleged mistreatment of detainees held by the United States since 2001.

Randolph: No, I don't think it has. Our court has.

Q: In any event, I just meant to get the point to you. Someone like yourself might have overheard some justice say, "You know, we did that thing in *Rasul*. Did you see those pictures that just came out at the same time that we—?" Actually, the day of oral argument in the Supreme Court—

Randolph: —was when they came out?

Q: —was when the pictures came out. But you don't know anything?

Randolph: Well, I don't know if they had an influence or not, but I do know that habeas corpus wouldn't have solved it. Number two, we've had cases trying to extend the Supreme Court's ruling on habeas jurisdiction to places like Iraq or Afghanistan, etc. I was not on those panels, but they held that there was no jurisdiction. Our court has held that; the Supreme Court has never taken a case to say otherwise.

Q: Is it *Al-Bihani* [*v. Obama*] that you're thinking of?

Randolph: I can't remember.

Q: We're going to get to that. In our next session, I want to roll fairly fast, if I can.

[END OF SESSION]

VJD | Session Three

Interviewee: A. Raymond Randolph | Location: Washington D.C.

Interviewer: Myron Farber | Date: January 17, 2013

Q: This is Myron Farber on January 17, 2013, continuing the interview with Judge A. Raymond Randolph of the United States Court of Appeals, D.C. Circuit, in his office in Washington.

Judge Randolph, I noticed in yesterday's *Times* that some poll—apparently some Republicans got together in Manhattan to discuss life. "Did you hear about the poll?" asked Representative Charlie Dent, Republican of Pennsylvania. "Congress is now rated slightly above or below cockroaches and colonoscopies." Then the *Times* adds in parenthesis, "Actually, it was below." [Laughter]

From time to time I have seen—especially embarking upon this project—the polls of the Supreme Court declining; the favorability view of Americans toward the Supreme Court of the United States. I think it dipped really precipitously in the last couple of years. Before we get back to where we left off yesterday, can you give me some feel for how you've seen the Supreme Court change—if at all—not just "this justice came or that justice left," but whether—you've been here in Washington a long time—whether your sense of the Supreme Court, as what it's supposed to be, has altered at all.

Randolph: Well, the way oral arguments are conducted has changed a great deal from when I first started in 1970, until today. The output that the public sees are the opinions—I think there is

more slash and burn in the opinions than there has been in the past—although I couldn't prove it. I think the opinions are longer than they were. It's interesting that you ask that question. At one point I may well do this, now that you've prompted me. The Supreme Court, when I first came to Washington and started arguing cases in the Supreme Court, which was 1970, the court was hearing one hundred and fifty or so cases on the merits—oral arguments—each term of court. Now it's gotten to the point where they're hearing less than half of that. They're hearing seventy-five cases a year. The survey I was going to do—I'm looking now at my bookshelf with Supreme Court reports on it—the survey I was going to do was to determine the number of pages for each term that the court put out when they were hearing a hundred and fifty cases as opposed to the number of pages they put out when they were hearing seventy-five cases, as they're doing today. My suspicion is that there's not very much difference.

But whether the public has any kind of appreciation of that, other than the reporting that's done on the Supreme Court, I just don't know.

Q: By the way, if I haven't asked or mentioned it before, I believe you appeared twenty-three or twenty-four times before the Supreme Court, I guess, for the main part, when you were at the Solicitor General's Office, twice, and won twenty cases?

Randolph: It depends on how you count.

Q: Well, it's close to that, isn't it?

Randolph: Yes. The last two cases I argued, first in 1973 and the last case I argued in the Supreme Court, I lost. I can't even remember the name of the case. Anyway, it's been roundly criticized by the Law Reviews ever since. It was a [William O.] Douglas opinion. Then the last case I argued, when I was deputy solicitor general, I lost. It was a case called *U.S. v. Chadwick* [1977]. The Supreme Court ultimately overruled it. But then I lost half of one case, a case called *Ruckelshaus v. Monsanto* [1984]. I was representing Monsanto. And I lost half of another case called *U.S. v. Murray* [1988], I think it was. So I guess one half, and one half, plus two equals three. [Laughs]

Q: While, an acceptable record. Certainly the guy who was number two at Penn when you were number one would have agreed with that.

But when you say the oral argument has changed—in what respect?

Randolph: Let me just tell you, first of all—I don't follow transcripts of arguments, although they're now online. They weren't, back when I was arguing. In fact, the recordings of all the arguments are now available. Back in the 1970s, you had to have special permission as a historian to even get copies of the recordings of the argument. My clerks, a few years ago, gave me a book of CDs of every argument I had in the Supreme Court.

Q: Wonderful.

Randolph: I thought it was a very touching gift.

Q: Right.

Randolph: Just really lovely. I happen to every once in a while pull one out and just sort reminisce, get the fire going and so on and so forth. But here's the difference. In 2002 or 2003, or whatever, my wife went up to the Supreme Court to argue a tax case and I decided I'd go and watch her. It was a pretty excruciating experience for me because before I came on the court—on this court—I was used to answering questions from the justices. Now that I'm on this court, I'm used to asking the questions. And here I was. I sat on my hands. I couldn't do either one with her. [Laughter] She stood up—and I had been told this, but never really witnessed it—and said, "Mr. Chief Justice, may it please the court—," which is the usual opening, and before she got another word out the questioning started. It was a half an hour a side. She hardly had any opportunity, other than in response to a question, to get out a coherent presentation. That I found troubling, and the reason I found it troubling is that my experience had been that, in preparing for an oral argument, even though you've got all the briefing done, there are thoughts that come to you and ways of putting things that escape attention in the brief and maybe focus the case a little bit better. It's very hard to do that when you're spending all your time fielding questions from the left side of the bench, and the right side of the bench, and this, that, and the other thing.

As a matter of fact, I had this conversation with Justice [David H.] Souter once. I was invited by the Third Circuit—Eddie [Edward R.] Becker, who was the chief judge, called me up and invited me to speak at their judicial conference, and I declined because it was in November and I had a speaking engagement in October and one in the middle of November, and I said I'd be taking on

too much. And he said, "Well, this is my last judicial conference as chief judge, and we're holding it in St. Thomas." I said. "I'll be there." [Laughter]

So I did, and at dinner on their gala night I was seated at a table with the chief judge, Becker, and the circuit justice, who was Justice Souter. I don't know how we got onto this subject—this was after my wife had argued—but I said I hadn't been back to the court for so long and things had changed because when I was arguing back in the seventies and eighties—and even my last argument, in 1990—you could get an argument out. The justices would at least give you the courtesy of not constantly barraging you with questions. There were techniques that we used to deflect that. But I said, "Now, the attorney gets up, and it's just one cross-examination for the entire thirty minutes," or whatever they say for rebuttal. He said to me, "Well, ninety-some-percent of the attorneys who appear before us are not worth listening to." Which stunned me. I said, "How do you know? You don't listen. You're just always asking questions."

Q: You said that to him?

Randolph: Yes. I said, "What I found particularly troubling was that when you reserve time for rebuttal, and it’s may be two minutes, or three minutes, or whatever, you stand up after the opening argument"—after you've given the opening argument, then your opponent talks, then you stand up to use up that precious few minutes in rebuttal, and what you've done is sat there and formulated a way of responding to what you consider the critical issues in the case. I said, "I saw my wife stand up for rebuttal and she was not able to get a word in. It was just all

questioning." So I found that particularly troubling, and he said that the justices have talked about that and tried to cut it down.

So that's one of the things that I find very different in the Supreme Court practice. But I think the other thing—what I'm about to say, there was some of this—although my memory is not very good—but there was some of this that was going on in the seventies, maybe in the eighties, but the reporting on the Supreme Court puts things in political terms. It's really important—it seems to the reporter—to always identify which president appointed the particular justices that are in dissent, or in the majority. And the analytical part of the opinions I don't find reported very well. It's the results and the policy that get reported, and I think for the layman reading that constantly about the Supreme Court—it's very difficult for them to realize that the role of the justice is not political; that what they're trying to do is describe the law as best they can, and maybe different techniques—we've talked about originalism, and there are other things like that.

Q: It's interesting you should say that. Of all the judges you've observed over the years, including looking in the mirror, is it natural for them to be partial, even subconsciously, to the party of the president that named them?

Randolph: I don't think so.

Q: You don't think so.

Randolph: I don't think so.

Q: Did that ever cross your mind, an “I’ve got to do this for the team”?

Randolph: No. No, we've had a lot of discussion about that, internally. Judge Harry [T.] Edwards has written about that and done statistical analysis—just talking about the cases in our court and the Democratic appointees, and the Republican appointees, and how they differ, etc., and found no statistical evidence of any kind of slant toward the political party position of the party that appointed the president.

Q: Well, you have been described—George H.W. Bush, who nominated you for the court—I suppose it's fair to say that he was described as a conservative Republican—moderate conservative, perhaps. You have often—often—been described as a conservative Republican, in discussing various cases, including the ones that we've been talking about. What does that mean? Are you conservative Republican in political terms? In judicial philosophy terms? Or do you reject that altogether?

