Oral History of
ALAN MORRISON
Fourth Interview - January 26, 2008

MR. MARCUS: Daniel Marcus interviewing Alan Morrison on January 26, 2008. Alan, I think where we left off was in the middle of separation of powers, and the next case that you were going to talk about was the Sentencing Guidelines case.

MR. MORRISON: I've discussed how cases came to me in the past. This one came an even different way. I was sitting in my office one day and I got a call from then-Circuit Judge Stephen Breyer of the First Circuit. Judge Breyer and I knew each other from my having taught at Harvard and also from his being down here working for Senator Kennedy. I was part-time teaching at Harvard in the January terms for a number of years when he was back there after he finished up with Senator Kennedy. We used to have dinner together and go running in the January weather in Cambridge and I would see him at the Administrative Conference and other things. We became friendly and have continued to be friendly.

Anyway, he called me up and he said he's been asked to join something called the Sentencing Commission, and I said, "Oh, yeah, I heard about that."

He said, "They're getting started and people want to hold meetings in secret." He said, "You know about that stuff. Can they do that?"

I said, "Well, it's got to be subject to the Federal Advisory Committee Act."

He said, "No, no, it's not an advisory committee because it's not giving advice, they're actually going to write the sentences."

I said, "You're going to do what?" I said, "Who is on this commission?"

He says, "Well, there's a bunch of federal judges and some other…."

I said, "There's what!?" I said, "You can't do that."

He said, "I don't want to know about that. All I want to know about is secrecy."

I said, "Well, you are right. It doesn't sound like…."

He said there was a specific exemption from the Federal Advisory Committee Act.

And sure enough, it was right.

MR. MARCUS: In the statute?

MR. MORRISON: In the statute as I recall. They—and it was clearly not an advisory committee although they were presidential appointees, which would have made it not an advisory committee. I said, "That just can't be right."

He said, "Well, okay, all right…."

So they proceeded. I went and got the statute and started looking at it and I saw two things. One is that the commission had been given enormous discretion. In fact, much more than the discretion in Gramm-Rudman. While there were pages in the statute which said you could take this factor into account, not that factor into account, in the end there was essentially open-ended discretion to do whatever they wanted. I had always thought that the sentencing guideline idea was a sensible idea as a guideline to rein in judges. My own feeling had always been that white-collar criminals had not been sufficiently sentenced and if you stole a welfare check from the Post Office for $250, you went to jail for a few years. If you stole $250 million in an antitrust violation, you didn't go to jail. It seemed to me there was no effort to try to do anything about that or about the inter-District discrimination—because it's probably the right word—especially with regard to minorities, on sentences.

Even within Districts, you had some judges who were known as very harsh sentencers. The idea of controlling it at least to some extent has always appealed to me. But when I saw how little guidance there was—

MR. MARCUS: In the statute.

MR. MORRISON: In the statute, yes. I suddenly realized that three members of the commission were judges—

MR. MARCUS: Appointed by the Chief Justice?

MR. MORRISON: No, they were actually appointed by the president.

MR. MARCUS: Ah.

MR. MORRISON: My recollection is that the Chief Justice may have suggested some of them.

MR. MARCUS: So all the members were appointed by the president.

MR. MORRISON: By the president, yes. That was essentially necessary to avoid the Appointments Clause problem. Then there were four of these other people who were all sort of pro-government, pro-sentencing kind of people. I said this can't be right because, among other things, it did not provide for congressional review except in a cursory way of not passing a law to overturn them. My concern was Congress didn't have to

approve—no congressional approval. It seemed to me that Congress could have easily provided that they would approve it, perhaps on an up-or-down vote and no amendments, but they could approve it. This was very troubling to me because I realized that these were really quite political decisions.

MR. MARCUS: Do you think that the Congress made a conscious decision to wash its hands of it, that it didn't want the political accountability of approving the Sentencing Guidelines?

MR. MORRISON: I'm sure. This was consistent, remember, with what we had seen in the legislative veto and Gramm-Rudman and so forth and so on. The second thing about it was that originally the proposal was going to put the Sentencing Commission in the executive branch. That's what the Justice Department wanted. Senator Kennedy, I think, and others said, "That's not going to happen. We can't let the prosecutors determine the sentences because that would raise serious separation of powers problems. Besides, even if it wouldn't be unconstitutional, it would be very unwise." We certainly didn't want to do that. So they assigned this to the judicial branch of government. They gave it staff and money and told them to go out and do sentencing; make justice. It was an enormous delegation of what I saw as a core congressional function; judges in the past had been doing retail sentencing but never wholesale sentencing. It was all individualized and it seemed to me to be fundamentally wrong, that judges should stay out of this and it was inconsistent with the separation of powers. The delegation was extraordinarily broad and together the two of them were just really wrong.

MR. MARCUS: Did you tell your friend, Judge Breyer, this?

MR. MORRISON: Not right away. I'm sure I told him along the way. When I got off the phone with him I, of course, had looked at the statute. It had been passed as part of a very large Omnibus Crime Act of 1984. This was a significant portion and since I didn't do principally criminal law work, almost none, in fact, it wasn't something that I would have paid attention to. We started poking around and the first question was how we could get this into court. If we thought the whole thing was unconstitutional, it needed to be adjudicated promptly. My thinking was, two things: number one, if you did it on an individual basis, it could take a very long time, number one. You have to find somebody with an illegal sentence. The second is, in these kinds of cases, momentum often matters and if a law stays in effect for a while, judges don't want to overturn it. They sort of say everybody is sort of working with it and living with it. This was actually a law which, it turned out, I was wrong about those things because the judges hated it. The more they saw it the more they hated it. Somebody once said to me—I think it was referring to the District in Colorado—Denver—he said, "The Sentencing Guidelines are the only thing in the world that could ever unite district judges, prosecutors and defense counsel."

Actually my own view was that the prosecutors liked it because it changed things from plea-bargaining to charge-bargaining. They were able to do that. Be that as it may, that wasn't what I was all concerned about. The first thing we tried to do was we tried to bring an anticipatory action here in the District of Columbia on behalf of the Public

Defender Service of San Diego, who represented all sorts of people. They said, and absolutely correctly in my judgment, here we are—we don't know what to advise our clients about whether this is constitutional or not. Every day we are faced with this. If it is constitutional, I've got to tell them to do one thing. If it's unconstitutional, I've got to tell them to do another. We have a real need and the clients have a need and we can't—you can't get the clients in because they haven't been charged and convicted—some of them haven't committed the crimes and this is a perfect kind of thing. Sort of like the doctors in *Roe v. Wade* and other third-party standing cases.

So we brought the case and we ended up before Stanley Sporkin and he said, "No."

MR. MARCUS: Even Stanley Sporkin?

