Oral History of
ALAN MORRISON
Third Interview - January 19, 2008

MR. MARCUS: All right. Here we go. Let's start again. This is Dan Marcus interviewing Alan Morrison on Saturday, January 19.

Alan, let's talk about the separation of powers cases that you worked on over the years at Public Citizen. Why don't you tell us how you got into that area and we'll go from there.

MR. MORRISON: Well the first set of cases we did were the impoundment cases that I think we talked about last time. They were really about a battle as to who controls the power to spend. As we discussed, I took the view that the Congress really had the power. The president didn't really have the authority to unilaterally decide not to spend money unless Congress had made it very clear that he had the authority. Of course, he had the authority not to spend money wastefully—if they gave him money to fight the war and the war was over, he didn't have to spend money fighting a war.

But generally that's not the way it worked and so there was this big battle and, as we talked about, we did some litigation cases in that. We brought a bunch of our own cases here in the District in addition to the *amicus* brief for the senators and the others in the Eighth Circuit.

We brought a case in Virginia involving the water—I think it was the money being spent for water treatment. Campaign Clean Water was the name of the client, I remember. We brought that case and we won that and then it went all the way up to the Supreme Court. One of my colleagues, Tommy Jacks, argued the case in the Supreme Court and won that.

MR. MARCUS: And these cases were all toward the end of the Nixon administration, '73 period?

MR. MORRISON: Yes, yes. He started impounding a lot more after his election in '72 because he wasn't offending as many people that were going to vote for him or hopefully vote for him. We had a bunch of them here in the District. We won a few of them.

The City of New York had another case involving the same water issue we did and both of those cases went up to the Supreme Court. The Supreme Court heard them together and decided against Nixon. Meanwhile, Congress had passed the Impoundment Control Act, which we discussed, that had the legislative veto provision in it with respect to the deferral part but not the rescission. We did a bunch of those cases and when the Impoundment Control Act passed, Congress essentially made clear what it thought it had done before and said "no rescissions." Rescissions meaning stopping spending the

money and deferrals where Congress could step in and say "no." Eventually when the legislative veto was declared unconstitutional, which we'll talk about a little bit later, there was still that provision in with respect to deferrals in the Impoundment Control Act. We brought a case involving that issue—it got into the D.C. Circuit and the D.C. Circuit ruled that—

MR. MARCUS: This was after *Chadha*?

MR. MORRISON: After *Chadha*, yeah. It ruled that Congress would not have given the power to the president to even defer, meaning delay in spending, if it thought that it couldn't exercise the legislative veto. So it was unseverable and the president's power to defer was eliminated. Even though it wasn't much of a power, it did make a difference during the year and had timing issues. David Vladeck argued the case in the D.C. Circuit. My recollection is that Judge Bork was on that panel and ruled in our favor.

MR. MARCUS: Ironically, of course, did it occur to you back in '73 or whenever you had the litigation on the Impoundment Control Act or whatever it was called, there you were attacking the president's authority to impound or defer—to rescind or defer—I assume you were not attacking the legislative veto provision at that point and did you think about that at all at all at that time?

MR. MORRISON: The first cases we brought were pre-Impoundment Control Act. That is, all the litigation was pre-Impoundment Control. Once the Impoundment Control Act was in effect there was no problem with our position.

MR. MARCUS: I see.

MR. MORRISON: But the answer to your question is I remember testifying—Ralph and I went up and testified about the Impoundment Control Act and we had a lot to say about it. The one thing that neither of us paid any attention to was the legislative veto provision. Now it was because I had never really thought about it before then. The second thing that happened was, of course, it was attached only to deferrals, which were much less significant than rescissions because the deferral provision only allowed you to defer it within the fiscal year so that if the money was supposed to be spent on a monthly basis you had to spend it all by the end of the year. That was less of an issue and people were less concerned about it from both sides—that is, the people who weren't getting the money were less concerned and the president was less concerned because it wasn't going to do him any good, he was going to have to spend the money anyway.

Anyway, so that was one whole issue and on that one we sided with the Congress. The next case that happened is—I've always thought of as a separation of powers case but many other people didn't view it exactly that way. That was the case involving the Saturday Night Massacre. Archibald Cox had been appointed to be the Special Counsel as it was then called—Special Prosecutor, excuse me—Special Prosecutor and he was investigating Nixon and they—he had—they had obtained an order for the grand jury, and it was affirmed by the D.C. Circuit, to the president to turn over certain tapes which

had been revealed by Alex Butterfield in the *Watergate* hearings that summer of 1973 and Nixon had been ordered to turn them over. He proposed various compromises and he then said finally when the court ruled he said he was not going to turn them over and he ordered Elliot Richardson to fire Archibald Cox and to put somebody else in his place who would follow the president's orders. Richardson resigned in protest.

MR. MARCUS: He refused.

MR. MORRISON: He refused because he had made a commitment to the Senate when he was confirmed in May of 1973 that he would appoint an independent prosecutor and he had named Archibald Cox and he had entered an agreement with the Senate as part of his confirmation. They had issued regulations that said that the independent prosecutor could be fired only for "extraordinary improprieties." Richardson refused to fire Cox and resigned instead. William Ruckelshaus, who was the second-in-command, did the same thing and it fell to Robert Bork, who was then the solicitor general to do it or not. Bork decided that it was more important for the government that he carry out the president's order and so he fired Cox Saturday night, I think October 17th, 18th, 19th, something in that range. Of course the story hit the presses, the FBI came down and cleared out the offices and everything like that. I was at home that evening and Ralph called me and he said, "Do you know what's going on?" I said, "Yes." He said "We can't let this go on." He said "Let's get people together tomorrow morning in our offices, 2000 P Street. We've got to figure out what to do. We can't let this happen." So I said, "Sure." So a bunch of us came together and I can't remember how many of us there were, but not a lot.

MR. MARCUS: Since it was the Saturday Night Massacre, it must have been Sunday morning.

MR. MORRISON: Oh, it was absolutely Sunday morning. It was absolutely Sunday morning. We started poking around and we found the *Federal Register* and the C.F.R. cites in which the regulations had been issued protecting the Independent Prosecutor from firing except for extraordinary circumstance.

MR. MARCUS: Yeah. When you say Independent Counsel or Independent Prosecutor it was a Special Prosecutor who was in the executive branch, so it wasn't as clear a separation of powers issue obviously. I'm getting ahead of you a little, but I just wanted to correct "Independent."

MR. MORRISON: They called him the *Independent* Prosecutor—

MR. MARCUS: Okay. But he was appointed by the attorney general and …

MR. MORRISON: But he was appointed…no statutory basis at all.

MR. MARCUS: That's right. You're right, you're right.

MR. MORRISON: But it was a rule and I knew that rules had to be enforced, and you could try to rescind the rules but they had not tried to rescind the rules. They had not alleged anything remotely dealing with extraordinary—"extraordinary improprieties" was the term. That was the term.

MR. MARCUS: It wasn't just "good cause."

MR. MORRISON: No, no, no, no, no. Nothing—and it was carefully chosen to be much stronger than good cause because we had the old cases. The "good cause" cases, *Humphrey's Executor* and so forth and so on. The first question—we saw this and we immediately saw the protection and we tried—I can't remember the precise order, but we tried to get in touch with Archie Cox, who had been at Harvard when I was there but only for the last year and I didn't really know him. I knew some other people in the office who were working there and we eventually got through to Cox and told him about this and said, "You can resist. It was an unlawful firing." Cox declined—he did not want to be involved. He said, "I've been fired, I understand—I'm not going to fight this." I sort of understood but would probably not have done the same thing, but who knows? Archie was at a different place in his life at the time and he was a different person and so forth and so on. So we said, well why don't we bring an independent case? At this time there had been a couple of opinions in the D.C. Circuit involving citizens' standing and there had been a bunch of cases involving congressional standing also. We had been involved—

MR. MARCUS: The law wasn't as bad as it is now.

MR. MORRISON: No, no, no, no. Quite the opposite.

MR. MARCUS: Right. You had all these Bazelon court decisions on standing.

MR. MORRISON: Yeah and there were other people as well. In fact, the cases, particularly in the '70s and '80s, there were cases from the right as well as from the left. Don't forget Goldwater challenged the rescission of the Taiwan Treaty and he was certainly not a liberal. So everybody was using them. Ralph was the first plaintiff because he was a citizen and we had Frank Moss from Utah who was a Democrat, something not heard of very much anymore in the Congress—Democrats from Utah. I think we got a couple of House members. I think Bella Abzug and I can't remember who else. We got somebody else and maybe there was one more senator but I'm not sure. We had had some other separation of powers cases around this time, just before this. I had brought an action on behalf of a bunch of senators who challenged the failure of the president to send up Howard Phillips's name for confirmation to be head of the OEO. They put him in as an Acting and then they didn't send his name in. There was a statute called the Vacancies Act and so we brought some cases on behalf of the senators saying, "Look, they had a right to have this guy come up for confirmation…"

MR. MARCUS: So they could turn him down.

MR. MORRISON: Turn him down, exactly. And we had another one with Proxmire, with somebody else. Anyway, we had done some of those cases and we had—the standing had been upheld.

MR. MARCUS: And here the standing theory was the confirmation promise?