Randolph: You just made an excellent point, and it illustrates what I was trying to say. When individual judges are described that way, the description, in the press anyway, is put in political terms. Not what your judicial philosophy is, but what your political philosophy is. Otherwise, why even mention the word "Republican"? That's a political term. I can tell you, I don't think that way in judicial terms. You brought up Felix Frankfurter and so did I. One could say that Felix Frankfurter was a liberal Democrat politically, but tended toward the conservative side judicially. So the two things, the two concepts, when they get merged together, I think cause

confusion among the public about what courts, or at least what the Supreme Court, is supposed to be about.

Q: But let us drop the party association and stick simply with the word liberal or conservative. To someone—what does that mean? What does it mean to be conservative, judicially?

Randolph: I'm not sure. I'm not sure a blanket label really applies in many situations. If you're very, very strong on protecting freedom of speech—let's say just that—and on the other hand, in areas other than the freedom of speech—and I'm thinking of a particular justice now, as an example—in areas other than freedom of speech, you may be conservative in the sense that you're reluctant to overrule exercises of congressional or executive power, except when they run up against particular provisions of the Bill of Rights—namely, freedom of speech—and the justice that I think best illustrates that point—I don't know what you would call Hugo [L.] Black. Would you call him a conservative? He dissented in *Griswold v. Connecticut* [1965]. He dissented in the *Bivens* case that I mentioned and numerous others. On the other hand, if it's a case involving freedom of speech, there was no one who was more protective of freedom of speech during the time that Justice Black was on the court.

So the generalization, I think, is dangerous. I frankly don't really understand the labels except that you have certain doctrines—originalism, the idea of just looking at statutes without going into the legislative history, etc., that are identified with a conservative judicial philosophy—

Q: But you, yourself, don't mind looking at the legislative history, do you?

Randolph: No. I'm not rigid about that. No. I wrote once that—the problem with that—the problem with looking at committee reports, and floor statements, etc.—and *Hamdan v. Rumsfeld* [2006], I guess, was one example in the Guantánamo area. But the problem is not with doing that; it's with what individual judges take away from it. There are instances, many, where the problem is with the performers, not with the technique. That's my view. We had a judge here that I mentioned, having applied to Harold Leventhal, who said that "using legislative history is like looking over a crowd and picking out your friends." [Laughter]

Q: That's right. Well, that's right. There are plenty of people who believe that's what judges do, just generally speaking. They get cases, they look at it, they say, "Here's my answer," before even examining.

Randolph: It's absolutely true.

Q: Actually, going back to oral argument for a moment, because you've been both an advocate and a judge—how important, even as you sit on this court, is oral argument? Do you think, basically—judges have gotten the briefs, they've read the briefs, they've studied the case, perhaps even before oral argument. If my understanding is correct, at the Supreme Court, they go into conference soon after oral argument.

Randolph: No, they wait a few days. I think it's important, but whenever I'm asked that question—and I'm asked that question frequently when I appear at law schools and open it up for

questioning—but it's always put, I think, in the wrong terms. It's always put this way—"How often does oral argument change your mind?" I don't know that that's the right question. The answer to that is "Not very often, but it's happened." I can think of one illustration where we went into the robing room and the judges chat a little bit about the cases. There were four cases that day. We were all kind of unanimously going the same way in each one of the cases. After the oral argument, we changed our mind in each case—four cases in one day. The most extraordinary one was—well, I won't get into it, but it was an immigration case where, during the oral argument, we discovered that the statute on which this fellow's conviction rested for entering the United States had been repealed. So we reversed.

But I think the right question is, number one, if we didn't have oral argument, we'd turn the judiciary into another bureaucracy. It would be just pushing paper; that's all we'd do. Second of all, the oral argument focuses. It's a point of focus for the judge. You read the briefs, you know you're going to be out there, and it's the only thing you're thinking of, that particular case. Third of all, it's a method of communication among the judges. Rather than simply memorandum writing, memoranda writing, the judges speak to one another through the attorneys who are arguing the case. You hear views and you think of things that you might not otherwise have thought of. And the fourth thing—maybe it should be the first thing—it keeps attorneys honest. If you're writing a brief and you know that either you or your partner is going to have stand up in court and defend what you're writing, it keeps you honest. You're not going to stretch the truth. Who was it? [Henry Louis] H.L. Mencken said, "Conscience is the feeling that somebody is looking over your shoulder." So when you're writing that brief, one hopes it's the feeling that the court is looking over your shoulder and you're not going to get away with a distortion of the facts

or a distortion of the law, or whatever. And that is very, very critical. It's one of the reasons why, I think, we ought to have more oral arguments, and have oral arguments, I think, even in cases that seem to have no particular issues in them.

Q: What about this idea of having television in courts—in an appellate court like this, or the Supreme Court?

Randolph: I don't think I'd be watching. [Laughter]

Q: I don't know what daytime television is like, so I don't know what you'd normally watch.

Randolph: How boring.

Q: Does it go up against *General Hospital* or something like that? But there are people who plug into that from time to time.

Randolph: I know. We've resisted it. I don't know whether it ever went into effect. I think it did, but there was an opportunity to do sort of a demonstration, have demonstration courts—courts of appeal—to allow the oral argument to be broadcast. We resisted it. The one thing we made an exception for was the anti-trust case that we had. When was that? I think it was February 2001, against Microsoft. It was of such tremendous interest that we couldn't accommodate all the people who wanted to come and attend the argument. It was two days of arguments. So we decided what we'd do was have another room, and we'd broadcast the argument, just the audio

portion of the argument. I think what we did was we released that material to the public almost immediately so there was an opportunity to hear the arguments. The Supreme Court has done that too, I think.

My problem is that as soon as you start televising these things, I'd be concerned—it's like the O.J. Simpson trial, and Judge [Lance A.] Ito, if you remember. The judges start posturing for posterity rather than concentrating on the cases. They start doing that. I can remember when I was practicing, I a number of times had witnesses to appear before Congress, and there was a rule that they had about television, televising procedures—this was before C-SPAN. I had a witness in the Koreagate matter, involving Tongsun Park and so on, a long time ago. But when I went up there to Capitol Hill, my witness was going to testify before this House committee, I invoked a little known rule that gave the witness the right to have the television cameras turned off. The chairman was stunned that I would do that. Why would you do that? Don't you want the publicity? You're the attorney. You can get some more clients out of this thing and be on national television. It was explosive testimony. I said, "I don't have to justify what I want to do. I insist that the rule be invoked and you turn them off."

Q: You don't think that any time soon it's going to happen here, or at the Supreme Court?

Randolph: I don't think so.

Q: I'm surprised that C-SPAN doesn't plug for that itself.

Randolph: I think there have been occasional efforts to try to get that done. Arlen [J.] Specter was one of the chief advocates of televising judicial proceedings.

Q: Let me go back. After the *Rasul* case we were talking about yesterday, after the Supreme Court ruled that the detainees down at Guantánamo had access to the courts, the Article 3 courts, Congress, at the behest of the administration, convened the Combatant Status Review Tribunals down there at Guantánamo—that may have been part of the Detainee Treatment Act of 2005. In any event, there were those developments.

Randolph: Actually, I don't think it was.

Q: Was what?

Randolph: Was part of the—the Combatant Status Review boards were set up after the Supreme Court's plurality decision in *Hamdi* [*v. Rumsfeld*, 2004], and they were done through an order, I believe, by the Secretary of Defense Donald Rumsfeld.

Q: I think you're right. And *Hamdi*, of course, was decided at the same time as *Rasul*. *Hamdi* involved an American citizen, so I am going to lay that aside. At any event, these were established, and these were supposed to take a look at whether the detainees were legitimately down there, in general terms, if that's fair to say. The Detainee Treatment Act of 2005, which is another effort by the administration, included a provision—just tell me when I make the inevitable mistakes—but it included a provision barring access to the Article 3 courts by the

detainees. That issue came before, and perhaps also an issue of whether the Geneva Conventions applied to the detainees—that came before this court, and ultimately the Supreme Court, in the case *of Hamdan v. Rumsfeld*. In *Hamdan*—

Randolph: I think you've got your sequence wrong. First of all, the Detainee Treatment Act, as I recall, did not become effective until the end of December 2005. The *Hamdan* case, in our court, was decided in the summer of 2005. July, I think. But the Detainee Treatment Act, which did not deprive the Guantánamo detainees from access to an Article 3 court—what it did was channel all the cases to our court for judicial review, rather than in the district court where they had evidentiary hearings. But in any event, that was passed while *Hamdan* was pending in the Supreme Court. So *Hamdan* didn't get decided by the Supreme Court until, I think, the last day of the term in 2006. So Congress passes this while *Hamdan* is in the Supreme Court, and one of the issues was whether that act applied to cases that were pending before a court rather than cases that were newly started after the end of December 2005. I think that's right.