MR. MORRISON: Even Stanley Sporkin. He said, "Just wait. There will be plenty of cases." And sure enough, there were plenty of cases. My colleague, Patti Goldman, and I were working on this together, and since I had done a lot of separation of powers cases before this, we were the recognized experts. We started franchising (not literally, but…) our brief. We got calls to come out and argue cases. We were involved in some of them here. I remember being called to come out to San Diego where the District Court sat *en masse*, but not *en banc*. That is, there were twelve judges and they apparently all agreed among themselves that they would hear it, they would vote and everybody would follow what the majority said because—it was a very sensible outcome because they didn't want to be in a position where they were—everybody was going to have to keep reviewing them and be gaming the system. So that everybody knew, kind of the same point I was making before about this, and we argued a bunch of those cases there and I remember going to Wichita and Patti went, I think, to Michigan and the Second Circuit. We had a couple in the District of Columbia. They were all over the place because it was an immediate need. They applied to crimes committed after a certain date and these cases were moving right along.

MR. MARCUS: So it was an unusual situation where you couldn't really pick the District or the Circuit that you wanted or control the course of the litigation.

MR. MORRISON: Had no control.

MR. MARCUS: It was coming up in dozens of places but you put yourself in a position where you played a key role in sort of coordinating the litigation strategy around the country. Is that a fair characterization?

MR. MORRISON: I think that's right. We had all these cases in the District Court and one—it may have been more than one case, but one case got to the Ninth Circuit and I was asked to argue the case and did. Alex Kozinski was on the panel and he agreed—he was all over this thing. He agreed with us completely and he ended up writing an extremely favorable opinion which had no influence on the court whatsoever.

MR. MARCUS: No influence on the Ninth Circuit or no influence on the Supreme Court?

MR. MORRISON: On the Supreme Court.

MR. MARCUS: Oh, you mean for the panel, yeah. He wrote the opinion for the panel.

MR. MORRISON: He wrote the majority opinion. I think it was a 2-1, but I can't remember for sure. In any event, meanwhile, a couple of other cases came up in the Eighth Circuit and the government came to me and said, we would like to ask for *certiorari* in advance of judgment; that is, before the Eighth Circuit heard this case, we need an immediate review in the Supreme Court.

MR. MARCUS: Why didn't the Ninth Circuit case go up before that?

MR. MORRISON: I don't think the Ninth Circuit case had been decided by then. It was argued before the government decided in the Eighth Circuit to take that case up. I think it was sort of a question of inertia that they suddenly realized at some point that this thing was getting completely out of control and they had to get up there. It was going on in every District in the country and every criminal case and they had to know what the answer was.

MR. MARCUS: And they weren't winning all the cases.

MR. MORRISON: Oh, they were *not* winning all the cases because the closer we got to the trial judges, the happier they were to accept our arguments. And we knew this. They were all unhappy about their discretion being taken away from them and they felt very bad about having to sentence people, as under the mandatory minimums, to far greater sentences than they thought were justified and they felt they were hamstrung.

MR. MARCUS: Was there also sort of an esthetic objection as judges, to having to go through this maze with this grid of all these factors, and so on, adding up the points and so on?

MR. MORRISON: I didn't get that sense. They had the parole—no, the probation officers—do that in the first instance.

MR. MARCUS: I see.

MR. MORRISON: I think most of the cases we saw at the beginning were relatively simple cases, and the Guidelines became more and more complicated as they got more and more developed.

You have a choice of either—in these situations like this, you have simplicity versus fairness and they pull in opposite directions. The more you try for fairness, then it becomes more and more complicated. It's inevitable. Like the Tax Code.

Anyhow, so the government asked for and we consented to have *certiorari* in advance of judgment. So the *Mistretta* case, which was neither particularly good nor particularly bad on its facts—I don't even remember what they were and they seem to be of no great moment. It was not a case in which the Guidelines had changed prior practice very much in either direction.

More importantly, it was the kind of case that everybody understood that it wasn't about just this case and the facts were not as dramatic as *Chadha*—five out of 339 people getting vetoed. Everybody also knew that this was not about whether Guidelines were a good idea or a bad idea. It was about how, in our system of separation of powers, they ought to be handled.

We wrote the briefs and I'm quite sure that I argued first in the Supreme Court. Oh, meanwhile—I forgot a really important point, although it is reminiscent of what happened in Gramm-Rudman. The Justice Department came in and defended the statute. We had two claims: undue delegation and separation of powers. The government disagreed with us on undue delegation, said it was a perfectly proper delegation. Then it said, "Even though the statute says that this is part of the judicial branch, that would be unconstitutional and, therefore the Court should treat this as part of the executive branch—and that it is perfectly permissible to have it in the executive branch and there is no problem delegating to the executive branch and, for that matter, for federal judges to sit in the executive branch to do that.

MR. MARCUS: So the government argued that the statute should be sustained on the fiction that because it was an executive branch function, that the Sentencing Commission should be deemed to be in the executive branch even though Congress said it was in the judicial branch. And do you think they thought that if that were the case—under the unitary executive theory, if it was in the executive branch, the president could tell the commission what to do?

MR. MORRISON: Well, only to the extent that the *Humphrey's Executor* case is no longer good law, because it would be an independent part of the executive branch.

MR. MARCUS: I see, yes.

MR. MORRISON: Rather like the FTC or the SEC. And they were prepared to say that was all right and the Independent Counsel case was going on at the same time. The Independent Counsel case actually was decided in July of '87, no '88, and *Mistretta* was argued the following October. So there was a lot of question about that, which I'll get to in a second.

Anyhow, the Sentencing Commission then hired its own lawyers. The solicitor general at the time was Charles Fried, who had been at Harvard when I was there, although I didn't have him. I knew him from when I had taught there. The Sentencing Commission then hired former Deputy Solicitor General Paul Bator, who had been my Civil Procedure teacher and who was then at Harvard—or was he in Chicago? He went to Chicago—he

may have been in Chicago by that time. Anyway, Paul argued for the commission. The commission said, "No undue delegation. No, it's in the judicial branch"—

MR. MARCUS: But that's okay.

MR. MORRISON: And that's okay. Judges can do this. There is nothing that prohibits judges from doing this. I remember the conversation I had with Paul about whether the Sentencing Guidelines were substantive or procedural and I said if they were substantive, they can't—this is—

MR. MARCUS: It's legislation.

MR. MORRISON: Legislation, they're doing legislation. And he said, "I thought I taught you the difference between substance and procedure in civil procedure." I said, "You did and that's why I have this claim and not that claim." So we had a nice back and forth about that on the case. We had done several of these in other courts, but we went to the Supreme Court and argued. There was a three-part argument in the Supreme Court. Even though the government had petitioned in advance of *certiorari*, I was considered to be the petitioner and I think I said to them I should go first because I was challenging the statute.

MR. MARCUS: You were the challenger, yes.

MR. MORRISON: Challenging the statute in terms of writing the briefs and everything else and everybody reached agreement that that was a more sensible way of doing things. Since we all knew each other and nobody was trying to get any advantage, it just didn't make any sense for them to write a brief explaining why an argument that I hadn't yet made was wrong.