MR. MORRISON: Yes, that they had made a deal.

MR. MARCUS: A deal. It was a contract, oral contract.

MR. MORRISON: Yes, but evidenced by the regulations which Richardson immediately put into effect as soon as he became the attorney general. So we had the case and we filed it and we drew Judge Gerhard Gesell. Judge Gesell was a wonderful, no-nonsense man who was a former Covington lawyer, highly regarded in the bar and at the court. We knew we were going to get fast action.

MR. MARCUS: A footnote, he had issued a courageous opinion in the *Pentagon Papers* case by then, I believe.

MR. MORRISON: Yes, yes, yes because that was in '71.

MR. MARCUS: So he had taken on the president.

MR. MORRISON: He was prepared to take on whoever needed to be taken on. So we filed the case and we filed a motion for summary judgment with the complaint because under the rules it allows complaints—you can file a motion—twenty days, it was—

I guess we filed at that time or we may have filed a motion to file it early. We filed the motion. The government responded and said we didn't have standing and all the usual things. It came on for hearing and Gesell entered an opinion in which he said, first, that Nader didn't have standing but that Frank Moss did, and so he threw Nader out and then he issued the opinion saying that they had violated their regulations and Cox was illegally fired.

By this time the president had appointed Jaworski. In theory, Bork appointed him, but the president negotiated the deal, Leon Jaworski from Texas. He came up and he kept most of the people. Some of the people went back because they felt loyal to Archie and didn't want to stay, but most of the people stayed and they proceeded to continue the investigations and went forward. Even though Archie had been let go and was not coming back, we felt that the victory, the decision that the firing was unlawful gave the office the kind of backbone it needed to fight. Eventually when Nixon went a year later to the Supreme Court —this was actually eight or nine months later—to challenge the orders and testing the legality of the Independent Prosecutor, the same kind of arguments in terms of the need for independence and the validity of the regulations and separateness enabled the Court to say that it was not simply a fight between the president and one of his lawyers, that they had this separate office and the separate office was significant in

assuring that there was a proper case or controversy. This was not an intramural squabble; this was really something that the courts could adjudicate. It gave both the moral and intellectual backbone to that case.

MR. MARCUS: But what happened? What happened to the Gesell decision? Did the government appeal?

MR. MORRISON: Yes, but they took forever to appeal.

MR. MARCUS: I see.

MR. MORRISON: And we said that it was moot. They said, "Well it was never ripe to begin with." We said, "Yeah it was," and so forth and so on, and finally—my recollection is that the case got fully briefed in the D.C. Circuit—fully briefed in the sense that we said it didn't matter, it was all over, it was done with and everything like that. Eventually the case got dismissed, I think after Nixon resigned, on the theory that it was no longer capable of repetition or evading review because the subject of this had gone.

MR. MARCUS: But is Gesell's decision still in F. Supp?

MR. MORRISON: Oh, yeah.

MR. MARCUS: It didn't get vacated or anything.

MR. MORRISON: It's in F. Supp. It's in F. Supp. *Nader v. Bork.*

Bork was simply the nominal defendant. I remember interestingly years later when Bork was being considered, I think first for the D.C. Circuit and then for the Supreme Court, I was called by the ABA committees asking me about this and I said I didn't agree with what Judge Bork did—what then-law professor Bork did, but I would never suggest that what he did was so improper that it would be a basis for disqualification of him. That is, he made a choice that it was better for the stability of the Justice Department to carry out this order and if there was something unlawful about it, somebody would go forward with it. I probably wouldn't have done the same thing, but it was certainly not disqualifying in any respect.

That was sort of the next little separation of powers case and then we had a couple of these things with the OEO and a bunch of these Vacancy Act cases when Nixon was not sending anybody up for confirmation because he knew he couldn't get these people confirmed because we had a very Democratic Senate and they were not about to put in these ideologues who were trying to dismantle the agencies which they had set up.

MR. MARCUS: Did you ever get a decision from the District Court on the Vacancy Act claims?

MR. MORRISON: Oh yes. Judge William Jones ordered Howard Phillips to get out. We won the case.

MR. MARCUS: And he got out and they didn't nominate—

MR. MORRISON: They eventually nominated other people in there and they got some people through. The Vacancy Act has since been changed and clarified a little bit. It's still not entirely satisfactory, but now the period runs—in essence it says you've got to send somebody up right away, but once it gets up to Congress the period tolls. That is before the Senate it tolls on the theory that you can't blame the president if the Senate sits on somebody forever.

MR. MARCUS: That's right. And there are limits now under the Vacancy Act amendments as to who you can make the acting head of the agency. You can't bring someone in from the outside.

MR. MORRISON: And, actually, I think it now is you have to bring somebody who was either confirmed—who was confirmed for another position so that you have at least—

MR. MARCUS: Or someone who has been in the agency for at least ninety days or something like that.

MR. MORRISON: Right, right. So they cleared up—it took a while but they finally cleared up the worst parts of it. There are still some problems and so forth, but they are not as bad as they were.

Oh, my—we had four plaintiffs in the Howard Phillips case. The lead plaintiff was one Harrison Williams who subsequently went to jail.

MR. MARCUS: But at the time he was very distinguished.

MR. MORRISON: He was. He was the chairman of the Appropriations Committee.

MR. MARCUS: We were all surprised when he turned out to be a crook.

MR. MORRISON: Yes, yes, yes. So those were our early separation of powers cases. This took us into 1975. The next separation of powers case involved the legislative veto. If I had ever heard of it before the spring of 1976, I surely do not remember it. Indeed, although there had been a part of *Buckley v. Valeo*, the major campaign finance case that dealt with the legislative veto over the regs of the Federal Election Commission. I had only the faintest recollection of that and never saw it as a particular problem—indeed the Court never reached that question in that case.

MR. MARCUS: They decided another separation of powers case on the appointment of the commissioners.

MR. MORRISON: Yes. The Appointments Clause said that the FEC was not constitutionally constituted because they had various people—in fact, virtually all of them were appointed by the Senate and the House and they said that violated the Appointments Clause. We were not involved in that particular dispute. Anyway, in the spring of 1976, Public Citizen's lobbying arm, Congress Watch, sent to me a bill that had passed the House Judiciary Committee, I'm pretty sure. It was a series of amendments to the Administrative Procedure Act. It was a really interesting, good bill that would have imposed a few additional requirements on rule-making such as having a definitive record, that is, they had to have a file and they eliminated some of the exceptions, as I recall, to the exclusions from rule making in the APA. It was a good bill.

All of a sudden comes the last provision in the bill and I remember reading it. I was in a taxi coming back from the Hill from some—maybe from the Court. I had it in my pile and I was reading it. I remember reading this provision which said that either house of Congress has the authority to veto by one house any regulation issued by any federal agency. I broke out laughing. I said to myself, "They must be kidding me! The Congress can't pass real laws, they can't get their budget in shape, they can't do anything. How could they possibly do this?" And then I also realized that this was a tremendous augmentation of the power of Congress. It gave those people who had access to the Congress a third bite at the apple. They would have the administrative proceeding, they would go to court, and they would have the Congress. All they had to do was to get one house which, in effect, meant only one committee or maybe even one subcommittee because these matters would be viewed as highly technical, —within the jurisdiction of the committee and the committee could just say all we're doing is maintaining the *status quo*. We're not doing anything and therefore there is no reason for the rest of the Congress to come in.

This seemed to me to be complete insanity from a political science perspective—and also unconstitutional. Because I remember from fourth grade civics or fifth grade that the Congress passes a law, you have to have two houses and the president. This was one house. So this began the legislative veto battle. I remembered—I asked Larry Ellsworth, who was then working with us, to start looking into this. We poked around and we then discovered the *Buckley* case and they had not decided it. We also discovered that the Justice Department had been ranting about this for years, that the president was very unhappy. We found out that these vetoes had been in effect since the early 1930s. Franklin Roosevelt had agreed to some of them as part of Lend-Lease because it was the only way he could get some of these done. There were some that were in reorganizations but that they had become increasingly popular in recent years. There were some two-house vetoes, some committee vetoes. Most of them were the one-house variety.

MR. MARCUS: And the Justice Department rantings that you describe took the form of OLC opinions or signing statements? Did they have signing statements in those days?

MR. MORRISON: They had some signing statements. I don't recall them coming in that way. There were OLC opinions and there may have been some signing statements as well. The problem from the Justice Department's perspective was how were they going

to get these things into court. They weren't prepared to sue the Congress over them. Among other things, this gave us a feeling if we got into court they would support us on this. And so what happened was that we also knew that the Federal Election Commission statutory revisions had not eliminated the legislative vetoes and we also knew that they had a very broad standing provision in them—in the statutes. And of course, there were people who were running for Congress—this was in 1976—and there were voters.

The statute also provided for expedited judicial review before the *en banc* D.C. Circuit Court. So we went out and recruited some plaintiffs, including Ramsey Clark, who was running for Senate, and the problem we had, although we didn't think it was going to be a problem at the time, was that the FEC rules that had been subject to the veto, some of which had actually been vetoed before when the Supreme Court did not pass on that, it said that everything that the FEC had done before the striking its appointments down as unconstitutional would be judicially approved and could continue in effect unless changed. There had been no new rules that had been subject to a veto after that fact.