Q: Yes. Actually, Judge [James] Robertson, in the district court here—

Randolph: Court of appeals.

Q: Judge Robertson. James Robertson.

Randolph: Oh, Robertson. Jim Robertson.

Q: He held, in November, 2004, that [Salim] Hamdan—this alleged driver was a driver for Osama bin Laden.

Randolph: It wasn't alleged. Hamdan admitted that in an affidavit.

Q: He could not be tried by a military commission, as was planned, set up there in Guantánamo Bay. Now what this court decided, I believe, was that these military commissions had been authorized by Congress under the Authorization for—

Randolph: —the Use of Military Force.

Q: —the use of military force, in 2001. So that they were legitimate. Also, that, "We therefore hold the 1949 Geneva Convention does not confer upon Hamdan the right to enforce its provisions in this court." So there are at least two issues there—military commissions are okay; Geneva Conventions don't cover.

Randolph: There are a number of aspects to the Geneva Convention question.

Q: Including, I assume, Common Article 3.

Randolph: Right.

Q: So anyway, it goes to the Supreme Court, and the court rules what?

Randolph: Well, first of all, the court says that the Detainee Act didn't deprive it of jurisdiction. The rest of it is a bit muddled. One of the problems with parsing that opinion is that not all of it was joined by a majority of the court, as I remember. There were subsections that were only four justices, etc. But the bottom line was, I guess, that the military commissions had not been sufficiently authorized by Congress, and at least—and I'm a little fuzzy on this—at least part of the Geneva Convention could be enforced, or applied, but I'm really not remembering very well—

Q: It is Common Article 3.

Randolph: The question was whether that portion of the Geneva Convention applied to the war against Al-Qaeda, because it seemed to be that that provision of the Geneva Convention seemed to be restricted to civil wars and not wars of an international character.

Q: Well then we get into these definitions of what's the international—how do you define this international character, and what it means. I'm going to leave that to the arguments that were done at the time. That would take another day. But essentially—essentially—it's saying that the Bush military commissions don't meet the standards of the Geneva Conventions, or the Uniform Military Code of Justice of the United States, and that the company—the court-stripping provisions of the Detainee Act of 2005 couldn't stand.

Randolph: Well, they didn't hold that. What they said is that it didn't apply to cases that were pending, and theirs was a pending case, so they had no reason to pronounce on anything other than that.

Q: Quite right, quite right. But this was the second time in a couple years—and by the way, in your own court, which we discussed a minute ago, unlike *Rasul* where it was three to zero in this court before being overturned, in this case it was two to one, and the judge joining you in the opinion that you wrote for the court was Judge John [G.] Roberts [Jr.].

Randolph: Right. But it wasn't two to one, it was three to nothing.

Q: Was it three to nothing?

Randolph: Stephen Williams, Judge Stephen Williams, wrote an opinion that was a concurring opinion, and what that means that all three of us agreed that the Geneva Conventions were not judicially enforceable—

Q: Right. Exactly.

Randolph: —even though Judge Williams thought that Article 3 applied, but had no effect because treaties that the country enters into, in tradition—and the United States, the law is clear about this—are generally not what they call self-executing. When we enter into a treaty, before it

can be enforced, Congress has to pass laws that essentially incorporate the treaty provisions. They've never been done with respect to the Geneva Conventions.

Q: Well, again, let me pass by that for a moment. There's a long record on that that exists, and I also want to get—

Randolph: It's also rather complicated, and it doesn't matter. Basically what—

Q: Yes, of course, you're right about there's really nothing—it was in the *Boumediene* case, which we're going to get to now, that it was two to one in this court.

Randolph: Right.

Q: Anyway, Judge Roberts also voted for that position in the circuit court. That was not long before he was nominated for the Supreme Court.

Randolph: And you'll notice he recused himself. He couldn't sit on the *Hamdan* case in the Supreme Court.

Q: Now after *Hamdan*, Congress went back and passed the Military Commissions Act [MCA] of 2006.

Randolph: Right.

Q: With respect to that in this court, this case became known as *Boumediene*, or, as you say, you were explaining that the lawyers were—

Randolph: "Boo-ma-deen." That's the way he pronounced it, so that's the way we pronounced it.

Q: Well, Boo-ma-deen or *Boumediene* raised, in this court, a couple of questions, as I understand it. The two questions were, did the Military Commissions Act of 2006 apply to the detainee petitions for habeas? And if so, was the MCA an unconstitutional suspension of the writ? There was a section—I think 7(b)—again, depriving the U.S. courts of jurisdiction without exception. Now how can we resolve this quickly? Do you recall that case well?

Randolph: I recall it. I don't have it committed to memory.

Q: Okay. What was the issue here, really? It went up to the Supreme Court. You wrote the opinion for *Boumediene* after a couple of district judges had divided on—

Randolph: Right. Judge [Joyce H.] Green and Judge [Richard J.] Leon.

Q: Exactly. Right. You essentially dismissed the cases for lack of jurisdiction.

Randolph: Right.

Q: Because?

Randolph: Well, there are two aspects. Here's the sequence. The Supreme Court decides *Rasul*. Congress overrules the Supreme Court in the Detainee Act of 2005, the Detainee Treatment Act. The Supreme Court rules in *Hamdan* that that statute doesn't apply to cases that were pending at the time it was passed. Congress then overrules the Supreme Court again in the Military Commissions Act and inserts a provision that essentially says the deprivation of habeas corpus jurisdiction over Guantánamo detainees applies to all cases pending or otherwise, or pending now, or in the future, without exception—an extraordinary statement to find in a piece of legislation. As a matter of fact, we did research and I think in the entire history of the judicial code, which runs thousands of pages, that phrase, "without exception," had been used only one other time.

So then we get the *Boumediene* case, and the first issue is whether the Military Commission Act really deprived us or the district court actually, of jurisdiction. I have to qualify this because what Congress did was substitute a judicial review in our court for habeas corpus in the district court. So our court would be reviewing combat status tribunal determinations as well as military commission determinations. So it wasn't completely striking any judicial review; it was channeling a judicial review into our court. By the way, that system of direct review in the court of appeals here is common to countless different kinds of actions.

Q: That was only after determination by the Combatant Status Review Tribunal.

Randolph: Right. The analogy was that the proceedings that would take place in Guantánamo were similar to the proceedings that would occur in a federal agency in a regulatory case. In all those cases, evidence is taken and we review it.

So the first thing we decided was that the Military Commissions Act did apply and deprived the district court of jurisdiction in the cases, agreeing with Judge Leon in that particular instance. On that part of the opinion, the Supreme Court agreed with us that the Military Commission Act was intended and did deprive the court of jurisdiction. That brought up the next question, and the next question was whether, by depriving the district courts of habeas corpus jurisdiction, did Congress violate the provision in the Constitution that states—I probably ought to pull this out—

Q: —"in case of rebellion or invasion."

Randolph: —"except in cases of rebellion or invasion, the privilege of the writ of habeas corpus shall not be suspended."

Q: And they held that it had been suspended.

Randolph: Right.

Q: And it had been suspended because the detainees were being deprived of the right of habeas corpus—the privilege of habeas corpus. Isn't that so?

Randolph: No, I wouldn't frame it that way. There was a case in the Supreme Court called *St. Cyr* [*v. Immigration and Naturalization Service,* 2001] that said that at a minimum, the suspension clause we just talked about reserves the writ of habeas corpus as it existed in 1789 when the Constitution was adopted. So the first question is what was the writ—how far did the writ of habeas corpus in 1789 reach? You had to decide whether that common law writ would have reached people in the position of the detainees at Guantánamo. To generalize the question was, "Did the writ of habeas corpus reach beyond the sovereign territory of the United States?" By that time Congress, which I think we talked about before, which has plenary power over deciding what is sovereign territory and what's not, had in both the Detainee Act and also in the Military Commissions Act, declared that Guantánamo Bay was not part of the sovereign territory of the United States. There's a provision in both of those statutes stating just that. So Congress thinking it had taken that question off the table in the light of the Supreme Court opinion that it wasn't part of the sovereign territory—

Q: In light of the Supreme Court decision in *Rasul*.

Randolph: Well, it wasn't clear what they did.

Q: Well, in any way they were taking the wind out of the sails of that argument.

Randolph: Yes. So that's the posture that the case was in when it came to us. So the question was a historic one. How far did the writ of habeas corpus in England reach during that period of time

in 1789? We had briefing on both sides, but when I was working on the opinion—I don't know if you want me to get into this now, about what I discovered in chambers.

Q: Ah no, that story in itself is a telling but long story, but can be summarized. Your research, your extensive research, which Justice Scalia later complimented in his own dissent in *Boumediene*, concluded that the writ did not run outside the sovereign territory of England as it would have existed in 1789, barring from common law—it wouldn't have run beyond the sovereign territory of the United States of America, either. That's essentially what you're concluding. But the Supreme Court in *Boumediene*—Justice Kennedy wrote the majority opinion. He's goes over this same ground, but not, perhaps, as extensively as yourself. He goes over the same ground and concludes that it's inconclusive. He concludes it's inconclusive.