For the only time that I've every argued in the Court, I got to argue for ten minutes before anybody interrupted me. I began, as I recall, by saying that this statute is unconstitutional and is a violation of undue delegation and separation of powers. In order for me to explain why that is so, I need to explain in some considerable detail what the statute does and what it doesn't do. So I went through an elaborate description of how the statute actually worked in practice and how much discretion they had in it to illustrate the point. There was much discussion about the three judges who were on the commission, what capacity they were sitting in. They said, well they are sitting as individual judges. They are not sitting—they are not courts, they are not acting as courts, they are sitting as individual judges. My argument was you are a judge twenty-four hours a day. You don't change your stripes when you are off it. So I said you are a judge and courts don't decide cases, judges decide cases. Chief Justice Rehnquist said to me, "Mr. Morrison, that sort of sounds like the argument that guns don't kill people, people kill people." And I said, "Precisely." And he looked at me and I don't know whether he didn't get my point or he didn't accept my point, but my thinking was that was just as much a fable in this area as it was in the area in which he had given. In fact, I had sort of anticipated that as a question—as a response. He didn't get my point and—or at least I didn't get his vote and,

in fact, I got only one vote and that was Justice Scalia, who had been the dissenter in the Independent Counsel case. Justice Blackmun wrote the opinion for the Court saying, no undue delegation. He said, there are pages and pages of descriptions thou shall and thou shalt not, to which my answer always was, "Yes, but it gave you so much leeway to do essentially anything you wanted to do that it didn't confine you at all and didn't tell you how to answer any of the difficult questions." This was a real abdication situation again. That was the end of that, so to speak.

MR. MARCUS: Had you—I remember being surprised that the Court which had been so tough on separation of powers in the Gramm-Rudman case sort of overwhelmingly voted to sustain both the Independent Counsel statute and the Sentencing Guidelines. Were you—going into this—were you surprised by the decision or were you sort of worried about it because of what had happened in the Independent Counsel case?

MR. MORRISON: I thought that the Independent Counsel decision was justifiable because judges were doing nothing more than what they had been explicitly authorized to do in the Constitution—appointing officers—and that there was no interference with the executive branch. There was, of course, no delegation problem as well.

MR. MARCUS: That's right.

MR. MORRISON: The judges weren't doing anything inappropriate. They weren't running the investigations. The other side, of course, said, in *Mistretta* well this sort of shows that this is a pragmatic court and they are into pragmatism and they are away from formalism which I always thought was a sort of a misguided argument. My own view of the legislative veto case is we won that because the Court understood what was at stake and was not about to have the Congress run the executive branch of government.

I am convinced that we lost *Mistretta*, the Guidelines case, because the judges said, well these are judges, they don't do anything improper. We're judges.

MR. MARCUS: They are our people.

MR. MORRISON: We know them, they're just doing their job and it would *never* influence *them* in their other work, the fact that they sat on the Sentencing Commission.

MR. MARCUS: We know these guys, yes.

MR. MORRISON: And it's not inappropriate. Judges do all kinds of things, some of which we like to do and some of which other people like us to do. Congress could make this decision to allow the judges to do all this.

That was the tone of the opinion. Justice Scalia writing in dissent referred to the Sentencing Commission as a "Junior Varsity Congress." They're doing exactly what Congress does except that they are not elected. Of course, he was right about that. By the way, I guess I felt worse about losing that case than I did about losing almost any other

case that I did because I thought it was so wrong as a matter of principle, so unnecessary, that Congress could have and should have been willing to take this advice and pass on it, that they really needed to give more guidance and that judges really had no business doing this. They were co-opting the judges to join the majority of non-judges—or maybe it was a majority of judges—I can't remember now. In any event, I felt that they were co-opting the judges to get them to be on board, to give the outcome a veneer of respectability that would not have happened if they had been all appointed by the president from the executive branch or from outside the government. And, of course, there were thousands and thousands of lives—not literally—at stake because the death penalty was not part of the Guidelines.

One of the things I argued was—Brennan and Marshall were still both on the Court at the time—and I argued that they could—that the way the statute was written, the commission could re-impose the death penalty if they wanted to. They said, we don't have to reach that question because they haven't tried to do that yet.

MR. MARCUS: I think you're right that one of the things that was at work in this case was a gut feeling that, gee whiz, this is kind of a natural thing for judges. They're the experts on sentencing and what's the big deal about letting them do it. But do you think that they might have felt differently if any of them had ever been a federal district judge or a trial judge and had to engage in sentencing? In other words, then they might have been influenced by their horror at the idea of binding sentencing rules depriving district judges of their discretion?

MR. MORRISON: I don't know. Surely the reaction among district judges was very strongly against. Part of it is, of course, what all of us find is when somebody imposes change on you, your first reaction is to say, "No." We resist change. The old system was okay. Leaving that aside, I think there was genuine concern and it became more so as people saw more and more cases in which the Guidelines really didn't fit. Judges were personally anguished and offended by having to impose sentences that they thought were unjust.

MR. MARCUS: You didn't have the crack cocaine/regular cocaine issue at that time, right?

MR. MORRISON: No, but there were other minimum mandatories already in existence.

Now speaking of delegation, actually there was one additional case which I'll just mention briefly. This was the pay case.

MR. MARCUS: Judges' pay?

MR. MORRISON: Judges' and everybody's pay. Again, the Congress couldn't deal with the problem so they appointed a commission. The commission made recommendations to the president and the commission could do anything—they could make any recommendation that they wanted and the president could do anything he wanted with

that recommendation. He could go up or down—except for judges. He couldn't take them down because Article III forbids pay reductions for judges. Everybody else could go up or down by any amount they wanted, had nothing to do with anything that they wanted to do. If there was ever a case where this was done for political reasons because the Congress didn't want to do it, this was it.

MR. MARCUS: Where the delegation was done for a political reason?

MR. MORRISON: Delegation—absolutely, clear abdication of responsibility. Somebody else brought the case—

MR. MARCUS: But it was a way to get pay raises for people.

MR. MORRISON: Absolutely.

MR. MARCUS: So—

MR. MORRISON: So nobody had to vote on it.

MR. MARCUS: All the government officials thought this was a great idea because Congress could never bring itself to vote for a pay raise because of the political consequences.

MR. MORRISON: And so did The *Washington Post* and The *New York Times.*

MR. MARCUS: It was a good government thing.

MR. MORRISON: A good, good government thing, yes. The fact that it was completely abdicating responsibility was my problem. I didn't get in the case at the trial level or at the Court of Appeals level. I was asked to file the *cert.* petition.

MR. MARCUS: And this is—if I can interrupt—this is a good example of how, I think, you and Ralph Nader, but especially you—

MR. MORRISON: Well, part of this was because Ralph was really unhappy about the pay increase.