We thought that we had a reasonable shot at doing this and so we brought a lawsuit the beginning of—the end of August.

MR. MARCUS: What year?

MR. MORRISON: 1976, just before the New York primary. Ramsey Clark was our plaintiff, and I can't remember who else. We had some individual plaintiffs as well, I think—under a very broad view any voter—but he was a candidate and he said he needs to know whether the rules are valid or not.

MR. MARCUS: The FEC rules?

MR. MORRISON: The rules of the new FEC and are they valid and so forth. We were only seeking a declaratory judgment and we filed our lawsuit and they set an *incredible* briefing schedule, like over the weekend we had the briefing.

MR. MARCUS: Under the statute the lawsuit got filed directly in the D.C. Circuit?

MR. MORRISON: We filed in the District Court and they certified it to the D.C. Circuit *en banc*. It was a completely insane procedure and in subsequent cases we got it into a three-judge court. There were no facts at issue here and we served the Secretary of the Senate and the Clerk of the House and they came in and essentially said there's no standing, there's no ripeness, there's no case or controversy and they barely tried to defend it at all. The Justice Department came in on our side and said there is a controversy, it's perfectly legitimate and we think it's unconstitutional as well. And we said it was unconstitutional. That weekend—we had never briefed this before—we put together the model, the argument in our brief which ultimately carried through. We had a three-part argument. We said if it's Legislative, it violates the Presentment Clause because it didn't go through two houses and the president. If it's executive, it violates separation of powers because Congress can't do this. And if it's Judicial that they're

vetoing it, as in overruling it, it violates Article III because only judges can do it. So whatever way you looked at it, it was unconstitutional and that was our basic argument. We kept that basic approach the entire way.

MR. MARCUS: Let me ask you a question. I know you had developed this intellectual interest in separation of powers and the importance of preserving the integrity of the legislative/executive relationship. But was there a motivation for the Public Citizen's interest in this and Nader's interest in this that overall the legislative veto threatened to knock out regulatory actions by regulatory agencies like the Federal Trade Commission or the SEC or whatever that would—so was there kind of a pro-consumer, pro-regulation aspect to your interest in this?

MR. MORRISON: Absolutely. As I said earlier, most of the original legislative vetoes were in the international arms area or reorganization area. But increasingly, they were coming into other areas. We thought that the FEC was particularly good because, essentially, you had Congress vetoing the rules under which they and, by the way, their opponents are going to run for office. That seemed a particularly egregious case for us. But we were very concerned about the ability of lobbyists and people who make campaign contributions to members of Congress to be able to derail these regulations.

I forgot to mention one of the things that we did along the way. Before we filed our FEC legislative veto case, the provisions of the APA amendments were subject to some hearings in the Government Affairs Committee of the Senate. We asked to testify about the legislative veto and we were there. There was a whole bunch of people ahead of us including OLC in the person of one Antonin Scalia and that was the first time he and I had met. He testified saying that they were unconstitutional. We decided that they were going to testify—scholars were going to testify as to that, so Rueben Robertson and I got this idea. I think it was probably my idea—to do a little skit.

MR. MARCUS: In your testimony?

MR. MORRISON: In the testimony. The testimony was a skit. We had a dialogue and Reuben was the head of the CAB. He'd done a lot of work with the CAB and I was his general counsel and the dialogue went something like this. The chairman says, "Well it's a great day. We have in our new rule." I think it was on lost baggage or maybe it was overbooking, both were issues that we had worked on. "When is it going to go into effect?" And I say to him, "Not so fast!" And then I proceed to explain to him all of the things that were going to happen with the legislative veto and he'd ask me questions, "You mean they can do it for any reason or no reason or because of a political contribution or anything like that?" And the senators sat there really paying attention because we had figured out a way to explain what was happening that made it so different. The testimony actually showed up in some Administrative Law casebooks as a new form of advocacy for a period of time. The *Washington Post* ran our picture that day. I think they had the story about it as well, but they had a picture of Reuben and me sitting there waiting with our hands on our chins and then our knees because we were there for four or five hours, but it was worth every minute of it to get that in there.

We had different means of advocacy and eventually that bill didn't go anyplace.

MR. MARCUS: What happened in the D.C. Circuit in the Ramsey Clark case?

MR. MORRISON: D.C. Circuit wrote an opinion in which it said, "No standing, not ripe despite the statute. We're not going to adjudicate it." We got a dissenting opinion from Judge George MacKinnon. George MacKinnon, very conservative Republican from Montana—

MR. MARCUS: Minnesota.

MR. MORRISON: Minnesota? Okay, excuse me. Someplace out there.

MR. MARCUS: And Catherine MacKinnon's father.

MR. MORRISON: Yes, I know that. Anyway, MacKinnon had been a member of Congress and he knew exactly what was going on here. He said it and really had a dynamite dissenting opinion. He said of course this is ripe, we've got to stop this thing in the bud and so forth and so on. It was *en banc*; we lost on eight to one or eight to two. I can't remember what the vote was but it was quite lopsided.

MR. MARCUS: But not on the merits.

MR. MORRISON: Not on the merits—nobody else said a word about anything but standing and ripeness. I think the rationale was that there had been no new rules issued under this new FEC and therefore we don't know that they are going to continue to follow, and since they were appointed before it, the Congress may leave them alone. It's a major constitutional question we ought to stay out of. But the Justice Department, who normally thinks that nobody has standing and everything is not ripe, had come in on our side.

We decided we didn't have anything to lose. Larry Ellsworth had argued the case but I worked very closely with him and we filed a *cert.* petition. The Justice Department flipped and decided it would not support us on *cert.*

And it would say that it was not ripe. It would agree and said it shouldn't take it. And then it said the fatal words. It said don't take this case. There is another case called *Chadha* against INS that has just been filed in the Ninth Circuit. That's clear that there is no ripeness problems. The court should wait to hear that case. Our first reaction was *Chadha*? *Chadha*? Where do we find *Chadha*? So Larry calls John Pohlman, who was the lawyer for Mr. Chadha in the Ninth Circuit —goes through the court, finds who he is, gets a number and calls him. He says to him, "Mr. Pohlman, we see that you have this case with the Justice Department challenging the legislative veto in the case of Mr. Chadha." Chadha is an immigration case. Chadha has been ordered to—was allowed to stay in the country and the House of Representatives vetoed the order of the Immigration Service as the statute authorized them to do. "We know a fair amount about this," Larry

said, "and we would like to come in and help you with the case, briefing the constitutional issue." Pohlman said, "Thank God. I knew there was an issue because I had read enough about this. I don't know anything about this. I'm an immigration lawyer." He said, "You can do whatever you need to do with the case." So that's how we got into *Chadha*.

MR. MARCUS: And became counsel for Chadha.

MR. MORRISON: Counsel for Chadha.

MR. MARCUS: Solved your standing problem.

MR. MORRISON: That certainly did.

MR. MARCUS: The best standing you ever had.

MR. MORRISON: Although the House and Senate, who came in, continued to insist that this was an intramural dispute between the branches and it was not subject to private rights of action and that nobody had standing. He didn't have standing to do it because it was not a justiciable controversy, more a political-question argument.

I remember in the Supreme Court when they made that argument I said to them, "They say this is an intramural squabble. They can say that, but if we lose the case, he's going to be on the next boat out of here the next day."

Anyway, about this time Larry decided he was going to leave the office because his mentor at the Center for Public Representation, Victor Kramer, had been appointed the Special Counsel to the Senate to investigate the *Koreagate* scandal. I can't even remember what it's about. Anyway, he asked Larry to come with him and Larry thought he would do that, that it would be an interesting thing to do. So he did. I, who had been very much involved in these cases, took over the *Chadha* case. The first thing that happened was we persuaded the Justice Department—it didn't take much persuading even though they were the respondent through the Immigration Service—to come in on our side. Once that happened, there was a serious case-or-controversy problem. What we did was we urged the Court to invite the House and Senate in as *amici* and they did that. They came in and filed briefs saying all the usual, no standing, political questions, not severable, meaning that if the veto was unconstitutional, so was the power to allow Mr. Chadha to stay in the United States, and they also defended on the merits as well.

MR. MARCUS: Was this still in the Ninth Circuit?

MR. MORRISON: Yes. This was all in the Ninth Circuit. The case was argued in the Ninth Circuit in April of 1978. My recollection is that it was some time in '77 that we got involved and it took about a year to get briefed which was, by Ninth Circuit standards, especially today, not bad. But even then it wasn't too bad, particularly

because we had this complication because we had to bring in the Senate and the House and they came in after the government filed its brief and so the thing was elongated.

I argued the case in the Ninth Circuit and the case sat there. One of the first problems we had was that one of the judges on the panel was Shirley Hufstedler, who in 1979 got appointed Secretary of Education, so she had to step off. Then they appointed somebody else and he either died or got sick or something and eventually they appointed a third judge who was somebody I'd never heard of—a lawyer in the Ninth Circuit from Sacramento named Anthony Kennedy. Kennedy turned out to write the opinion but not for quite some time. Meanwhile, these vetoes keep coming up in other legislation and they started to be exercised.