Randolph: Now you told me you were a historian. One of the major linchpins in that holding was that the historical record is incomplete. My response to that is that no historical record is completely complete. You do with the material you uncover, and maybe there will be better material in the future and maybe there won't. But you're not going to be able to recover everything that possibly could bear on a particular issue. No historian has ever been able to do that.

So that, I thought, was an invalid ground. There was a clear statement by Lord Chief Justice [William Murray] Mansfield in a case called—was it *Rex v. Cowle* [1759]? That the writ of habeas corpus didn't reach beyond the sovereign territory of England. He said that. What I had found—and I think this is very, very significant—oftentimes—and I can think of cases, even one

I mentioned, *Ruckelshaus v. Monsanto*—the Supreme Court relied very heavily in interpreting the Constitution on [William] Blackstone's commentaries. Those commentaries were lectures that Blackstone gave at Oxford University to students who wanted to become lawyers. Robert Chambers took over for Blackstone in the lectureship, and he was giving these lectures almost contemporaneously in Oxford at the adoption of the Constitution. The reason I had those lectures—they had never before been cited in any judicial opinion—but I had them because I knew, as a Johnsonian, that Samuel Johnson had helped write, if not write them all. Because when Chambers got appointed to the professorship after Blackstone retired, he got writer's block.

Anyway, I pulled them off the shelf and found not only Lord Chief Justice Mansfield's opinion but the lectures themselves, instructing all these budding lawyers in England that the writ of habeas corpus didn't go beyond the shores of the sovereign territory of England. To me, you couldn't get more contemporaneous than that, and you have two of the leading authorities—Lord Chief Justice Mansfield was widely regarded as *the* leading lawyer in eighteenth century England.

So there you have it, and to me, that was conclusive. I found no evidence going the other way and neither did Justice Kennedy. I think Justice Scalia said over and over again in dissent that Justice Kennedy has not been able to cite a single case that goes the other way—the other way from the Oxford lectures and the Lord Mansfield opinion.

Q: Okay. Nonetheless—however injust it is, or unjust—you're a circuit court judge here, and Kennedy is a Supreme Court judge, and he called the day for the Supreme Court, and that is what rules.

Randolph: Exactly.

Q: So what we've got here, what we had after *Boumediene* was a situation where the Supreme Court has ruled that the detainees can file these petitions for habeas corpus here in the district court, appealable to this court, and does the Supreme Court lay down some rules for you in terms of evidence, or in terms of anything as a guidance to you, this court, of how to judge these petitions?

Randolph: No.

Q: Nothing?

Randolph: No. There's no guidance at all. There's a vast difference between jurisdiction on the one hand and merits on the other. One wouldn't expect, I think, in fairness to Justice Kennedy, wouldn't expect him to lay down any rules—except for one wrinkle, which you haven't mentioned, Myron, and that is that even though he found or he determined that the writ of habeas corpus could reach beyond the shores of the United States, that still didn't end the question. Because there was a line of Supreme Court cases that said it is not a suspension of the writ if Congress provides an adequate substitute for habeas corpus, and the substitute that Congress

provided was the Military Commissions Act, and the Detainee Act, and the judicial review in our court. So Justice Kennedy and the justices that joined him had to determine whether the Detainee Act and the Military Commissions Act were adequate substitutes for habeas corpus. In order to do that, one would think that the first thing you'd have to decide is what is the substance of habeas corpus? And then compare it. He did a little of that, but not much. As I recall it was just simply that, "Well, the court of appeals can't take evidence, and in habeas corpus you can take evidence." Even that's a questionable proposition.

Q: Well the Combatant States Review Tribunals—without belaboring it right now—had all sorts of wrinkles according to the tribunal's critics, of whether you could call witnesses, whether you could get witnesses, whether you could see classified material, who could see it, whether you had a lawyer or a personal representative—and virtually everybody was being determined to be an enemy combatant after the Combatant Status Review Tribunal.

Anyway, my point is there were a lot of issues around whether they were anything like a habeas hearing ought to be.

Randolph: No, no, no. That is the wrong comparison. The Combat Status Review is obviously what occurs in Guantánamo. The comparison that Justice Kennedy was forced to make was between what the proceeding would be in our court on review of the combat status versus what would happen if the common law—if the district court here had habeas review. So it's our review versus review in the district court that is the comparison. The district court would be habeas. The

question is whether our review was a sufficient substitute for what would happen in the district court, not what goes on in the Combatant Status Review Tribunal.

Q: Did he not conclude, Kennedy, in his opinion, that the Combatant Status Review Tribunals were an inadequate substitute for habeas?

Randolph: No.

Q: That they were an inadequate substitute for habeas?

Randolph: No, no. The ruling was that review in the U.S. Court of Appeals for the District of Columbia was an inadequate substitute for review in the district court on habeas corpus. That was the holding.

Q: The MCA had unconstitutionally suspended the writ of habeas corpus because the Combatant Status Review Tribunals falls "short of being a constitutionally adequate substitute."

Randolph: What are you reading from?

Q: I am reading from something I took from their opinion. I should point out that, unlike *Rasul,* in this matter, we're dealing with the Constitution—the entitlement under the United States Constitution—not statutory matter.

Randolph: I'm trying to find a limited quotation for you to understand the point I'm making. But it really is the "absence of a release remedy, and specific language allowing the authorization to use military force challenges are not the only constitutional infirmity from which the statute suffers, however." What he's talking about there is—the more difficult question is whether the Detainee Act permits the court of appeals to make requisite findings of fact. The other problem he found was that there was no release remedy in our court.

Q: Right. Right. But the, the—

Randolph: Here, here. After going through the analysis, this is what Justice Kennedy says—and I'm reading from page 128, Supreme Court 2275. "Our decision today holds only that the petitioners before us are entitled to seek the writ that the Detainee Treatment Act Review Procedures are an inadequate substitute for habeas corpus," that's our review procedures, "set forth in the act, and that petitioners in those cases need not exhaust the review procedures in the court of appeals before proceeding with their habeas actions in the district court."

Q: Okay. Okay. In any event, the bottom line is that after *Boumediene*, the detainees had what options available to them, in terms of habeas?

Randolph: That decision entitled—not entitled them—that decision, despite the legislation, restored habeas corpus jurisdiction in the district court.

Q: In the district court?

Randolph: Right.

Q: And only in this district court, not in a district court in Denver or San Francisco or something?

Randolph: That's an interesting question. I'll tell you—because there's a portion of Justice Kennedy's opinion that says, "Well, where do you get this idea that it's only going to be in the district court here?" And he says, "Well, maybe the other district courts should transfer their cases to—"

Q: Well, that did happen though a little bit, didn't it?

Randolph: I don't know where that came from, by the way.

Q: That was the trilogy of the Supreme Court cases relating to non-nationals at Guantánamo. In each case you wrote the opinion for the circuit court here, and in each case you were reversed by the Supreme Court.

Randolph: Right.

Q: Is it possible to step back for a moment—does that take a personal toll to be reversed in three prominent cases like that by the Supreme Court on basically the same—not the same exact issue, but the same subject?

Randolph: No.

Q: Your wife doesn't, at the breakfast table, say, "Come on, Ray. Can't you get this right?"

Randolph: Well, you're making a very large assumption.

Q: That's right. [Laughter] I withdraw the question, I withdraw the question. But, no—it doesn't bother you at all?

Randolph: In all honesty, it doesn't bother me in the least, except for the country. I think the Supreme Court was wrong in those cases, so to the extent I have concerns—it's not my personal ego or any of that sort. My concern would be what this does to the country. Was it in *Boumediene* that Justice Scalia said that he thought that the consequence of the opinion in *Boumediene* was that more soldiers were going to be killed? I don't know if I'd go that far. Maybe he's right, maybe he's wrong, but you have to think about those things. Because what you're doing, for the first time in history, is having the judiciary intrude on a military operation. That's what this is all about in the end. These individuals are being held by the military. And you wonder how far this goes. This case deals with Guantánamo, and when *Boumediene* came down, not only myself but other judges on our court were concerned. Does it apply to the Bagram Air

Force base in Afghanistan, where prisoners are being held? Or to various and sundry spots in Iraq? In fact, it wasn't so long after *Boumediene* that a case came to us from Bagram, claiming that it was a logical extension of *Boumediene* that the soldiers holding individuals in Bagram, the jailers, should be subject to a writ of habeas corpus to test whether they had properly been holding these people.

Q: What happened there in that matter?

Randolph: I was not on the panel. Judge Sentelle was, and he had a choice in that case. I'm not telling tales out of school.

Q: Did that come up with Judge [John D.] Bates?

Randolph: I think it did. In all these cases, the names start to—

Q: [Fadi] al-Maqaleh, or something like that.