MR. MARCUS: Oh, I see. I was going to make the opposite point that this was an area where you got free rein to pursue your conceptual separation of powers agenda without regard to whether it was something substantively that Nader was interested in. But he was interested? He thought federal employees made too much money?

MR. MORRISON: No, he thought that Congress should vote on it.

MR. MARCUS: Oh, okay. He just believed in the separation of powers and political responsibility.

MR. MORRISON: For example, the Sentencing Guidelines, although he agreed with me about white-collar criminals, he had no special interest in sentencing policy or other things like that.

MR. MARCUS: But he really believed in this separation of powers stuff.

MR. MORRISON: Oh, absolutely, absolutely. So we filed a *cert.* petition in the pay case, and we said, in essence, if this isn't undue delegation—because there was not a sentence, a word, about what the standards were, just what ought to be done. It is the essence of legislation. I got no votes on the Court. It was at that point that I conceded that the delegation doctrine was dead. I think that if we had gotten that case up before some of the other ones, they might have balked at some point. But having gone through *Gramm-Rudman* and *Mistretta*, especially, they weren't going to be concerned about it. Among other reasons, because about this time Congress had basically bailed out on this and it wasn't clear they were going to try to do it this way anymore. There were also some standing questions—there might have been standing questions ultimately.

MR. MARCUS: You also had a lot of bad Supreme Court precedents.

MR. MORRISON: Yes, yes, of course.

MR. MARCUS: You have the World War II cases on price controls and so on, which approved delegations to the president without any standards of law.

MR. MORRISON: No, they had standards.

MR. MARCUS: Well, very vague.

MR. MORRISON: Yeah, but you could tell what they wanted you to do. You could tell what they wanted you to do. Here they could have done anything. This is a case where they could have gone up or down. They could have given raises to some and not to others. They could do anything they wanted to do. It seemed to me to be completely unprincipled, but that got me nowhere.

What I now do is when I teach Administrative Law, I have the delegation cases in the book and then I give them the Pay Act and I say to them, "Is this constitutional, why? And if not, why not?" That's when we get through and say, look, it's effectively the end of the delegation doctrine. There is no undue delegation save, if they tried to do it to private parties—after all, *Schechter Poultry* was a delegation to private parties. There is also an Appointments Clause argument with respect to private parties as well.

So that takes us through *Mistretta.* About this time, the Congress had decided that it needed to do something about the Washington metropolitan area airports. The Department of Transportation made a recommendation to create a separate Airports Authority.

MR. MARCUS: What was the status before this legislation? They were just owned directly by the federal government?

MR. MORRISON: By the federal government.

MR. MARCUS: All three airports?

MR. MORRISON: Yeah, and they were under the jurisdiction of the Transportation Department. It didn't make any sense.

MR. MARCUS: When I say "all three," I guess it's just two, right?

MR. MORRISON: No, Baltimore.

MR. MARCUS: Baltimore, as well. Is owned by the United States?

MR. MORRISON: Well, no, I may not—

MR. MARCUS: I don't think so.

MR. MORRISON: I may be wrong about that. I may be wrong about Baltimore.

MR. MARCUS: Yeah.

MR. MORRISON: As part of the Compact with the three states, they all came together in these three airports. The concern was that Congress was willing to let go of them, but it wasn't willing to let go of them completely. So it created this Airports Authority with multistate membership and then they provided that the rules of the commission, the Authority—very significant matters—could be disapproved by a board which was composed of eight persons appointed by the Congress. They didn't have authority to do anything, they had only authority to stop things from happening.

MR. MARCUS: Presumably to protect federal interests? That must have been the theory.

MR. MORRISON: You got it. Federal—translated "congressional."

MR. MARCUS: Parking spaces.

MR. MORRISON: Parking spaces—among other things, to which cities you could fly out of from which airports.

MR. MARCUS: Ah, yes, yes.

MR. MORRISON: All the things that really matter in life. And the eight people appointed by Congress were, as I recall, four sitting members of Congress and four

former members of Congress, all of whom having some connection with the Transportation Committee from which this bill came—came out of.

MR. MARCUS: And the Authority that was created was, in theory, not part of the federal government?

MR. MORRISON: No, it was created as an Interstate Compact. It had to be approved by the federal government under the Compact Clause and it was subject to the federal statute, but it was not a federal agency. I read about this in the paper. I said, "They can't do that." And sure enough, we found a group of citizens headed by—John Hechinger was one of the lead plaintiffs. They were concerned about aircraft noise and they were fearful that—Hechinger at that time (he died a few years ago) was living on—near Chain Bridge Road, in the Wesley Heights area where the planes came by on a regular basis. They were fearful that there would be more and more planes come in, there would be more inconvenience. And so we brought suit and, in fact, the Congress had vetoed one plan that would have been helpful to the citizens in terms of keeping down the noise. It was *Citizens Against Aircraft Noise v. Metropolitan Washington Airports*.

MR. MARCUS: And you were trying to knock out only the provision for this board. You weren't trying to knock out the whole Compact.

MR. MORRISON: No, the Compact was perfectly valid. We just said that the board couldn't do this. The Justice Department agreed with us and came in on our side.

The board, I think having no real practical choice, had to defend the law—they hired Bill Coleman to represent them. My colleague, Patti Goldman, was in charge of the case and I worked with her, of course. We brought this case and we won it, and we won it in the Supreme Court six to three, I think, saying that Congress couldn't do indirectly through the creation of a private board what they couldn't do directly, which is the legislative veto. They had no more authority to override rules this way than they did another way.

MR. MARCUS: Did you argue the case in the Supreme Court?

MR. MORRISON: No, Patti did. And then—so they came back and Congress wouldn't give up. They gave the board the authority to delay rulings. We went back to Court again and—

MR. MARCUS: What was the theory of that, that they could delay it so that Congress, if it wanted to, could pass a statute?

MR. MORRISON: Right. And we said, "Congress can pass all the statutes it wants. It can set as much time as it wants, but it cannot have a positive effect on the course of legislation—on the course of rules that are put into effect. It has no power to do it." The fact that it wasn't a federal agency didn't matter because Congress's powers were limited to lawmaking and this was not lawmaking because it didn't go through the bicameralism and presentment provisions. The D.C. Circuit agreed with us again and the Supreme

Court denied *cert.* And that was the end of it. They walked away and now the Airports Authority is operating independently, as it should.

MR. MARCUS: Who did you lose? What three votes did you lose in the Supreme Court? Do you remember?

MR. MORRISON: No. Probably Justice White.

MR. MARCUS: Yes. He thought all these things were okay.

MR. MORRISON: It may have been Rehnquist—I don't remember.

MR. MARCUS: Well let me ask you this, Alan, I'd not remembered this case. It's very interesting and a good victory. I'm interested in the second one because, as you probably know, Congress has passed a statute that is in effect that requires that all major federal rules be delayed for a period and reported to Congress. It's a delayed effective date. It's not real long but it is designed to give Congress an opportunity to review the reg and pass a statute throwing it out if they want to, which they've only done, I think, once or twice.