MR. MARCUS: Was this during the Carter administration?

MR. MORRISON: It was early Reagan.

MR. MARCUS: Early Reagan.

MR. MORRISON: Early Reagan. These other two cases that we had, the first one was a FERC case, Federal Energy Regulatory Commission case, which I'll say something about in a few moments because it had all sorts of problems with it. Then there was an FTC funeral—it was either funeral or used car—rule that finally got vetoed, and other people brought that case as well.

Meanwhile, we're waiting for this going on and there is more and more impetus for legislation. Elliot Levitas wants to put it in everything. They're putting it in all the bills. I occasionally testified. I went up there, testified one day and said, "It's unconstitutional." And the members of Congress said, "We'll leave that to the Court." I understood exactly why this was. This was a wonderful toy. They get to pass big, broad statutes—

MR. MARCUS: But keeping the agency on the string.

MR. MORRISON: On the string and then they can do all the favors they want and yank back all the authority and no one will notice. They get to curry favor with their supporters and with the people who are opposing regulation. So it was getting to be a really serious problem.

About this time, Ronald Reagan got elected, and during his election campaign he said that he supported the legislative veto, reflecting the views of the people who supported him. So when he got sworn in I became quite worried that maybe the Justice Department would shift its position, and I was also wondering what was going on in the Ninth Circuit because we argued in April of '78 and we were now in January of '91.

MR. MARCUS: '81.

MR. MORRISON: I'm sorry, you are quite correct, '81. So I talked to the folks at the Justice Department. They said they hadn't heard anything yet—this is people in OLC and the SG's office because somebody in the SG's office was actually doing it, I think. And we talked some and I decided that maybe we would try to find some way to push the Ninth Circuit. So I said let me try this. Let me talk to my client. I haven't talked to him in a long time. He had been at the oral argument and I'd met him there, but I hadn't talked to him in some time. Maybe we can find some excuse for saying to the Ninth Circuit, you know, we need to do this for some reason.

So I called Mr. Chadha and I tell him that I need to talk to him and there is a long silence on the phone. He says, "I have something I think I need to tell you." I said, "What's that?" He said, "I got married to an American citizen."

I have two reactions, congratulations and, oh shit! Is the case now moot? Because I knew from when I was in the U.S. attorney's office that even though I never practiced immigration law we had enough cases there that I knew that if a foreigner marries a U.S. citizen, they then become eligible for citizenship. Given the propensity of the courts to duck this issue already, I was concerned that they were going to be ducking it. And by the way, the Supreme Court denied *cert.* in the Ramsey Clark case, as the Justice Department asked them to do, and so we had only *Chadha* at this point. He said, "I actually got married some time ago. We've had a child now and I wasn't sure but I thought I probably shouldn't tell you about this…" I said, "Look, I understand completely. If these are the facts, then these are the facts." My first question to myself and to others at the office was, "Do I have an immediate obligation to tell anybody about this?" So the first person I could tell was, I knew, I could tell my friends at the Justice Department about it. I told them about it and I said look, I need to do some poking around, you need to do some poking around to see whether, in fact, it's moot. So I started doing some research and I concluded that it was not moot because—this was the theory and this was the theory that won in the Supreme Court on the same argument—that if Chadha wins his case in court, he becomes eligible to be a citizen immediately.

MR. MARCUS: I see.

MR. MORRISON: And that, on the other hand, if he has to do the marriage route, it is five years—a perfectly sensible time. They don't want people getting married and then getting divorced, getting citizenship, and so he would save a whole bunch of years by doing it this way. Therefore, he did have standing and it was not moot. I told the Justice Department that, they thought about it. The agreed with it and I do not recall whether we sent a letter to the clerk of the court on this. I think we did not. We did not because we didn't think anything had changed. We did think, however, that we did disclose this to the Supreme Court.

MR. MARCUS: In your brief.

MR. MORRISON: At some point along the way. I cannot remember in which context. We decided that they should decide whether it is, in fact, moot or not and we didn't think we had that obligation with the Ninth Circuit but given the fact that it was in the Supreme Court, we did that. So in the summer—shortly after that, I think it was probably about May, we finally got a decision from the Ninth Circuit striking down the veto.

MR. MARCUS: That was the first court decision ever striking down a legislative veto provision?

MR. MORRISON: Right, right. It was a very solid decision by Justice—then-Judge Kennedy. It was unanimous, I think. Funny how you forget those things, but I think it was unanimous. The Justice Department filed a *cert.* petition. Although it said it agreed with it, it said that it had an obligation to file the *cert.* petition. I think the Senate and House filed their own petitions. We said that we agreed the decision was correct but that it was an important issue and we thought that, in view of the two branches supporting it, we were not opposed to grant of *cert.* It would have been silly to have opposed it in those circumstances.

MR. MARCUS: And, in fact, you probably were hoping, given your long-term interest in this issue, to get a Supreme Court decision.

MR. MORRISON: Yes, but I also of course had a client.

MR. MARCUS: Of course, yes.

MR. MORRISON: Who was quite interested in not having it further reviewed although no he's—it's a great thing in his life that he's—

MR. MARCUS: Right, he's a hero.

MR. MORRISON: He's a hero.

MR. MARCUS: He's immortal.

MR. MORRISON: The case was granted. We had oral argument in February of 1982. I argued for Chadha. Rex Lee, who was the solicitor general, argued for the government. Gene Gressman argued for the House and I think Mike Davidson argued for the Senate—no, no it was not Mike Davidson, it was somebody else. I've forgotten his name.

MR. MARCUS: Was Gressman an outside lawyer for the House?

MR. MORRISON: Yes, he was retained.

MR. MARCUS: Whereas Davidson was in the Senate Counsel's office.

MR. MORRISON: Yes, but Mike didn't argue it. It was somebody else who argued it whose name I've now forgotten because he didn't appear in any of the other cases. Gressman did appear in some of the other cases.

MR. MARCUS: And was there ever—before we get to the argument and the decision, was there ever any concern during this period that because of the president's position on the legislative veto the Justice Department would change its position on the merits?

MR. MORRISON: We were—I was concerned. I do not know whether there were internal battles that I was not aware of. Ted Olson was the head of the OLC at the time. One of his deputies was Larry Simms with whom I dealt most of the time. I don't recall them ever saying that it was in jeopardy. I think that we were okay. I think that when Reagan got in office he realized that—

MR. MARCUS: He was the president.

MR. MORRISON: He was the president, and looked at all the other places in which this thing was impinging upon his powers and potentially so. A couple of other interesting things happened along the way. One is that the ABA filed a brief on our side saying it was unconstitutional but the principal part of the brief was talking about the ramifications of what the legislative veto would do and all the areas in which it was destructive of the American government. Then-law professor Antonin Scalia wrote that brief in conjunction with a lawyer from Davis Polk, and it was an extremely helpful brief in my view. There were a few other briefs in the case, but not many. There were a lot of people who didn't understand what was going on.

As I said before, there were other cases going on and one of them was this Federal Energy Regulatory Commission case involving natural gas pricing of some kind or other. When this veto took place—I think it was in 1980—there were some consumer groups that had been supportive of the FERC rule that got vetoed, and I approached them about bringing the case because we had not gotten a decision from the Ninth Circuit and this was a one-house veto also. But the *Chadha* case involved what was a form of adjudication that was being overturned. The decision to allow Chadha to stay in the country, that was by an executive branch agency. The FERC was a rule making by an independent agency and so although on my theory of separation of powers, focusing on what Congress was doing, it made no difference, there were people who argued that there was a difference.

MR. MARCUS: That it wasn't as much of a separation of powers problem—

MR. MORRISON: Because the independent agencies—and there was rule making and it was less of—it was kind of a visceral reaction kind of thing. One couldn't dismiss it out of hand as being a potential dividing line. Second, we wanted a second case because we didn't know a) whether we were going to win that one or what was going to happen to it and so we brought this FERC case. The FERC case had *enormous* procedural problems with it, the first one being that the FERC statute said that you had to have asked for

rehearing before you could go to court. Since our clients had been perfectly satisfied with the rule as issued, they hadn't asked for rehearing. It was only the veto. I decided what we would do is we would ask the FERC to reinstate the rule that had been vetoed on the grounds that the veto was unlawful.

MR. MARCUS: Which of course they would have to refuse to do.

MR. MORRISON: And then we could take the case up. We would satisfy the procedural thing, arguably. There were two or three other things about the statute that made it extremely complicated, but we managed to write briefs surmounting all of those obstacles, we thought. We got to the D.C. Circuit and we drew Judge Malcolm Wilkey. Judge Wilkey had spent most of his time with the executive branch and was a strong supporter of the president. A Republican, he had always been a very straight judge in our cases, we felt. He was always a gettable vote and he saw immediately what was going on and he wrote a fabulous opinion with us on every single point—he had leapt over all these procedural hurdles to get to the veto issue and then held it unconstitutional.

MR. MARCUS: Before the Ninth Circuit decision.

MR. MORRISON: No, after the Ninth Circuit.

MR. MARCUS: Oh, after the Ninth Circuit.