Randolph: Something like that. The choice was to go with *Boumediene* and extend it, or follow *Johnson v. Eisentrager*, because *Johnson v. Eisentrager*, if you try to distinguish it on the basis of the Guantánamo factors, you couldn't do it. Because Bagram was the same as *Eisentrager*.

Q: Just parenthetically for another time, I'm not sure that's a fair—one of the points I think the justices like Stevens, for example, or Kennedy were making was that Guantánamo Bay is unique

as a candidate for application of the habeas. Because whether you want to argue that Cuba ever had sovereignty over it, or did have sovereignty—the treaty uses the word sovereignty, it's true, or what have you—but we are in complete and total control there, and they can't have it back without our permission—and that would be a little bit different than Landsberg prison or Bagram prison.

Randolph: Why?

Q: Because we're not so situated in those countries as we are in Guantánamo. I didn't mean to get off into this discussion. I'm simply saying that—

Randolph: Do you realize that the Bagram Air Force base was territory occupied solely by the U.S. military on a lease from Afghanistan?

So it's not that simple. But anyway, the opinion of our court was that the writ of habeas corpus did not reach Bagram.

Q: Well, we'll get to that.

In November 2008, a few months after the Supreme Court decided *Boumediene*—half a year after—you took senior status. Now you had been a judge on the court since 1990. You took senior status in November of 2008. Should any line be drawn between the outcome of *Rasul* and *Hamdan* and *Boumediene* and your taking senior status?

Randolph: I'll tell you, I took senior status November 1, 2008. Right? Do you know why?

Q: I'm asking you.

Randolph: It's my birthday. I turned sixty-five. There's a rule of eighty. Do you know about the rule of eighty? In order to take senior status, you have to have combined service and age of eighty. I had twenty—eighteen years, something like that. Eighteen years, plus sixty-five—you have to be a minimum of sixty-five years old.

Q: Oh, you mean it's your age and the years.

Randolph: The years of service. I had eighty-three, but you couldn't take senior status until you—

Q: Well, did you have to take senior status?

Randolph: No, you don't. But everybody does. Not everybody. I take that back.

Q: Why did you?

Randolph: For a couple reasons. Number one, financially. It's a financial advantage to take senior status. Do you know why?

Q: No, I don't.

Randolph: It's because when you take senior status, by law your salary becomes an annuity rather than a salary. Number two, you can start drawing social security. Number three, you stop paying social security taxes. You stop paying Medicare taxes. And in some states, like New York, annuities are not subject to state income tax. So there's a huge financial advantage. There's another whole series of other advantages, one of which, on our court, we don't have to sit on what's called complex cases, which are nothing that any of our judges really enjoys. These are cases that may involve thousands and thousands of pages of briefs and take days of oral argument in huge regulatory cases. Another advantage is that you're relieved of special motions duty, which is always a burden—the phone calls in the middle of the night and all the rest of that.

So there were all these advantages. Judge Williams took senior status when he turned sixty-five. Judge Silberman took senior status when he turned sixty-five. Judge Edwards took senior status.

Q: Well, then let's put it this way. Let me put it this way. As a senior status judge, what are your obligations? What do you have to do? You sit, you rule, just as before. Is that correct? With those provisions that you just mentioned.

Randolph: You can take a percentage of the usual case load and your staff is cut. The size of your staff is dependent on what percentage you take. You can take a hundred percent case load, the same as an active judge. One thing I neglected to mention—as a senior judge, you can't sit on

en banc cases, and you can't vote on them either. The first year I took seventy-five percent, and I had three law clerks. We're entitled to four. For just a couple of years I took four and it was too many for me. But now, for the last several years, I've been taking fifty percent case load and that entitles me to two law clerks and a secretary.

Q: Can you have a panel in this court of just senior judges?

Randolph: That's a very good question, and we've talked about that. I'm not sure whether we've ever done it or not. The clerk's office, in their computer program that we talked about, was setting up panels and has pretty much avoided that problem. I don't know that it's happened.

Q: So you took senior status in November of 2008, and all these people were sitting around the Supreme Court benches saying, "Oh, you see? We drove him out of his regular job." They are mistaken, but in February of 2010, you gave a talk at—by god, it was the Federalist Society—at the Federalist Society, in which you went over the *Boumediene* case in particular. This is on February 27, 2010, and then in November of 2010, you gave a wonderful address at the Heritage Foundation, I believe it was, called "The Guantánamo Mess." You described things as "the Guantánamo Mess," and you borrowed that term from Scott Fitzgerald's *The Great Gatsby*, speaking of Tom and Daisy Buchanan, who smashed things up and were careless people, who smashed things up, and let other people clean it up. Smashed things up, and let other people clean it up.

Now you're still on the court, and you're giving these talks, and I must say this "Guantánamo Mess" talk has gotten wide circulation. [Laughter]

Randolph: It's what?

Q: Has gotten wide circulation with “Guantánamo Mess” talk. I mean, people know about this talk for sure, in which you go over some elements of your opinions and the Supreme Court results point out—is it fair to say that you think the Supreme Court was all wet three times running?

Randolph: Yes.

Q: What prompted you to give these talks? You also wrote a piece in the Harvard Journal of Law and Public Policy that has the line—you mention that you were reversed three times, "With this in mind, you can consider my remarks about the Supreme Court's performance as sour grapes; or, as I prefer, you can treat my comments as informed criticism." This is the title of the piece, *Originalism and History*, in the winter of 2011, Harvard Journal of Law and Public Policy. A long-winded way of asking the question, what prompted you, even as you're sitting on cases affecting Guantánamo Bay and the future, what prompted you to give these talks?

Randolph: Well, let me back up. First of all, I think it's in a long tradition of federal judges commenting on the Supreme Court cases. The judge that I clerked for, Henry Friendly, did that often and very effectively. There are a series of articles that he wrote about criminal procedure—

that the Constitution is a code of criminal procedure, complaining about *Miranda* [*v. Arizona*, 1966] and *Escobedo* [*v. Illinois,* 1964], and case after case after case. So he did it and he did it frequently.

What prompted me to give that particular talk? I was asked to give a speech at the University of Pennsylvania law school and chose *Boumediene* as my topic. It was something I thought I knew a little bit about, and to me it illustrated one of the problems with originalism, and that is that originalism, I think I said it there, really comes down to reading the Constitution in light of its history. So how well you do that depends upon how well you perform the task of a historian in evaluating historical material.

Q: Or whether you're looking to pick out your friends in the crowd.

Randolph: Yes. Looking out over history and picking out your friends. The other thing that may not be particularly well understood is that the code of conduct for federal judges—and let me back up. I was a member of and chairman of the judiciary's ethics committee for six years during the 1990s and it was a topic I also thought I knew something about. It encourages judges to speak out on legal issues. You're not permitted to comment on pending cases but you're encouraged after the case—except in an academic setting—you're encouraged to speak out on legal issues after the case has come down. I think I said in one of these talks—I can't remember, maybe both—that I agree that Supreme Court decisions command compliance, but they don't command agreement. And I think it's perfectly proper to take the Supreme Court to task when

you think they're wrong if your argument is on the basis of legal analysis or historical analysis, not just on policy grounds or that sort of thing.

Q: When Judge Brown of this court refers to the "airy suppositions" of the Supreme Court and Judge Silberman refers to the post-*Boumediene* litigation as "a charade prompted by the Supreme Court's defiant, if only theoretical, assertion of judicial supremacy," is that within the ballpark of what you're describing as legitimate?

Randolph: Well, Judge Silberman's remarks are not ones that I would have made. I would not have put it that way. I don't even know what the context of that was. I would not call the Supreme Court as having engaged in a charade. I'm not even sure what a charade is. And I don't know the context, or I don't recall the context of what Judge Brown's remarks were.

Q: In any case, a couple cases—there have been a number of cases that have poured through this court, this district court—habeas cases. Two cases that you sat on were *Al-Adahi* [*v. Obama*] in 2010 and *Kiyemba* [*v. Obama*] in 2009. *Kiyemba* was a Uighurs case, in which I believe you held that the federal courts in general lack the power to order the political branch—the executive—to admit non-citizens into the territorial U.S. What did they want?

Randolph: First of all, they were Chinese nationals, and there was an opinion by Judge Garland holding that they were entitled to be released. Because they were training in Tora Bora, not to conduct operations against American military forces—they were training in Tora Bora to go back into China and conduct terrorist activities in China. Like I said, they were Chinese

Muslims. So the Authorization for the Use of Military Force did not permit the United States forces to hold them. So Judge Garland in his opinion ordered them released. When they were faced with release, they didn't want to go back to where they were captured—which was in Afghanistan—and they obviously didn't want to go back to China because they thought they would be executed if they were, because they were committing treasonous acts. I can understand—and the State Department had a policy of not releasing people from Guantánamo into territories where they would be subject to either torture or execution.