MR. MORRISON: The only time I know was the repetitive stress rule.

MR. MARCUS: That's right. That was the OSHA rule in the beginning of the Reagan administration.

MR. MORRISON: Bush.

MR. MARCUS: Bush administration.

MR. MORRISON: Bush II.

MR. MARCUS: That's right and they threw it out.

MR. MORRISON: Perfectly constitutional.

MR. MARCUS: It's different? What's the difference?

MR. MORRISON: The difference is that it is automatic and in the statute and no independent congressional board is doing the change. And we said if you want to make everyone subject to delay (which, of course, they wouldn't do because there were lots of things going on), they needed to pass rules all the time and they couldn't do it. The statute you refer to refers only to major rules and—

MR. MARCUS: That's right. It's turned out pretty much a dead letter in the sense that Congress hasn't interfered with—except for the OSHA Repetitive Stress Rule.

MR. MORRISON: The reason they were able to do it there was because you had changed the presidency and Bush willingly signed it into law. Clinton would have vetoed it, and there never would have been enough votes to override a veto so it's only useful in an extreme, extreme case or at the time of the transition.

MR. MARCUS: Okay. So are we ready for the line-item veto?

MR. MORRISON: We are ready for the line-item veto. I had been well aware of the line-item veto for many years and always thought it was an unwise idea, both because I didn't think it would do much to control spending and because I thought it gave the president much too much power to be able to destroy political compromises and really tilted everything against the Congress. For years the Congress, at least the majorities, thought the same. They would never give a president the power. There was always a major constitutional question because the line-item veto literally, as even the proponents of the law that passed admit, is, if carried out literally, unconstitutional. The president does not have the power to pick and choose. He must either sign a bill or veto it. Nobody contended the opposite. In the forty-something states where there is a line-item veto, every one of them has a specific provision in the state constitution allowing the veto.

MR. MARCUS: And we don't worry as much about the power of a governor as we do the power of a president.

MR. MORRISON: And there are other things. They've got balanced budget requirements, and all sorts of other things that operate differently. They have different kinds of borrowing authorities; it's quite different than the federal government. They don't wage war, have national debts and ditto with international finance and so forth.

Along about 1995, as part of the Contract with America (or "on America" as it is often referred to), in addition to the Balanced Budget Amendment which I talked to you about last time, there was the line-item veto. Clinton, like every president before him, supported the line-item veto. The Republicans were in the ascendancy—they always thought it was a good idea.

MR. MARCUS: Reagan had made a big issue of it, as I recall. He wanted it. Because he had had it in California.

MR. MORRISON: Yeah, he liked it. Why wouldn't you like it if you're the president? There's nothing not to like about it, which was sort of like the legislative veto; for Congress, it's the same thing. The parallels are really quite uncanny.

The Democrats were saying, as we talked about in the Balanced Budget Amendment, "Stop me before I spend again." We absolutely have to have it. It's the only way we're going to get control.

MR. MARCUS: And their guy wanted it.

MR. MORRISON: Their guy wanted it. So for the first time—

MR. MARCUS: That's right. The stars were aligned.

MR. MORRISON: But not quite, because the Republicans, as a condition of this, made the veto not effective until January 1, 1997, because they thought that they had a chance of recapturing the presidency and they didn't want to give Clinton anything, especially in an election year. The Democrats, of course, had no way to stop that from happening. They were prepared to concede that but it wasn't necessary. So there were various proposals in the Congress and no one really thought that the little line-item veto would work. There were various alternatives proposed, none of which were, in my judgment, constitutional. They finally settled on the one in the bill.

Interestingly, there had been a lot of constitutional discussion but there was no discussion about this particular one and why it was constitutional, except for the most cursory matter. I think in the end people didn't really care. They just were going to pass something. Senator Byrd fought mightily to oppose it. He was the leader in the Senate. The House was, at this time, Republican and they just rolled it through. They didn't have any debate or anything like that.

MR. MARCUS: For the record, I don't know if you are going to do this, but why don't you tell us what the particular mechanism they came up with was.

MR. MORRISON: Okay, sure. The mechanism was that the president would do what the Constitution requires, to sign the bill into law. Then he had a period of ten days in which he could submit a rescission message. The rescission message under which he could identify any separate items of spending, and that meant that they had to be separated someplace in the statute or, I think, in the legislative history also. It was also applied to tax expenditures, but in a very limited sense and it was only with respect to new ones and only if they met certain qualifications. This was a necessary concession because everybody who understood the first thing about it understood that tax expenditures are the same as appropriation expenditures. They are actually worse because they are hidden and they don't come up every year.

So they passed this bill, and the president had to make three findings. First is that the rescission item would reduce the deficit. Second, that it would be not harmful to the national interest, and third, it would be in the public interest. Which meant he could do it whenever he wanted to. There was no question that he could do it whenever he wanted to. There were no criteria whatsoever. He would send the rescission message back and Congress would then have an opportunity to override the veto—the line-item veto.

MR. MARCUS: But did he then have to sign the overriding legislation?

MR. MORRISON: Yes.

MR. MARCUS: That was what the proponents thought made it okay, right?

MR. MORRISON: Yes. The trouble was, of course, that it shifted the balance of power and it now meant that Congress had to get two-thirds to override a line-item veto as opposed to two-thirds to override a bill veto. That gave the president enormous additional power. We thought it was unconstitutional.

MR. MARCUS: Did you or Public Citizen participate at all in the legislative process on this statute? Did you testify and say this is a terrible idea?

MR. MORRISON: Yes, I'm pretty sure I did testify and said it was unconstitutional and a violation of separation of powers. We also recommended and drafted a provision for expedited judicial review for the reasons that I've discussed before. We also provided that members of Congress—

MR. MARCUS: Could have standing?

MR. MORRISON: And we thought that this was the best case for congressional standing because the members were really being interfered with in their jobs. They could no longer make a binding bargain—I'll give you this and you'll take that.

MR. MARCUS: Yeah.

MR. MORRISON: And the president could go and destroy it. It created all the incentives in favor of the—everything went in favor of the president. It made it much more difficult to compromise. It made it much more difficult to be able to negotiate with the White House about anything because they had this absolute power to veto for any reason or for no reason or for the worst possible reasons.

Senator Byrd understood all that, but he also understood this was a matter of Congress as an institution. Senator Moynihan, Senator Levin and I'll think of the fourth Senator. We had somebody from the House of Representatives as well. We did not get any Republicans, which saddened me. I thought we had a chance at a couple but they decided not to come on. So we brought suit before the statute was in effect saying we had to essentially know. The standing provision said they could pursue it immediately. There were two separate ripeness problems on that. One was that the statute was not literally in effect. There had been no vetoes. The president didn't have the power—it was signed into law in late '95 and we brought the suite in early '96. There had been no vetoes.

MR. MARCUS: But your theory was that the legislative process was already being—appropriations process was already being affected by the existence—the specter of the line-item veto.