MR. MORRISON: Three weeks before oral argument in *Chadha*. So we of course submitted the opinion as support for us. *Chadha* was then argued. All of the energy companies who wanted the veto to be kept in had been intervenors and they had filed for *cert.* as well. So the case was argued—*Chadha* was argued in February and no decision. Finally, the last day of the year there was an order entered: *Chadha* is set for reargument.

MR. MARCUS: The last day of the term?

MR. MORRISON: In June. Everybody was mystified. In the meantime, we and the Justice Department had made a motion to the Court asking to defer filing a response to the *cert.* petitions in the FERC case until the Court decided *Chadha*. We filed this in May, I think, and the Court agreed to allow us to do it. Then, of course, once they set it down for re-argument we were told that we had to file our oppositions. We filed our oppositions and the oppositions said, yes, it's important; yes, it presents the case, but you should, nonetheless, await the decision in *Chadha.* In addition, we also pointed out that there were, I think, eight different *cert.* petitions involving between sixteen and twenty-four separate issues, depending on how you counted them, many of which would be—could be—barriers, all of which would have to be decided before you could get to the legislative veto issue and therefore, *cert.* should be denied.

MR. MARCUS: And this reflected your view that *Chadha* was the stronger case?

MR. MORRISON: Well, at least it ought to be decided and sorted out and see what was going to happen. We filed that in the summer, probably August. Unlike every case which I have seen in which cases were set for re-argument, the October calendar came out and *Chadha* was not in October. It wasn't in November either. The FERC case was on the first court conference in September and when the order list came out there was no grant or denial of the FERC case. Almost immediately after that, *Chadha* was set for re-argument in December.

Justice Blackmun's papers claim that the chief had screwed up somehow and not assigned *Chadha* or had kept it for himself and didn't get it done. That was the reason it was set for re-argument. I, of course, was not there at the time but I do not believe that to be the case and I think that the history that I've just recited to you about the not rescheduling for argument and scheduling only once the FERC case had gone to conference supports the theory that the Court was originally inclined to set the FERC case for argument with *Chadha*, hear them both at once and get the full spectrum of legislative vetoes and deal with it all in one opinion.

MR. MARCUS: But you said—because—you say the FERC case came down shortly before the original argument in *Chadha* so the Court was thinking, "Let's wait for the *cert.* petitions in the FERC case and maybe we'll have everything to decide. We'll have the benefit of both cases." That makes sense.

MR. MORRISON: Yes.

MR. MARCUS: Or it could be that someone like the Chief Justice started work on an opinion and thought well, gee, this would benefit from—

MR. MORRISON: Unlikely, because they knew a case came down—the opinion was there, they could see that and if that was what they were going to do, they would have said to us early on do this or have done something else and it didn't make any—it's the only thing that makes any sense given the issues of timing, especially on the not setting it down for re-argument and then only setting it down for re-argument immediately after they saw what a mess the FERC case was.

MR. MARCUS: Of course, they couldn't put off—they couldn't hold the *Chadha* case initially because—postpone the argument because they didn't know whether *cert.* petitions would be filed in the—

MR. MORRISON: Or what they would say.

MR. MARCUS: Or what they would say, yes.

MR. MORRISON: Yes, yes, yes. So that's my belief as to what actually happened. The initial argument—

MR. MARCUS: So you argued it twice?

MR. MORRISON: Yes. When the case got scheduled for re-argument my mother said to my father, "Why are they re-arguing it?" My father said to her, "Did you ever go to a movie twice?"

They must have liked the argument so much. In fact, the first argument was a really good argument. It was contentious; everybody was on top of the issue. It was a really good argument, well argued on all sides. The second argument was boring. They had seen this movie before and they were literally going through the motions and, as I recall, nothing was said of any substance in the second argument that changed anybody's view. Lo and behold, down comes the *Chadha* case in late-June striking down the legislative veto.

MR. MARCUS: We're now in 1983.

MR. MORRISON: '83, yes. Striking down the legislative veto and striking it down completely across the board as applied to all vetoes. Burger wrote the opinion saying Congress can't do this, it is legislation. Powell says, not so fast I think it is an adjudication here but as an adjudication it doesn't work either. White dissented and said it was okay. Rehnquist dissented on the grounds that the veto was non-severable from the power granted and that therefore Chadha had no right to stay in the country in any event. The Court admitted that it was striking down two hundred statutes with this. Most of the time Congress didn't go through and take the provisions out of the statutes and maybe they still were able to exercise some influence. It was a big case and I said at the time that I thought the case was less significant for what it struck down that happened in the past than for what it prevented from happening in the future. That we would have had a completely different administrative state if the legislative veto had gone into effect.

MR. MARCUS: Oh, I agree with you and the other thing I would say, even though I'm not being interviewed here, is that White's dissent, as I recall, was this apocalyptic thing. It was a fairly powerful opinion, actually, in which he said gee, the modern administrative state has required this big shift of rule making and everything to the executive branch. The legislative veto is the only thing that really enables the Congress to really retain real power over legislation, in fact, and you are approving a massive shift the other way.

MR. MORRISON: And he also said it will be the end of compromise, that people can't work these things out and this was an accommodation and so forth and so on.

MR. MARCUS: Of course what he didn't realize is Congress had lots of other arrows in its quiver.

MR. MORRISON: It certainly did, it certainly did.

MR. MARCUS: Okay, so that was probably the case for which you as a lawyer will be most remembered. Don't you think?

MR. MORRISON: Well…

MR. MARCUS: I don't know.

MR. MORRISON: Maybe, maybe.

MR. MARCUS: Yeah.

MR. MORRISON: We can decide this later on. Someone else will have to decide that question. But certainly among them, certainly among law students.

MR. MARCUS: Among Con Law professors.

MR. MORRISON: One of the things that people always ask me about this was how did this particular veto take place? What was the theory? Why did the Congress veto?

MR. MARCUS: Yes, I see.

MR. MORRISON: There is no definitive answer. The statute was a statute that allows Congress to create exceptions for people who would otherwise be deportable if they have shown that they've been in the country for more than five years and that there are—I think again, extraordinary circumstances that prevent them from going back to the country from which they were sent.

MR. MARCUS: Let me just correct—I think that you meant allowed the attorney general…

MR. MORRISON: Attorney general, yes. Did I say the Congress?

MR. MARCUS: You said "Congress," yes.

MR. MORRISON: I meant attorney general through the Immigration and Naturalization Service. They were allowed stays of deportation and they were allowed to stay in the country and eventually become U.S. citizens. Needless to say, lots and lots of people applied for these—extraordinary hardship, I think, or undue—extreme hardship or something along those lines. It had to do with the fact that you couldn't go back to the country from which you came because political conditions had changed there. That was principally the aim of this statute. The Congress had a period of up to almost a-year-and-a-half or two years—if the INS, once they approved Mr. Chadha and the others, had to send the list over to Congress and Congress had until the end of that congressional session which, in the case of Mr. Chadha, I think was about eighteen months, to veto it. There were three hundred and thirty-nine people like Mr. Chadha whose names were on this list. The Immigration Committee apparently looked through these and they came out with a list of five people who got vetoed. When the resolution was brought to the floor of the House, the subcommittee chair said that we felt that these people didn't qualify. That's all that was said about them. That was the entire discussion on the floor. Nobody

said anything more; they unanimously approved the five and meant that the other three hundred and thirty-four got to stay. Why Chadha? Number one, why Chadha? No particular reason.

MR. MARCUS: Where was he supposed to be deported to?

MR. MORRISON: Well that was one of the problems because he had come from—he's of East-Indian extraction, had lived in Kenya at a time when there were a fair number of Indians. When in the 1960s and '70s the situation in Kenya changed, Indians became *persona non grata* and it would have been very difficult for him to have gone back. I don't think there was any quasi-asylum claim, but something sort of like that. He had a British passport but they wouldn't let him in to Great Britain either so he really had no place to go. He never lived in India although his family was originally from there.

One of the thoughts was that there was a scheme of bribery in effect at this time in Congress and that you had to pay to keep your name—

MR. MARCUS: To stay.

MR. MORRISON: Now there were two things—one thing that supports that theory. The subcommittee chair was Joshua Eilberg, who was subsequently indicted for bribery and convicted. I think bribery, but some bribery-like scheme. It was not unthinkable. The other problem was that to have a scheme of bribery you have to have people pay the bribes and—

MR. MARCUS: Three hundred and thirty-four?

MR. MORRISON: Yes—and nobody every told Chadha that he was supposed to have paid a bribe or that his lawyer was supposed to pay the bribe and they didn't. So while it is theoretically possible, I didn't believe that. My own view about this was that it was sort of an "off with your heads" approach, that the committee was just showing who was the boss, that they had the power and they wanted to be sure that the Immigration Service understood it and that the overseers were overlooking what was going on. Whether it was random or not, they picked enough of them that the INS wouldn't know that was going to happen. I have no specific evidence of that but it is the only thing that makes any sense about it. So that's the situation.

MR. MARCUS: Okay, Alan. Let's move on to the next case which is the Gramm-Rudman-Hollings legislation.