So the question then was what the proper remedy would be, and a district judge here held that they could be released into the Washington, D.C. area. Our decision was that the judiciary has no authority to override the executive, or the Congress, now, because there have been so many statutes that prohibit bringing Guantánamo people into the United States; that it was totally up to the political branches to determine where the individuals should go. The way that could be done was through diplomatic channels, trying to find a place where these individuals could be housed, or could be released.

I've got to be careful now, because we had information that was classified, of the diplomatic efforts that were being made. I think eventually—I can't remember whether it was before—I think it was after some of the Uighurs did, in fact, get released to Bermuda. While the case was pending with us—can we stop now? I want to check to see, before I say anything—I want to check to see if this is—

[INTERRUPTION]

Q: Okay.

Randolph: Shortly before we issued our opinion in February of 2010, we also received word from the government in material filed under seal—because it was classified—that there were seventeen Uighurs, and each one of them had received a resettlement offer from a foreign country. But by the time the case reached the Supreme Court, I believe they had received—and the Uighurs declined the offer, by the way—by the time the case reached the Supreme Court, and I'm not really sure of the date, I think they had received another offer of resettlement from another country. The Supreme Court grants certiorari in the case, and then the Solicitor General Elena Kagan sent a letter to the court telling the court that the Uighurs had received another offer. What was not clear—so the Supreme Court vacated its grant of certiorari and sent the case back to us, and we reentered our original opinion.

Q: Okay. In the *Adahi* case, the Uighurs—some went to Palau, some went to Bermuda. Are there Uighurs still at Guantánamo, do you know?

Randolph: I don't know. There were seventeen of them, and by the time the case came back to us all but five had been relocated.

Q: Okay. The 2010 case that you were involved in—*Al-Adahi*—there, you apparently created a concept of conditional probability with regard to assessing evidence. Is that right?

Randolph: No.

Q: Okay.

Randolph: I didn't create it.

Q: I knew when I used that, that it was going to get me in trouble.

Randolph: Maybe it's my scientific background.

Q: Some people say that after *Al-Bahani* [*v. Obama,* 2010] this is the most important post-*Boumediene* case by the D.C. Circuit, and that what happened here was that you—again, I use this word here—you laid down the rule for judges in this district to use a mathematical concept called "conditional probability," sometimes known as the "mosaic theory," in weighing the aggregated whole of evidence so they can see how it all fits together, even though all pieces may be circumstantial from the same sources, in reaching a judgment on the evidence—what the evidence shows. What's wrong about that?

Randolph: Well, it's not a mosaic theory. That’s a different animal entirely. Conditional probability is a well-known concept for evaluating evidence. Mathematicians, scientists of all sorts use it all the time. It's been around in a different form. It was called Bayes Theorem at one time. But if all you have to do is plug in on a Google search the terms "conditional probability," which I have just done as we were talking, and how many hits did I get? Let's see. Five million,

fifty thousand hits for "conditional probability." It's a well-known concept. There are many, many books written about it. If I just give you the Wikipedia definition of it, you'll understand that it's really common sense. Conditional probability is the probability that an event will occur when another event is known to occur, or has occurred. So what you don't do, what is a fallacy, is to view each event in isolation. That's a fallacious way of determining probability. When you're evaluating evidence, what you're doing, in the standard that we assume applies, is determining whether the government has shown by a preponderance of the evidence that the individual was part of Al-Qaeda or part of the Taliban. Well, what is preponderance of the evidence? It's more likely than not. That's what preponderance of the evidence means. That is a probability analysis, so I think it is entirely proper to put it in terms of conditional probability because that's exactly what we do and what courts have been doing for many years. Oftentimes, you'll find judges who instinctively know that's the way to analyze, but instead of putting it in the terms that I've put it in, they call it the "totality of the circumstances," which is—

Q: Okay, but why was it necessary? Or is it not true that there you laid down that rule for the district?

Randolph: Right.

Q: What was being done before it? Why weren't the judges doing it—making sense of all the evidence in its totality, as it was? Are you saying that each piece—weak pieces which might be disregarded otherwise have to be viewed along with other pieces, and that the weak piece may gain strength from the other pieces?

Randolph: I'll give you an illustration, which I've used. If I give you a list of a dozen names and ask you what is the probability that each one of these individuals is over six foot tall and weighs more than 220 pounds, what would you say? Pretty low, right?

Q: Each of them?

Randolph: Yes.

Q: Each of them.

Randolph: Each of them.

Q: I'd say it's pretty low.

Randolph: Pretty low. If I tell you—if I add a prior fact that's been developed and proven, that each one of them is an offensive lineman on a pro football team, what would you say the probability is that each one of them is over six-foot tall and 220 pounds?

Q: Better. [Laughter]

Randolph: You would say it was one hundred percent, wouldn't you? Do you follow football?

Q: I follow football, but I'm not conceding anything.

Randolph: What you have just engaged in is conditional probability.

Q: Well, what were these very smart, presidential appointed district judges doing here before? They needed you to tell them that?

Randolph: I don't think we can generalize. In this particular instance, that was not done. Now whether other judges were doing it, I doubt it very much. I think the other judges were probably doing conditional probability analysis without naming it, but I think they were evaluating the evidence exactly that way. They do it all the time in criminal cases.

Q: Since you mention preponderance of the evidence, it appears as if you, along with the aforementioned Judge Silberman, feel that preponderance of the evidence is actually too high a standard.

Randolph: Too high, too low. My point is—and I can't remember where I made—maybe in *Al-Adahi* I made this point—that there are many instances or areas of law where habeas corpus applies in which the preponderance of the evidence standard is not used.

Q: You mean a lesser—

Randolph: A lesser standard. I think in some areas—in immigration cases, there may be some evidence, etc. So my point is, how does one choose? Where in the Constitution, in the phrase, "the privilege of the writ of habeas corpus shall not be suspended except in times of rebellion" or whatever—how do I get from that to deciding what the standard of proof is? A very basic question—if you're going to have habeas corpus, you've got to know what the standard of proof is. So how do I get there? What is the analysis? My answer is, I don't know.

Q: Well, but still and all, haven't you argued that it ought to be—unless it could be easily a lesser standard than that, it could be some evidence.

Randolph: It could be. Yes. How does a judge decide that?

Q: Why, a judge could just say “have clear and convincing evidence.”

Randolph: Sure. How about "beyond a reasonable doubt?" One way of deciding it is to determine what the standard of proof was when the writ was issued in 1789. If you do that, then you’ve come up against the system that was existing then, where the prisoner was not permitted to contest the facts that the jailer set out in the return. As long as the return, on its face, that the jailer provided showed that he had authority to hold the fellow, then the prisoner was not permitted to— the point is, that standard—what does that amount to?

Q: Well, didn't, in *Hamdi*, Justice [Sandra Day] O’Connor say that "some evidence" was quite inadequate—using the standard “some evidence was quite inadequate”?

Randolph: Number one, that was an American citizen, on American territory. We weren't dealing with the situation of the common law writ of habeas corpus; number two, that wasn't a majority opinion.

Q: All right. In the *Al-Bihani* opinion, post-*Boumediene*, in this court, which you did not sit in on, the circuit court—apparently it says that hearsay evidence is generally admissible. Is that customary in habeas situations?

Randolph: Like I told you a day or two ago, I am not an expert in what goes on in habeas cases in the United States or on habeas review of state court convictions or whatever. I have handled a few when I was in private practice. Let me say that I think hearsay evidence is admitted in a number of critical stages of the criminal justice system. For example, in pre-trial suppression hearings involving searches or seizures or Miranda warnings or whatever, hearsay is freely admitted. That's a pretty critical stage, I think, of the criminal prosecution. At sentencing, where the judges have to make an evaluation and use the sentencing guidelines, just as a guide or whatever, hearsay evidence is freely admitted. So as long as it has a tinge of reliability, then it comes in. So whether that should be the rule or not the rule—

Q: Well, you didn't decide on this.

Randolph: I didn't decide on it.

Q: But in that same opinion, by a different panel, the government needs to make its proof only by a preponderance of the evidence standard. Apparently, that was the rule that was made, whether it was right or wrong. I have no opinion. But in the *Latif* [*v. Obama*] case, which I don't think you sat on either, which was a 2011 case—the panel there, Judge Brown writing, in which she said that *Boumediene*—now I'm losing it—the *Boumediene* ruling was based on "airy suppositions that caused great difficulty for the executive and the courts." There, she laid down the principle that government intelligence reports are entitled to a "presumption of regularity." Are you familiar with that term "presumption of regularity" in this context?

Randolph: I read the opinion when it came out.

Q: Right. Now that's a departure, is it not, that these intelligence reports, gathered in the fog of war, are to be given the presumption of regularity; that is, that their contents are being accurately reported?

Randolph: I know of no other time and no other proceedings in which the issue of the reliability—judicial proceedings where the issue of the reliability of intelligence reports has ever come up. So this is new. This is new. This is new territory.

Q: Apparently it's come up among the district judges here, before this opinion, and they had declined to accept that.