MR. MORRISON: And that nothing would happen between now and January 1 '97 that would change anything.

MR. MARCUS: That's right.

MR. MORRISON: All these people were still going to be in Congress and the president was going to still have the power and so forth and so on. And that Congress had specifically said, "bring it now," because they wanted to know what the answer was.

So we brought a lawsuit and we worked with a lot of other people, Lloyd Cutler and Lou Cohen from Wilmer. Mike Davidson, the former Senate Legal Counsel, and Chuck Cooper who had been OLC in the Reagan administration—someone who I'd gotten to know and had gotten to like a lot and work with. We had some differing views on many things but by no means on all things. We put together quite a good team. We roared through the District Court. We drew Judge Thomas Jackson. Jackson has had a mixed record on the court. Some good things, bad things; he had a reputation of not always being the fastest judge in town. He got on this case and he rammed it through and wrote a really good opinion in which it was—the one thing that's clear is he understood exactly what was going on. He really understood the separation of powers problem. The case was decided in early April, expedited judicial review. We got to the Supreme Court and it was argued at the end of May.

MR. MARCUS: The expedited review provision—bypass the Court of Appeals?

MR. MORRISON: Because it was in the statute. We had actually suggested that the Congress put a three-judge court in it and for reasons that I don't remember they didn't do it. So it was a single judge up to the Supreme Court. Turned out to be fine for us. The solicitor general was on the other side. I think the Senate—yeah, I think the Senate and House filed *amicus* briefs or some people filed *amicus* briefs against us. They argued standing. It was not an issue with the District Court because the statute said so and because the D.C. Circuit had been receptive to congressional standing. But in the Supreme Court they argued standing and, to a lesser extent, ripeness, so that was really the question.

MR. MARCUS: I assume they also argued—they had to argue the merits?

MR. MORRISON: They argued the merits as well.

MR. MARCUS: They defended the statute.

MR. MORRISON: They absolutely defended it.

MR. MARCUS: And this was when Walter Dellinger was the SG?

MR. MORRISON: He was the acting solicitor general. I think this was his last argument that he made in the Court at that capacity, then Seth Waxman took over after that.

We argued the case. I remember Senator Byrd said to me afterwards, he said, "Why don't they let you finish your sentences?" He said, "We would never let that happen." I said, "Senator, that's the difference."

All the members were very much involved and they read the briefs and they came to the argument. They cared deeply about this. They felt this was both bad as a matter of policy and an affront to their offices. The case came down and we lost seven to two.

MR. MARCUS: On standing.

MR. MORRISON: On standing. Only Stevens and Breyer said we had standing. Souter and Ginsburg said well, if there weren't people whose projects were going to be vetoed who would clearly have standing when the law becomes effective, we might view this differently. And the other five, led by the Chief, said, no congressional standing. A very significant decision.

MR. MARCUS: It put the knife in the back of congressional standing, generally.

MR. MORRISON: This was a really strong case for congressional standing; a very important part that members could go in and sue. It was right in the statute, so all the prudential reasons were set aside, there were clear injuries. We had the Adam Clayton Powell case where he could sue for a job. At one point during the process I wanted to make an argument and was persuaded not to make it. It probably wouldn't have made any difference. I would have said, "Suppose that the statute had said that members of Congress have to pay a dollar if they vote against the override. Would that give them standing because they had an economic stake in it?" And it was, no that's just silly and that—but, you know, if you read the opinion, that's sort of what they say. They have no stake other than their stake as members of the Senate. It seems to me fundamentally wrong. I think that we probably went too far in some of these cases with congressional standing. I don't say I overreached, I took an opportunity get into court the issues that I wanted and cared about. But to say that the Congress's judgment about this is unconstitutional because, in effect, they struck down the standing provision as violating Article III; they declared the statute unconstitutional. People don't think of it that way, but that's really what happened. We've got to argue that. I said, "You have to say this is unconstitutional." And they said, sure. Next case! They don't care. So they then waited around and the next year—in January, Clinton started vetoing some things. Cases came up quite quickly again. I was not counsel of record in any of these cases, but I did file an *amicus* brief on behalf of several of the senators supporting the challenge. The Court ultimately ruled six to three that it was unconstitutional. The interesting thing is the split in this case. The majority opinion was written by Justice Stevens, joined by Justices Ginsburg and Souter. Justice Breyer dissented. Thomas and Rehnquist joined the majority as did Kennedy. Justice Scalia dissented and Justice O'Connor dissented. So you had people from all three wings of the Court in all—the center, the left and right on both sides of the split. You had pragmatists O'Connor and Kennedy split. You had Scalia and Thomas split and you had Breyer split from Ginsburg.

MR. MARCUS: Well for Scalia, it was a tension between his belief in separation of powers and his zeal for executive authority.

MR. MORRISON: Yes. And his dissenting opinion says, well there would be nothing wrong with the president being delegated the authority in particular legislation, to not spend as he wanted. He cites the old gunboat example in the War of 1812. We said, of course the president doesn't have to spend things on things that are plainly useless and Congress would not have wanted to spend it. It doesn't say anything about this here. And no, we don't agree the president could have the authority—could be given blanket authority not to spend without any standards or qualifications. That would be improper and it has never happened before. The big difference was between—again, the words I used in the *Mistretta* case was "retail versus wholesale." Somebody said, "Could you give the president the authority *not* to spend money in a particular bill?" The answer I gave—I think I was asked this in oral argument—is that would be a closer case, probably constitutional because, in that case, you wouldn't have a background statute as to which you would have to negotiate against to get out from under the revision. That you wouldn't have to give up anything; the bargaining was on essentially even terms. In that particular case you might be willing to say that Congress might be willing to do this as a tradeoff in that particular bill. But for Congress to get that tradeoff now once the line-item veto is in effect, you would, in essence, have to give up something more to be able to do that.

MR. MARCUS: So in the *Raines* case, which you argued, although it went off on standing, the argument did significantly deal with the merits as well.

MR. MORRISON: Oh, absolutely. Oh yes.

MR. MARCUS: Was it clear to you at the end of the oral argument that they were unlikely to reach the merits and were going to knock you out on standing?

MR. MORRISON: I don't think so.

MR. MARCUS: You must have been a little worried.

MR. MORRISON: Of course, every time the Court gets near standing I get worried. You don't have to be a student of the Court to know that. You have standing to lose. You don't have standing to win.

Now the other interesting thing was as the case materialized and as the president started vetoing things, members of Congress started to sit up and say, "Well, I didn't think he was going to use it for *that*! It was supposed to be for waste. These are important programs," or, "This is a needed tax break" or whatever it was. "I would never have thought that." And so when the case was decided, one would have expected to see constitutional amendments coming in. There was an initial flourish. I think actually John McCain supported the legislative veto. I think he was one of the main supporters of it—the line-item veto, excuse me. Nobody made any serious run at amending the Constitution.