MR. MORRISON: I was sitting home on a Saturday morning and the phone rings and it is Ralph calling me. He said, "I got a call from Senator Weicker who was telling me about this effort to balance the budget and he described this process under which the president is going to send his budget over to the Congressional Budget Office but the Congressional Budget Office was going to decide whether the president had the authority to spend the money or not and if they didn't, the president would have to stop spending

the money." I said, "They can't do that. The Congressional Budget Office works directly for the Congress; we just won the *Chadha* case!" This was in 1985. I said, "They can't possibly do that."

Ralph put me in touch with some people and then we found out that various people in the House of Representatives were worried about this issue also. I went over to meet Mike Synar, who eventually became our plaintiff along with eleven or twelve others. I had never met Mike before—from Oklahoma. He's a lawyer, but not practicing much law, not much constitutional law, and the first thing I remember about him, aside from the fact that he had cowboy boots on and he put his feet up on the desk was, unlike other congressional plaintiffs whom I represented, he really wanted to know what this case was all about. He really cared about it. He wanted to know what we were going to do and how we were getting standing and all the rest of the stuff. He's a wonderful guy, just understood what was absolutely wrong with all this and that they were trying to use gimmicks to balance the budget and they were not making hard choices and the Congress was just trying to put this thing on autopilot under some formula that they were going to put in the statute where there turns out to be an enormous amount of discretion under the statute that was supposed to be kind of automatic. Anyway, he and I had discussed this and, meanwhile, the Justice Department was making—

MR. MARCUS: If I can interrupt—what year are we in now?

MR. MORRISON: Fall of '85.

MR. MARCUS: '85, okay. And the bill had not been passed yet?

MR. MORRISON: Had not been passed, it was still proceeding. The Justice Department, meanwhile, had weighed in, said it was unconstitutional to give it to the Congressional Budget Office.

MR. MARCUS: Let me interrupt again just to ask you was the GAO issue—was the GAO question in the bill at this time?

MR. MORRISON: No.

MR. MARCUS: I see, okay.

MR. MORRISON: The Congressional Budget Office was in the bill and everybody realized that the Congressional Budget Office was not going to work, but they thought they had a chance with the GAO and so they substituted the GAO for it. In my mind, the GAO was only a little better than the Congressional—

MR. MARCUS: Was a little better because the president nominates the head of the GAO, the Controller General.

MR. MORRISON: Yes. But the Controller General can be removed by the Congress and works for the Congress and everything and so we knew that was a big separation of powers issue. We also knew that the Justice Department was vigorously fighting the GAO in a variety of other cases then, some involving review of government contracts in which the GAO was claiming it had various executive branch-like authority. I knew that we could get the government to come in on our side. I also thought that Gramm-Rudman was bad public policy because it purported to put the government on autopilot, it left to the GAO lots of important choices to be made in the statute and this was, I thought, an excessive delegation. Mike thought so, too. This is what—he didn't care about the GAO. He thought this was a bad—this was government by gimmickery, just like the legislative veto and this was just not the right way to run the government. That was my view also.

MR. MARCUS: It was irresponsible.

MR. MORRISON: Yes, yes. And it was camouflaged and you really can't solve the problems that way. So I was working with Mike and I said to him what we need to do is we need to put a special judicial review provision in the bill. It has to do two things. One, it has to confer congressional standing so that at least the statute says it. It also gives an immediate right to go to court and requires it go to a three-judge district court in the District of Columbia and then automatic appeal to the Supreme Court. This approach actually appealed to everybody because people who said it was constitutional or unconstitutional, everybody agreed that we needed to know this right away. That got put in without objection. We had stuck an attorneys' fees provision in there, but that didn't last. I was trying to get Public Citizen paid on this thing because we never got a nickel in the *Chadha* case. We drafted the complaint as the bill was going through. Meanwhile, at this time the president had come out in support of the bill without realizing that the GAO thing was in there. He was supporting the concept of getting control of spending.

MR. MARCUS: It was very popular.

MR. MORRISON: Very popular.

MR. MARCUS: The political system can't do this, we have to set up a system—the automatic pilot was a virtue, that this was the way that the political branches could agree to get spending under control. It was very clever.

MR. MORRISON: Don't let me forget to talk to you about the balanced budget constitutional amendment because it's not—it's not a litigation but it was a very important thing and I'll tell you about my role in that.

So we were getting ready to file a lawsuit and I realized that I wanted to see my—

MR. MARCUS: Meanwhile, the bill has passed?

MR. MORRISON: It's about to be passed.

MR. MARCUS: About to be passed.

MR. MORRISON: Fred Fielding—

MR. MARCUS: And you begin to realize President Reagan's going to sign it.

MR. MORRISON: He can't not sign it. He can't not sign it.

I called Fred Fielding who was an old, old friend. I don't know whether I've mentioned this to you. I had met Fred when the *Pentagon Papers* case was in the U.S. attorney's office in New York. I was not working on it, but Fred was Deputy Counsel in the White House at the time and Fred was sent up to New York to watch us to see what we were doing in the case, to be sure we didn't give away the country. He didn't have much to do and I had some time so I got to meet him and became friends with him. We became friends over the years including when he was in the Reagan White House—well first when he was in the Nixon White House the last couple of years and then when he was in the Reagan White House. I called him and I said, "Fred, they're going to sign this—the president is going to sign this bill. I understand that, but the Justice Department has been fighting about the GAO provisions and lots of other things. I don't expect him not to sign it, but can he issue a signing statement saying he supports it but that this is unconstitutional and that the government's not going to support it?" And, sure enough, Fred got the president to put that in the signing statement so I knew I had the government on my side on one issue in the case. They did not come in on my side on the delegation issue which I was never expecting them to come in because any delegation is fine as far as the executive branch is concerned.

So we filed the lawsuit—immediate three-judge court—the GAO then hired its own lawyers, Lloyd Cutler, and then I was on the other side on behalf of Mike Synar and eleven other members of Congress. The three-judge court was appointed: Oliver Gasch, either June Green or Joyce Green (I can't remember) and the third judge was Antonin Scalia, as the requirement was one circuit judge and two district judges. We were put on a very expedited briefing schedule as the statute required, but this was really expedited.

MR. MARCUS: Brutal.

MR. MORRISON: Brutal. We argued the case in the ceremonial courtroom in early February of 1986. I argued, saying it was undue delegation and argued also that the GAO was unconstitutional but I left most of that argument to the government because the government had that. They said that the delegation was okay but it was unconstitutional. The GAO said the delegation was okay and the GAO was constitutional. So we had three different positions.

MR. MARCUS: Was Congress—House and Senate—represented in the three-judge court, do you remember?

MR. MORRISON: My recollection is that they were not—that the GAO was carrying their water for them and making all of their arguments.

About this time the GAO had then issued its first order cutting back on a pay raise or some benefits for government employees and so NTEU, National Treasury Employees Union, filed their own case which was consolidated with ours and eventually went to the Supreme Court with ours, although they made almost no arguments that were different from ours, and their lawyer did get to argue. But fortunately the Court said they had standing so they didn't have to reach whether Mike Synar had standing or not because as we know subsequently, they would have found that he didn't have standing.

MR. MARCUS: He was your only client.

MR. MORRISON: Well I had eleven others similarly situated—

MR. MARCUS: Oh, right, yeah, but it was just Congressmen.

MR. MORRISON: Just members of Congress, right.

MR. MARCUS: When you say the Court held the NTEU's standing, are you talking about the three-judge court?

MR. MORRISON: The Supreme—both of them.

MR. MARCUS: Both of them, okay.

MR. MORRISON: The three-judge court said because it was D.C. Circuit law at the time—

MR. MARCUS: Congressmen had standing.

MR. MORRISON: Had standing. Right. And certainly in a case in which there was a statute conferring standing all the prudential limitations which had arisen in some other cases were nonexistent and so they didn't have any particular problem with that. We argued in the Supreme Court—there was an opinion written in the three-judge district court *per curiam* but everybody believes that Justice Scalia, then-Judge Scalia, wrote it.

MR. MARCUS: You won in the three-judge court?

MR. MORRISON: We won in the three-judge court unanimously. The case went to the Supreme Court and we won on the GAO grounds. The Court didn't reach the delegation ground although the lower court had reached the delegation ground, said it was a proper delegation—the Supreme Court didn't reach the delegation ground.

MR. MARCUS: In the oral argument did you divide the argument with the government?

MR. MORRISON: Actually, it was divided four ways.

MR. MARCUS: Oh, yeah. What did you argue?

MR. MORRISON: I argued mostly the delegation point because that was the argument we were making alone. I think Lois Williams got to argue some as well. Lloyd Cutler argued for the GAO and I don't know whether Rex was still there or not—Rex Lee was still there at the time…if he wasn't, maybe Charles Fried—I think maybe Charles did argue it.

Anyway, we won the case, but not on the delegation grounds. I have always believed that although we didn't win the delegation argument that the delegation argument was vital because it made the Court understand that this was not simply a matter of adding up numbers, that the GAO had an important function with lots of discretion in it and that, therefore, it was particularly inappropriate, not a technical thing, but really went to the fundamental question of executing the laws.

MR. MARCUS: So the delegation argument colored the Court's view of the case in your view.