Randolph: But what I'm saying is that we're in new territory here. We're getting top-secret intelligence reports, and what do we do with them? Do we call the individuals—do we treat this like a criminal trial and require that the documents be authenticated and that the individuals who compiled them should be subject to cross-examination in court in order to determine how reliable they are? You've got to do something with them. The government—and how could it operate otherwise—relies on them and makes judgments about their reliability.

So the question is what does the court do with it? Do you call in the CIA officers from Afghanistan who questioned the detainees and make a determination? Almost invariably in these cases, we get allegations that if the individual incriminated himself, or the detainee, that he was a subject of torture. So what do we do? Do we call all the military officers that guarded him? Call them in and have a full-blown trial? These are incredibly difficult questions that we have to sort of muddle through and try to make the best of it we can, because it's all new territory. I think Robert [M.] Chesney and Ben Wittes said that the effect of *Boumediene* is to grant almost unprecedented law-making power to the district court and the court of appeals here in Washington, because we're sort of making it up as we go along. We don't have any guidance. We don't have any guidance from the Congress. We have no guidance from the Supreme Court in this.

Q: Okay. That’s a good question—no guidance from Congress. Has it been Congress's job to give you some guidance on this? Apart from saying that the detainees can't be tried in the United States, they can't be brought into the United States, they can't be sent to certain countries without

our approval—apart from that kind of thing, have they been giving any kind of guidance that one would expect them to give?

Randolph: On Guantánamo habeas cases? None.

Q: Would one reasonably expect them to do that?

Randolph: I think so.

Q: Isn't that the thing we're talking about, that Felix Frankfurter and Judge Friendly, yesterday—about the people speaking through the legislature and the legislature taking the responsibility of doing something?

Randolph: I am pulling off the shelf a very thick volume. This volume contains the civil judicial procedures and rules. In 1970, 1971, 1972—somewhere around there—I was on a committee that formulated, for the position of the Department of Justice, a set of rules that got adopted called the Federal Rules of Evidence. They tell district judges and they tell the court of appeals that reviews the decisions what evidence is admissible, what is not admissible, and how you test the evidence for reliability, and when hearsay is allowed and when it's not. These rules don't apply. The Federal Rules of Evidence don't apply because we're dealing with a common law writ. We've also got the Rules of Procedure of the District Court in statutory habeas corpus cases that go on for page after page. We've got provisions of the Judicial Code. So when we're operating in a system where we're dealing with civil cases or criminal cases—what I just said is true for the

criminal procedures as well—we're operating within a framework of rules that have been set down and adopted by Congress and adopted by the courts. Here, we're operating in a vacuum.

So you ask me, do I think Congress ought to do something about it and take it up? I think absolutely they should. But they haven't. And I thought, not in the opinions in the—sort of the twilight of this whole business—that I wrote, but I thought there were calls by my colleagues in some of these cases for Congress to do something.

Q: Yes, there have been. There have been.

But after the *Adahi* opinion that you wrote that was seized upon in a study by the Seton Hall University School of Law, which has been interested in the Guantánamo thing and gotten its facts right or wrong for many years, probably since 2002. They said that since *Adahi* the detainees are succeeding or winning their habeas petitions in the merits in next to no time, whereas before they were winning most of the time. Now they're virtually winning none of the time. And they say that, "The effect of *Al-Adahi* on the habeas corpus litigation promised in *Boumediene* is clear. After *Al-Adahi*, the practice of careful judicial fact-finding was replaced by judicial deference to the government's allegations." Now the government wins every petition. Now what they're talking about—they're talking about I think what we were just talking about, which is the conditional probability effect of the conditional probability.

In any event, were you mindful of the fact that these figures had changed around so since *Adahi*?

Randolph: No. I don't know how much I'd credit that evaluation. It's the old causation versus correlation problem. It may be that the early petitions were ones that were more clearly meritorious than the later ones. It may be that the Department of Justice in litigating these cases has gotten stronger evidence and compiled the material in a better form. It may be that the procedures of the district courts have more or less solidified. I don't know. There may be a dozen factors. I think it would be very hard to say.

Q: Well, I think the bottom line appears to be accurate. What led to that, I don't really know. The head of the Seton Law, the director of policy, said that, "Since *Adahi*, judges are effectively robo-signing denials, and robo-stamping government allegations. The Supreme Court gaveth, and the appeals courts taketh away."

Randolph: I think that's silly. I think that's silly. When I was in college, I was in the debate society, or on the debate team, and any time we had this question of causation and correlation—we had it often, in various subjects—I always gave this example, that in the month of May, in Denmark, more babies are born. And in the month of May, in Denmark, more storks fly overhead; therefore—[Laughter]

Q: And yet. And yet this town, this country, is rife with critics of this court, particularly the, "evil—"

Randolph: The "evil?"

Q: “Evil” Judge Randolph. Even the *New York Times*—

Randolph: What do you mean, *even* the *New York Times*? But, of course.

Q: Even the *New York Times*, on March 1 in 2011, "Judge Raymond Randolph of the District of Columbia Circuit"—this is an editorial—"wrote the key *Kiyemba* opinion. The Uighurs’ brief says, ‘The constant in this case is the court of appeals' refusal to apply, or even acknowledge’ the *Boumediene* ruling." Then he goes on and points out that you gave this talk, the "Guantánamo Mess."

Speaking of "Guantánamo Mess," to use that as the title of a talk, I suspect that some of the detainees would agree, also, that that is a title for the situation in Guantánamo—

Randolph: And they certainly should.

Q: —from a different perspective, perhaps.

But in any event, only recently—see you’re not a favorite of the editorial pages of the *New York Times*. Benjamin Wittes wrote last year, "The meme has been floating around for some time: the D.C. Circuit—and, particularly, the evil Judge A. Raymond Randolph," with tongue in cheek, "the evil Judge A. Raymond Randolph is subverting habeas, fighting a rear-guard action against the rule of law, and turning *Boumediene* into an empty shell."

Randolph: Who said that?

Q: Wittes is summarizing what others are saying. Now here's one critic that I'd like to point out. Critics have used words like "subverting, vitiating"—this is the literature that I read—"subverting, vitiating" *Boumediene*, "eviscerating" it, "fighting a rear-guard action while their colleagues coalesce around substantive," if means the lower court, "colleagues coalesce around substantive procedural rules that are materially consistent with what little guidance the Supreme Court provided in these cases." But the judge I want to focus on is Judge James Robertson. Robertson was at a forum in July of this year.

Randolph: He was no longer a judge, right? He retired.

Q: Right. And he said that a "hostile if not defiant" circuit court—that's this court—was "gutting *Boumediene*," and the Supreme Court was not doing anything about it. As you pointed out before, the Supreme Court, apart from this Uighur situation that dissolved—or apparently has dissolved because of these offers of settlement, or the fact settlements of the Uighurs of countries—apart from that, the Supreme Court hasn't taken any case out of this court on Guantánamo since *Boumediene*. But is it surprising that—you were saying before it's okay for judges to criticize other decisions. Are you surprised that Jim Robertson—I think that's his name—would say these things?

Randolph: I am a little. I've always thought of him as a rather thoughtful judge, and if I had been on that panel when he said that our court has been "gutting *Boumediene*," I'd ask him, "How do

you gut a vacuum? What is there in *Boumediene* that determines how the proceedings should go forward in habeas corpus cases?" And the answer to that is, "Nothing." The only thing that Justice Kennedy said that even comes close to dealing with that—and, as I said, I don't fault Justice Kennedy so much because that wasn't the issue. The issue was jurisdiction—but he said there should be meaningful review. That's it. What do I do with that? What does that mean? Meaningful as compared to what?

Q: Well, maybe Robertson doesn't like the decisions of the court.

Randolph: Well, that's a different story. He's perfectly free to disagree.

Q: When Wittes wrote this attack upon the attack upon you—

Randolph: Do you know his background, by the way?

Q: Wittes? He's at Brookings, I think.

Randolph: He is, but do you know what he was doing before that?

Q: No.

Randolph: He was the legal editorial writer for the *Washington Post* for years.

Q: I never can make out Brookings. There are all kinds of people at Brookings. But he points out that the allegation that the D.C. Circuit is subverting *Boumediene* just doesn't wash. He says, "Second, every morality tale needs a villain." And you're filling that job. "I suppose Judge Randolph is as good a villain as any." And three, he says, "It's wrong to overstate the role that Judge Randolph is playing on the D.C. Circuit. This is a collective project."

Randolph: That's true. He's right about that. In the three opinions we're talking about, the votes were eight to one. Three different panels, three judges each, the votes were eight to one.

Q: Has any detainee gotten out of Guantánamo as a result of habeas action here in Washington where the U.S. government executive branch was opposed to it?

Randolph: Well, we've already talked about twelve of the seventeen Uighurs.

Q: No, the U.S. government wasn't opposed to that. When I said U.S. government, I meant the executive branch. I'm thinking where the executive branch objects.