MR. MARCUS: And there has been no really serious effort to pass another version of it that might survive. You know, there are a number of proposals to jury-rig it in some way that it might be okay. Bush, in a couple of State of the Union addresses, I believe, has said he wants the line-item veto again.

MR. MORRISON: Yes.

MR. MARCUS: I think there have been some actual draft bills and I forget what the new approach is, but it is one that some people think would pass muster under the Supreme Court decision and other people think is hopeless. I take it, from your shaking your head, that you think it is hopeless.

MR. MORRISON: I hope so. I don't think they'll get the support for two reasons. One is members decided that they really didn't like it very much and the very thing which made it attractive to the president, which was to do whatever you want to do whenever you want to do it, if you want to do it, is exactly what members of Congress got worried about. The second thing is so long as we have anything resembling divided government, nobody is going to want to give this kind of power to the other side.

MR. MARCUS: That's right. I think the legislation was a political fluke in the sense, as you said, the stars happened to be aligned with both the Republicans and the Democrats. I think if Newt Gingrich hadn't decided this was a good idea and made it part of the Contract with America, it never would have happened.

MR. MORRISON: Yeah. And at the time the budget had appeared to be completely out of balance and then we just turned around and we got the budget back in balance—having nothing to do with the line-item veto. The other thing about it was it never had potential for making big changes in the budget for two reasons. One is because the big numbers were not in the items. Or they were in items which nobody was going to touch.

MR. MARCUS: Like defense spending.

MR. MORRISON: Two bombers, yes. The irony was you had to veto all the B-52 Bombers, you couldn't just veto one.

MR. MARCUS: You couldn't just say one.

MR. MORRISON: You couldn't say, "We'll take two Bombers out of seven." No, you can't do that. It was crazy in a lot of respects anyway and it was a foolhardy effort but one that took on some seriousness and would have, like the legislative veto, fundamentally altered the balance of power relationship between the Congress and the president in exactly the opposite way that the legislative veto would.

MR. MARCUS: Let me ask you this. Obviously when you started out with your first separation of powers case you had no idea this was going to be a major theme of your

legal career. It is interesting. No one knew there were going to be all these separation of powers cases in the '80s and '90s. It has now become a major subject of constitutional law as a result of these cases. Did your litigating in this area affect the way you approached your academic career, for example? Teaching Constitutional Law?

MR. MORRISON: Well, I've never taught Constitutional Law. I've taught Administrative Law and I teach all these things.

MR. MARCUS: So you teach the Delegation Doctrine?

MR. MORRISON: Delegation and I teach *Chadha*. I tend not to teach *Mistretta*. When I teach *Chadha* in the Breyer and Stewart book, which is the one I use, largely because the first year I was teaching at Harvard, the book was in manuscript form and Dick Stewart—I didn't know what to do and so I said I might as well use your book and maybe I can give you some ideas about using it when I get through with teaching. Might as well buy a book for your friends as opposed to buying a book for somebody else. So I continued to use that. The *Chadha* chapter and the pre-*Chadha* stuff was at the beginning. I decided I would teach *Chadha* and presidential control of rule making at the end, both as a review session and to understand the political science/administrative law aspects as opposed to the constitutional aspects.

It is helpful to try to understand what those doctrines are trying to do in terms of control of administrative agencies, which you can't understand until you know what agencies do and how they operate and how the courts proceed in the meantime in the ordinary cases. So I teach those at the end in review. I don't tend to teach the line-item veto case. Actually, I do teach it in one respect. I teach it in a course that I have taught a number of times as a result of a book that I edited, put together, while I was at NYU called *Fundamentals of American Law*. It is a book for which I got the idea when I was in China teaching at Fudan University. I went into the Law School library there and they had no books about the American legal system. They had an old edition of *Wigmore on Evidence*, *Casner & Leach on Property*, *The Restatement of Torts*, completely useless things that there were—much too much detail and no understanding of how they had to explain American law to the Chinese.

So I came back—this was in '89—and embarked on several years of trying to do this and finally got an opportunity to do it when I was teaching at NYU. The book is published by Oxford. I think it's a very good book. I've had friends who are federal judges tell me that when they got a new chapter area, somebody had a bankruptcy case, they didn't know anything about bankruptcy reorganization, they read the book and they got a good understanding. Friends who are not lawyers have read the book. It was supposed to be marketed principally abroad, but it never got marketed. It's used significantly now here in the United States—

MR. MARCUS: For foreign lawyers?

MR. MORRISON: Foreign lawyers who are coming to the United States. I've taught it a number of times. The book is not a casebook. It's a readable textbook. I started, after a while, using cases to teach. In part because students needed to see how U.S. law was taught and partly because it just sort of brought some meat onto the substance. I use the line-item veto case as an example of how flexible the Constitution is, and how matters of policy affect it and what are reasons from one set of principles and another and how everybody was looking at the same cases and coming up with different answers, how they use analogies and how dangerous it is to put labels on Justices and expect to figure out who is going to vote which way in which case.

MR. MARCUS: Let's turn now to the issue of legal services. You came to Washington and this was one of the things on your agenda.

MR. MORRISON: Yes. I was concerned about the availability and affordability of legal services for ordinary Americans. I was concerned about a number of the practices which seemed to me to be principally for the protection of the profession and not for the protection of the public.

MR. MARCUS: And this was a natural issue for Nader, too. This was a major consumer protection issue.

MR. MORRISON: Absolutely. We discussed this before I came down and this was an area he and I agreed we should do something about. So the first set of these cases involved the minimum fee schedules in Virginia. I had been aware that these were actually going on and they seemed to me to be a violation of the antitrust laws. About the time I arrived in Washington, a lawyer, who was then at the Federal Trade Commission, named Lew Goldfarb, had bought a house in Reston, Virginia. As part of the contract for the purchase of his home, there was a provision in there that said we (the developer) recommend the use of A. Burke Hertz of Fairfax to be your lawyer for closing, and there was a list of charges. He contacted Hertz, who gave him a set of prices, the principal one being for title examination. There was a fee schedule and Hertz followed the fee schedule. The fee schedule was one percent of the purchase price for the first $50,000 and a half a percent thereafter. In addition, there were also charges for other things as well and the whole thing was like $750—at a time when house prices were selling in the $30,000 and $40,000 range. So Lew decided he knew what was going on. He wrote to thirty-five or more lawyers in Northern Virginia who did this kind of thing.

MR. MARCUS: This is before he talked to you? He did this on his own?

MR. MORRISON: On his own. He was a lawyer at the Federal Trade Commission. He knew what he was doing.

MR. MARCUS: They all said $750?

MR. MORRISON: Everybody said, "I know of no one who would charge any less. We are required by the Bar not to deviate from the schedule. It would be unethical to do

anything like that." And nobody—he got nineteen responses—and nobody suggested anything other than non-deviation.