MR. MORRISON: Yes. If all they had been doing was adding up numbers in a column, no one would have cared. This was why they cared, and why you shouldn't let the Congress people, the congressional agency with powers to be removed by Congress, doing it. And then of course, after that they went back and they gave it to OMB and they did some other things. They tinkered around with it. Ultimately, it was somewhat helpful in moving the budget along, but ultimately it was getting lots of tax revenues in there.

Actually, this is as good a time as any to talk about the balanced budget constitutional amendment. This idea came in because Congress felt it couldn't get control of the spending.

MR. MARCUS: Right. So it was motivated by the same kind of political motivation that underlay the Gramm-Rudman.

MR. MORRISON: And subsequently the line-item veto. All the same thing.

MR. MARCUS: Stop us from spending, we can't control ourselves.

MR. MORRISON: Exactly the words. Government by gimmickery I refer to as the whole series of things. It's not reform. It's fooling yourself.

I first heard about this—Mike Synar told me about this and I got called to testify before the House Budget Committee on the constitutional amendment, the balanced budget.

MR. MARCUS: And of course, the Balanced Budget Amendment was the greatest threat in a way because that really would have put a straitjacket—

MR. MORRISON: It wouldn't be unconstitutional—

MR. MARCUS: It wouldn't be unconstitutional, and similar things have created enormous problems in states.

MR. MORRISON: The states, of course, have a problem but they have provisions that the balanced budget is only with respect to current expenditures. They have the power to issue bonds that are outside of all of this. The Balanced Budget Amendment would not have provided any safety valves at all. I did not think that anybody cared what I thought about the Balance Budget Amendment as a political matter. I thought the only thing I could usefully talk about was the question which nobody had asked: Are disputes under the Balanced Budget Amendment justiciable? If somebody claims that the budget will go out of balance, can somebody go to court and, if so, who and on what basis? If they are claiming the war powers exception, can they go to court on that?

And I had, I think, probably the most intellectually interesting day that I ever had in the House Budget Committee where I went on for well over an hour, maybe longer than that, discussing this back and forth and saying to them, "I don't know what the right answer is, but this is something that is completely irresponsible for you not to answer the question, 'Is it justiciable?' and if so, who and under what circumstances and what kind of cases, and that you can't pass an amendment to the Constitution and say, 'Leave it to the courts as to whether the courts are going to decide it.'" Many people said, "Of course, its justiciable," and many people said, "Horror of horrors! We can't let the courts decide the budget." There are no necessary right answers to that, but you have to decide it. Of course, they punted. Got over to the Senate and I testified again in the Senate—

MR. MARCUS: You say they punted—

MR. MORRISON: Meaning they didn't say a word about it, passed the Balanced Budget Amendment.

MR. MARCUS: The House passed it.

MR. MORRISON: House passed it. And the Senate came within one vote of passing it. Then it would have had to go to the states and maybe it could have been defeated or held up or something like that, but it was a complete disaster. I remember testifying before the Senate Judiciary Committee and Orrin Hatch was there and I said to him, "Senator, I have only one thing to say and that is it is the height of irresponsibility for this committee to pass this out without saying whether it is or isn't, and what is intended is justiciable. You cannot throw this matter onto the courts. You are amending the Constitution and the people have an absolute right to know the answer." Didn't stand in their way, nobody was interested in this at all. People would say, "The courts will sort it out." I said,

"That's not their job! When you are amending the Constitution, when you see an obvious problem, you've got to deal with it."

MR. MARCUS: But you got nowhere with this.

MR. MORRISON: Nobody was interested. A few people mentioned it from time to time as opponents, but that was sort of, oh well you don't like it and therefore you are using this as an excuse. I felt that that was, as I said, the height of irresponsibility not to deal with this issue. Imagine if that had passed?

MR. MARCUS: And it had a lot of steam behind it.

MR. MORRISON: It easily passed the House and it came within a single vote of passing the Senate.

MR. MARCUS: And if it had passed it might well have been ratified by the states, who knows?

MR. MORRISON: They would have said, "We have to live by balanced budget, so do you."

MR. MARCUS: Yeah.

MR. MORRISON: You don't have to wage war, you don't have to take care of the national debt and so forth and so on. It was really worrisome.

MR. MARCUS: It's amazing how these issues like that peak politically at a particular time and while there are still tremendous problems with balancing the budget and deficit spending, you don't hear about that anymore.

MR. MORRISON: Well, it's becoming possible to do the things they want to do.

MR. MARCUS: Okay. The next—what's the next big separation of power issue? Is it *Mistretta*?

MR. MORRISON: Well, actually, let's talk about the War Powers Resolution.

MR. MARCUS: Yes.

MR. MORRISON: At the bottom of Nixon's popularity, in the fall of 1973, Congress passed a War Powers Resolution designed to control the president's ability to wage war. It had a number of provisions in it. I think it had—it did have a legislative veto provision in it but—

MR. MARCUS: Still does.

MR. MORRISON: Yes, yes.

MR. MARCUS: And everyone assumes it is unconstitutional.

MR. MORRISON: Yes, yes.

MR. MARCUS: That's the one thing that everyone agrees is unconstitutional in the War Powers Resolution. It was passed, by the way, over President Nixon's veto, as you mentioned.

MR. MORRISON: That is correct and no small surprise that he would veto it.

MR. MARCUS: Probably any president would.

MR. MORRISON: I think that is probably right, yeah. They had lots of controversial parts. The part that always seemed to be the least controversial, least dubious in terms on constitutionality, was the provision that required that within forty-eight hours after combat of any kind begins (the words are not precise) that the president had to send a report to the Congress explaining the circumstances and telling the Congress how long he envisioned this was going to last and what was going to be done about it—an information report—and send it over specifically under the War Powers Resolution and Congress could then do what it wanted to do based upon that.

Reagan at various times had sent over information which arguably satisfied the War Powers Resolution but without invoking it—without saying that he was doing it. In—I think it's the fall of '87 now, Reagan is still in office, there began a series of sea battles in the Persian Gulf and we were fired on and they fired on us and ships were being sent there, among other things. Troops were being given combat pay and the president has not sent over any report as to what he was doing.

MR. MARCUS: And when you say "they," was it Iraq?

MR. MORRISON: Yes.

MR. MARCUS: So it was Saddam Hussein?

MR. MORRISON: No, no—yes, it was Iraq.

MR. MARCUS: It wasn't Iran at this point.

MR. MORRISON: I'm sorry.

MR. MARCUS: I don't remember actually either. It doesn't really matter.

MR. MORRISON: Iran is to the north so they couldn't—it was Iraq and others.

MR. MARCUS: Yeah.

MR. MORRISON: There were battles going on and we were firing back and forth and it was clear that everybody thought this was some kind of a war. Mike Lowry, who was a congressman from the state of Washington, and ninety-three other members of Congress filed a lawsuit after having written the president to ask him to please send the report over. The lawsuit simply wanted him to acknowledge the war and give us the information as to who was responsible, what our plans were, how long we were going to stay, so that Congress could act responsibly. The president refused, so we brought a lawsuit making absolutely clear that the only thing we wanted was this report to establish that Congress had the right to receive this information. Filed the lawsuit, reasonably expedited basis, the case was heard by then-Judge George Revercomb here in the District. He issued a decision in late-December (I'm pretty sure this would have been '87) saying that it was a political question and that there was no specific authorization for the lawsuit. He didn't say we didn't have standing and he said this was a political matter that Congress should deal with.

We took an appeal to the D.C. Circuit on a very expedited basis and within six weeks we got briefing and oral argument. Our first response was how can this be a political question? Congress has already passed one law. How many laws do they have to pass to get him to do this? Second, we're not telling the president he can't do anything, we need this information for our legislative responsibilities. The statute is perfectly clear; there is no doubt that there is this war going on. They are paying people combat pay. How can there not be a cause of action under the statute?

The case was argued in the D.C. Circuit. The panel was, I think then-Chief Judge Patricia Wald, Judge Harry Edwards and Judge Stephen Williams. These are very capable, smart and for these purposes, very fast judges. The case was argued in February, the first week in February my recollection is. February goes by, March, April, May, June—in July sometime there is a cessation of hostilities and we get an order from the court saying, "Does the recent announcement about the cessation of hostilities have any impact upon the litigation?" We wrote a letter back saying, "No, we still are owed this report. It's not moot, it doesn't change anything around. We might do things differently but we are still owed this report. There is an obligation, it is certainly not moot." And to the Justice Department's credit, they said, "It is no more nonjusticiable now then it ever was." It should the thrown out. The decision should be affirmed." Those things came in in the beginning or middle of August. Finally, we get an order in late October which I find out about only because a reporter calls me because we didn't have online anything then and because they sent it out but it didn't get picked up until after the reporter picked it up. The court enters the following order, "The hostilities having ceased, the case now is moot. The appeal is hereby dismissed." I always considered that the worst example of ducking a hard question that I ever saw. Some day I'm going to ask one or all the judges, each of whom I know, what happened.

MR. MARCUS: Well the judges must have assumed that since the statute had—well maybe—I don't know—did the government take the position that this wasn't really hostilities or…?

MR. MORRISON: No, they never said anything on the merits.

MR. MARCUS: They never said anything on the merits, but I guess the court, of course, if they held that the statute had been violated, would then have to decide whether the report requirement was constitutional.

MR. MORRISON: The government didn't really argue that it was unconstitutional.