Randolph: I'm not sure. I don't take surveys. I get individual cases. There was that Australian fellow who was involved in the first case—[David M.] Hicks.

Q: He took a plea, I believe—

Randolph: Is that what happened?

Q: —and was released.

Do you ever sit back and say to yourself, isn't it true—or is it true—that the vast majority of the people at Guantánamo have never been shown to be anything like the "worst of the worst"? That the vast majority—before their release, because the vast majority have been released for other reasons—were ever tried by any kind of military commission or anything else, that showed them to be guilty of something? In other words, if you're not looking at it just from a legal point of view, just wondering, "Who are these people?" What conclusion is to be drawn?

Randolph: Somehow or other you seem to have made an evaluation on a person-by-person, detainee-by-detainee basis, that these are not the “worst of the worst.” I have no idea. That's a comparative judgment, not a legal judgment. And number two, I don't know why that matters. Supposed they're only the least worst of the worst, rather than the worst of the worst. Why does that matter?

Q: The judgment I make, I'm basing it on not an examination case by case—although I'm familiar with some handful of cases—but on the fact that the government, both the Bush and the Obama administrations but particularly the Bush administration, released the vast majority of the people—the vast majority of the people—who were ever there. So I'm relying upon that; that they would not have released the "worst of the worst," but they did.

Randolph: I don't know the circumstances of the release, number one. Number two, a good many of the individuals who were released were released to foreign governments for them to hold them rather than them being held in Guantánamo. More than that, the individuals that were released—there's evidence that has been cited that they returned to the battlefield.

Q: Not many. Evidently.

Randolph: I don't know how many.

Q: I don't know, either. I'm just saying that's the evidence I've seen.

When I say the Supreme Court hasn't—it's almost as if the Supreme Court has disappeared. They gave you the job and then they've taken a long vacation. Linda Greenhouse, whom I mentioned yesterday, she said they've got what's called "Gitmo fatigue." And that they've said goodbye to Gitmo. Is that bad—?

Randolph: Well, I don't know. It only takes four votes. The question about when the Supreme Court grants certiorari and when it does not, and why it doesn't grant cert, and why it does, has been sort of a riddle for practitioners for years and years and years—for as long as I had been litigating in the Supreme Court. It was always pretty much a riddle. I don't know. Maybe they're taking a breather. Maybe they're waiting to see how things develop within our court or the district court. Maybe it's because—there may be four votes to grant certiorari, but perhaps Justice Kagan is recused from some of these cases—which would lead to a four-to-four split, if they did

a survey on votes before granting certiorari. I don't know. It might be a combination of all those factors. But there's another explanation, which is basically that the majority of the court—not a majority, it would have to be a super majority of the court—thinks we're getting it pretty much right.

Q: Maybe so. Maybe so.

Randolph: I just don't know.

Q: Have you noticed any discernible difference between the posture of the Bush administration in this circuit with regard to Guantánamo and the Obama administration?

Randolph: I think the answer to that is that I think there's not much of a difference. I think the Obama administration positions are sometimes taken a little more cautiously, but I can't document that. You have to understand that what goes on here in our court, in these kinds of cases and in other cases, is we have on the government side attorneys that we see frequently. The attorneys who are arguing in the Guantánamo cases are the same attorneys who were arguing for the government in the Bush administration. They are career Department of Justice attorneys. And there's a team of them that we see over, and over, and over again. They're quite outstanding advocates. So the idea that they would suddenly switch gears when the administration comes in is not something that I would have expected anyway.

Q: When one looks at the real world consequence of all of this litigation—and I just wanted to mention that, of course, as we know, [Shafiq] Rasul, Hamdan, [Lakhdar] Boumediene, and [Yaser] Hamdi too, have all gone home. Not one of them is incarcerated anywhere, certainly not at Guantánamo. But when one looks at the real world thing, there has been a lot of litigation about Guantánamo. It has had virtually no concrete impact upon specific detainees to date. The number of detainees is going down. Of the eighty or so who haven't been cleared for release, half of them, perhaps, the government is thinking about prosecuting, and the other half they say can't be prosecuted. I don't know what's going to happen there. But even in the situation of what they could be prosecuted for—. The other day, in October of this year—actually, last year, October 12—a panel of your colleagues here in this circuit ruled that material support was not a charge that could be used against the Guantánamo detainees because at the time of their alleged support, material support was not—

Randolph: Well, I don’t want to comment. That case is pending.

Q: —was not an international crime.

Randolph: That case is pending.

Q: It's pending?

Randolph: It's pending, Myron, and I don't want to comment on it.

Q: Well, they just ruled.

Randolph: I know. But it's pending before the Supreme Court.

Q: Oh, I see. Okay. Actually, in *Rasul*, Justice Stevens tried to get five members of the court to say that conspiracy wasn't a legitimate charge.

Randolph: Yes.

Q: That's a question now, also. These detainees that they're trying, or have tried, are people like Khalid Sheikh Mohammed or something. They've been charged with those very things. But I appreciate the fact that you don't want to comment on that.

But just, finally, today—the point I was really making is that in a simple kind of word—you bring Mafia leaders to trial in a criminal case. I mention this because I remember a trial in New York that I had to sit in on. But you bring them all to trial; they get convicted; they're sent to Florence or Marian or something or other, and we see the result. There are seventeen of them or twenty of them or something and off they go. In the Guantánamo thing, there's a lot of paperwork, a lot of litigation, a lot of time taken up by lawyers and judges and what have you, but in terms of the detainees themselves, it hasn't added up to much. Am I seeing that through the wrong end of the telescope?

Randolph: Well, I don't know what the long-term consequences are, and there are two ways of looking at it—kind of back to my economics background—a micro way and a macro way. One thing I think has been left out of the calculus and your description of it—and you have to throw this in—is that a lot of the litigation has been to prevent the detainees from having to go before a military commission. The *Hamdan* case is exhibit number one. So they've been litigating, the detainees have been litigating to prevent trials—some of them, anyway—before military commissions, other than bringing it to a head and then getting the particular sentence, whatever sentence it happens to be. So on a micro view, you have to go detainee to detainee and try to determine why this individual has not been brought before a military commission until now. It may be, at least for some of them, it's because they've been opposing military commission trials.

On a macro view, in a long-term view, there may be unseen consequences of all this turmoil surrounding Guantánamo. Think of yourself as the chief of staff or the head of the Joint Chiefs and another war breaks out. Would you house prisoners in Guantánamo, depending on what X country is, or would you keep them all in a secure facility in a foreign country? The answer to that seems to me fairly straightforward. The idea of Guantánamo was to get them out of the area of the battlefield—namely, Afghanistan and Iraq—and to keep them in a secure facility where the people who were guarding them were not in any kind of jeopardy of rocket attacks or any of the other things. So, in the long run, which is the better system? To keep them in Guantánamo or to keep them overseas? This may sound like sort of a Hobson's choice, but the fact of the matter is that unless the Supreme Court rules otherwise, and maybe they will, the writ of habeas corpus has not ever been extended beyond the shores, other than Guantánamo. So you'd have a situation in which, in order to avoid all this turmoil, and having top-secret documents produced and so

on—and I want to say a word about that—we'll keep them overseas. Is that a good thing? I don't know. I don't know.

The other thing that's also lost in the shuffle is that we're talking about the security of the United States. That's what this is all about. One of the things that troubles me is that as these cases come through our court, classified material, top-secret material, debriefings of individuals who are cooperating with the United States government in Afghanistan and earlier in Iraq, are deposited with our court. The reason that's troubling is that we're not the most secure facility in the United States here. We have some experience in handling this kind of material, but we're talking—. Every one of my law clerks now has to get top-secret security clearance before they begin, and that's fine, but it's spreading out. You've got more and more people who have been privy now to a lot of classified information that you would not ever want to see the light of day because it would jeopardize the lives of people who are over there now, who are cooperating with the United States. They wouldn't be alive for a second if their names were released. Yet, that information is now filtering out. Our law clerks only spend one year with us, then they go on. I trust them, and they've got top-secret security clearances. I trust the judges on our court. But who knows when a slip could be made, or somebody who has the security clearance and turns out to be an Alger Hiss? It can happen. Hiss was a law clerk to Justice Oliver Wendell Holmes. That's why the name comes to my mind.

So that troubles me. I think it should trouble everybody.

Q: Well, is it also true that when you lay down the rules here—for example, having to do with whether it's conditional probability or preponderance of the evidence or admissibility of hearsay evidence—that these would apply seven years from now in another war situation, or what have you?

Randolph: Well, if the common law writ of habeas corpus applies, yes. I would think so.

Q: Right. Okay. Is there anything more? I can't think of anything more I can abuse you with within a reasonable time today. Is there anything else that you feel you want to add?

Randolph: Oh no. I've talked too much.

Q: Well, then, thank you very much, Judge Randolph.

Randolph: Yes.

[END OF INTERVIEW]