MR. MARCUS: Really? They didn't argue the report—it's very hard to argue that a reporting requirement is unconstitutional.

MR. MORRISON: Yes, yes.

MR. MARCUS: There is another—I mean, from the executive standpoint, there are other provisions of the War Powers Resolution that are much more questionable.

MR. MORRISON: Absolutely, and when I took this case on, I said to them, "We are arguing only this."

MR. MARCUS: Only the report.

MR. MORRISON: Because you've got to get your foot in the door and the question about cessation of hostilities and withdrawal of troops and other things like that, those were surely more difficult and I don't think the government cared about the first step. I think they didn't want to have the second one. If this is justiciable, what else is justiciable?

I didn't quite make that argument. I assume what happened was I had one or two votes and somebody had threatened to take it *en banc*.

MR. MARCUS: Well, it's possible.

MR. MORRISON: And nobody wanted it to proceed so that's what—

MR. MARCUS: It's interesting because, of course, the big issues, separation of powers issues with respect to the War Powers Resolution, have never gotten decided as far as I know.

MR. MORRISON: No.

MR. MARCUS: And was that your only brush with the War Powers Resolution?

MR. MORRISON: I think so. The rest of these cases were brought by people who were trying to stop fighting in Nicaragua and arms to the Sandinista and I said to myself, gee, let's walk before we run because those are really tough cases. If this case couldn't get decided, all those other cases…. And this case, if there was any case that was congressional standing was ever appropriate—

MR. MARCUS: Yes, it was this one.

MR. MORRISON: Because it was a report so we could carry out our constitutional responsibilities.

MR. MARCUS: Yeah.

MR. MORRISON: To say this was a political question, pretty harsh to say that.

MR. MARCUS: But in that case the government argued it was nonjusticiable but they didn't argue no standing, right?

MR. MORRISON: Oh, yes, they said that members of Congress don't have standing, that their only remedy is to pass another law and to keep passing laws and laws and laws after that.

MR. MARCUS: Let's go on to the next case.

MR. MORRISON: In the wake of *Watergate* and Archie Cox's firing, Congress responded by passing a new Independent Counsel statute which created a statutory basis so that no president could ever remove in the same way that Nixon removed Cox. The statute provided that a special three-judge court would appoint Independent Counsels upon the advice and recommendation of the Justice Department and they had to forward recommendations if certain conditions arose.

There had been several of these appointed without too much controversy and when Ted Olson was the subject of the investigation for his role at the Office of Legal Counsel, he brought a challenge to the statute, to the Independent Counsel who at that time, in that investigation, was Alexia Morrison, no relation. Years later one of my students whom I ran into at a reunion said to me, "Gee that Independent Counsel case was great, but how did they get your name wrong?" I said, "No, no, no, this is not me." We had supported the legislation creating the Independent Counsel. We thought it was necessary, we thought it was modest and was properly—was constitutional.

MR. MARCUS: You didn't worry as much about judicial power as—I'm just teasing.

MR. MORRISON: Well we did worry about judicial power, as you'll see when we came to *Mistretta*, the Sentencing Guidelines case. The only power they had was—they had two powers—one was to appoint somebody, which the Constitution specifically gives them.

MR. MARCUS: Right. It's quite a shocking thing from a separation of powers standpoint, but it is right there in the Constitution, right.

MR. MORRISON: Although there is at least an argument which did not prevail, that it was meant to apply only to people who worked for the judicial branch rather than for other branches. That argument did fail because it wasn't—it's one thing to appoint the Marshals and the clerks, it's quite another thing to appoint—

MR. MARCUS: Appoint a prosecutor.

MR. MORRISON: Or the Secretary of State. Now fortunately the argument is that Congress would not allow that to happen and this was only in special circumstances.

The second thing, which became the real problem in Ken Starr's investigation, was the power of the court to expand the scope of the investigation without any check from the executive branch. That became ultimately a real problem. Olson filed this challenge and he won in the D.C. Circuit, Larry Silberman writing the opinion striking down on separation of powers grounds. We filed an *amicus* brief in the Supreme Court saying that it was perfectly legitimate, necessary and other things supporting it. But they had—we thought it was good government and it was not interfering with separation of powers. It was limited and carefully controlled.

I think my most useful contribution in the case was that I participated in the moot court. I think I may have looked at the merits briefs but I don't recall how much I was involved. I had lots of people. I was very much involved in the time leading up to the oral argument and in the moot court. One of the questions was who should argue this case? Should Alexia Morrison argue the case? She was a highly respected former assistant U.S. attorney and had been at the SEC and was recognized as a very able government lawyer, but she had never argued a case in the Supreme Court before in her life. This was a big case and you had not only Olson, but you had the Justice Department, Charles Fried, arguing against the constitutionality, saying it was unconstitutional, interfering with the president's power. She was on the other side. I think Congress filed some briefs but she was the only one that was going to argue it.

Lots of people thought that we should get somebody else outside to argue the case. My law school classmate Larry Tribe was mentioned and I said, "No, we must not do this. This is a case about separation of powers and extra-governmental activity. This is the last case we want somebody outside. We want Alexia to argue this case. She's got to argue this case. Our job is to get her ready to argue the case." So we did. I don't know who made the final call—but she argued the case. I remember during the moot court one of the issues came up as to whether she was following Justice Department guidelines and instructions. She said, "Well, yes." She said, "I have a copy of the U.S. attorney's Manual," and she goes like this and she reaches behind her and sweeps her arm back and she says, "I look at this every day." I said to her, "You absolutely have to say that at the oral argument. That's exactly the vision we want, that you are just like any other prosecutor except that you have a little bit of an insulation. What we want you to talk

about is how regular you are and how you follow everything and you do everything just like you did when you were an assistant U.S. attorney."

When she made the argument we wanted the Court to feel this was nothing out of the ordinary and unusual and it was not threatening to anybody. I had not known Alexia before and she is a woman—she was at the time—this was in 1987, '88—in her early to mid-forties, I guess. She has a large amount of hair with a bun on top. She dresses very conservatively and she looks like nothing but a schoolmarm. Your old vision of a schoolmarm and she has a completely unthreatening manner unless you happen to be a defense counsel. In the court she was calm and we got her ready and all she did for the first twenty-five minutes of her argument was to talk about what she did and how she went about doing it and how regular it all was. She didn't talk about separation of powers, she didn't talk about any of those kind of things. The message we got out was she was a prosecutor and she would do fair and right by it. And people afterwards said, "But she didn't talk about any of the issues," and I said, "No, no. This is exactly what she should be talking about." If you read the opinion, the opinion says yeah, it's a little unusual but nothing very threatening. She was completely unthreatening. She was unthreatening and she won the case eight to one.

MR. MARCUS: Well that's interesting because I remember being somewhat surprised by the decision at the time and I think this issue of supervision was very important in the case. Scalia makes a big deal in his dissent, as I recall, about how these guys are rogues, they can do whatever they want and so I think you were on to something there—

MR. MORRISON: And Rehnquist wrote the opinion—

MR. MARCUS: Who had been a former head of OLC and who was a big executive power man.

MR. MORRISON: Yeah, yeah, yeah. I felt that was a major contribution in that case.

MR. MARCUS: I think it was.

MR. MORRISON: Everybody—when I finally made my points about not going outside and what she ought to be talking about, everybody was comfortable with it and you could feel the Court being comfortable with that argument that day.

And a last thing I want to say about the Independent Counsel statute is after the Ken Starr thing which he once referred to as "the recent unpleasantness," which I thought was a nice way of putting his fights with the Clintons, there was a lot of talk about what to do. David Vladeck and I put together a paper in which we said "Mend it, don't end it," that there were things wrong with the Independent Counsel statute that could and should be fixed, but it still had an essential truth to it and, unfortunately, nobody was interested in it at the time and they may come back to it. I don't know if they got—the Scooter Libby-Valerie Plame prosecution was clearly the kind of thing where Patrick Kennedy had—

MR. MARCUS: Patrick Fitzgerald.

MR. MORRISON: Fitzgerald—had enormous power, had as much power as anybody else had in it and nobody thought that that prosecution ever would have gone forward but for an independent—and I don't care whether it is statutorily independent as long as its got the kind of independence it wanted there. That was a pretty good test case and maybe you proved that you didn't need a statute and that maybe the big problem was, some people would say, that the Valerie Plame investigation had a life of its own and went on far too long. I don't think, so but it continues to be somewhat of a problem.

MR. MARCUS: Well it does and it's interesting right now with the CIA destruction of the videotapes there is a kind of dance going on where the attorney general moved very quickly to appoint a Special Prosecutor but not with the kind of independence that Fitzgerald had because—

MR. MORRISON: Has he—has he got less?

MR. MARCUS: Yes. He reports to the deputy attorney general, whereas Fitzgerald had the powers of the attorney general. There are still calls in Congress for the appointment of an outside Special Counsel.

MR. MORRISON: The CIA tapes, of course, raises the additional national security issue which was not really at stake in any of the other ones.

MR. MARCUS: I think that's right. Okay. Should we end now?

MR. MORRISON: Yeah.

MR. MARCUS: Okay. This is the end of the January 19 session.

END TRANSCRIPT