So he brought a lawsuit. He bought a home in Reston, Virginia, and this was all part of a single development. He brought it on behalf of a class of about 2400 which, in many respects, is a really good-sized class. It's enough so that nobody thinks they should bring individual actions and it is not so humongous that either it will break the bank or you have manageability problems and they are all subject to the same set of facts and the same location. And indeed in most of the cases, they all had similar provisions in the contracts. What had happened was Hertz and the others gave the developer a good price on their title examination when they bought it, with the understanding that they would put his name in the agreement. And all he had to do was to do the update from the time the developer bought the land until the developer sold the property. The amount of work that had to be done was even less than usual. Lew brought this case. I think it was filed just before I came to Washington in the beginning of February '72. A friend of Lew's had been at the Federal Trade Commission, named Mark Silbergeld, who was now working for one of Ralph's groups, introduced me to Lew and said we should talk about the case and I was very excited about it. I agreed to help.

Lew wanted to do this case himself. How he was going to find time to do this when he was at the FTC… Immediately they raised the question about can he be the class counsel and the class representative at the same time. I said to him, "Look, you can't do this. We'll take it over and you can continue to be involved with it." So we took the case. They sued the Virginia State Bar and they sued the Fairfax County Bar Association, the Arlington County Bar Association and the Alexandria City Bar Association (the latter three were all voluntary associations) and sought an injunction against the use of fee schedules and money damages for the class.

The fee schedule system was adopted by the Virginia State Bar. They issued a report, first in 1962 and then in 1969. One of the things about the case is this was proceeding in Alexandria, we were going in a hurry and we went in a hurry in the Fourth Circuit. I never really went back and looked at these reports to the extent that I should have looked at them, probably. So I got to the Supreme Court and when I did, I re-read the Virginia State Bar Fee Report. The Fee Report begins by the following statement: "Slowly but surely, lawyers are committing economic suicide." I began my oral argument in the Supreme Court with that.

MR. MARCUS: With that quotation.

MR. MORRISON: The solution—minimum fee schedules. It was a lesson—an important lesson I learned—even though I've been practicing law for a dozen years—no, less than that at the time—that things which you read the first time, you don't really understand the significance of until you go back and see them in perspective. Statutes in particular, but other kind of matters as well. The facts jump out at you in a way that they didn't jump out at you before. So the Bar said there should be minimum fee schedules but they should be done on a local basis. The counties then—the various bar

associations—adopted fee schedules and the Bar issued an ethics opinion saying it would be unethical to routinely fail to follow them. Presumably if you had an exception for your grandmother or something, you could fail to follow them. But if you routinely did so, that would be considered solicitation or unethical. And we had proof that they were being adhered to in Northern Virginia.

So we started the case, started moving along and the Bar started making motions and we had a couple of depositions, not very much. Then over the summer the judge set a cutoff on discovery. We were in the Eastern District of Virginia, Judge Albert Bryan, Jr. was the judge, and he moved things along.

We had a very funny incident. We got assigned—or we thought we got assigned—to Judge Orrin Lewis and Orrin Lewis was not likely to rule in our favor—but he also had a problem. He had been the president, I think, of the Virginia State Bar or…but at least one of the Bar Associations. His son was currently the president of one of the Bar Associations. He had multiple other connections with all of them. So we made a motion to recuse him. He hears the motion and he says to us, "This motion is completely without merit." He said, "I have no bias in this at all. I have an absolute right to sit in this case, but since you made the motion, I'm going to recuse myself."

He was wrong on both counts. He surely should have recused himself and he surely should not have recused himself it he didn't think there was a problem. We got him off the case and we got Judge Bryan. The other side made motions to dismiss and we won a motion for class certification. He denied the motion to dismiss and said this case is going to go to trial. So we proceeded on our way and went to trial—

MR. MARCUS: You got your class certification?

MR. MORRISON: We got the class cert—they basically didn't object. I mean, it was pretty hard to object, and they weren't in that kind of mood at that time. We went to trial. Just before we had a one-day trial—it was actually less than that; it was half a day, maybe. We had a stipulation on a number of the facts and we put in evidence principally about the interstate commerce aspect. We had to show interstate commerce. Tommy Jacks had worked with a volunteer to go and do a search of the deed books in Fairfax County to show interstate money and buyers and moving and everything like that and guarantees for the federal government. There was a pretty strong interstate commerce connection. That is, if you bought our theory of what interstate commerce was and how it applied. We had that and we had the Goldfarbs testify and that was it.

Just before the trial, the Alexandria and Arlington Bars came to us and said, "We will withdraw our fee schedules if you withdraw the claim for damages against us." We decided to accept that. First, we thought litigating against the Fairfax County Bar and the State Bar was quite enough. Second, we wanted to be able to show and argue later on that the world did not come to an end when the fee schedules went out. We went to trial. Very quickly, Judge Bryan issued an opinion in which he said the fee schedules violate the antitrust laws. They are a form of price fixing. There is interstate commerce and there is

no learned profession exception. He enjoined Fairfax County Bar. But he said the State Bar was immune for its minimal role in the process and it also had a *Parker-Brown* exemption.

MR. MARCUS: Was the main defense on the merits—or that the antitrust laws just didn't apply to the profession?

MR. MORRISON: Yeah. I think Bryan basically didn't much care.

MR. MARCUS: The problem was if it applied to per se violations.

MR. MORRISON: But Bryan—my recollection is that the summary judgment motions weren't really serious because I just think he decided there was no need to not have a little trial. We can just have a little trial and get the whole thing over and done with. I don't think he took them—he just sort of denied them. We got a look at what their arguments were and we understood what we had to do. The Fairfax—well, both of them had a learned profession argument, both of them had an interstate commerce argument and both of them had a *Parker-Brown.* The Fairfax *Parker-Brown* was sort of, "Well, we were just doing what the State Bar told us to do."

MR. MARCUS: And the State Bar is a governmental body?

MR. MORRISON: Government. It's an arm of the Supreme Court. Both sides took appeals.

MR. MARCUS: What did you appeal?

MR. MORRISON: The dismissal as to the State Bar.

MR. MARCUS: Oh, of course.

MR. MORRISON: He let the State Bar off and frankly, as far as we were concerned, if the State Bar got off, they could replicate the whole thing with the State Bar doing the whole thing. We couldn't possible let that stand. In addition, it was clearly not a minor role they had because they had issued fee reports and they were the enforcers. Moreover, they issued another report in 1969—I didn't mention this—in which everything was the same except they increased all the schedules up. They raised everything up. And then of course, the local bars followed the leader. The State Bar was a "suggested." They all said "suggested," but of course, under the antitrust laws, it doesn't make any difference if an association is suggesting to its members that they fix prices.

So it went to the Fourth Circuit and we argued before a very hostile panel and lost two to one. Senior Judge Boreman wrote the majority opinion. Very, very hostile on everything. No learned profession exception, no interstate commerce—

MR. MARCUS: You mean there *was* a learned profession exception.

MR. MORRISON: I'm sorry. There was a learned profession exception and there was no interstate commerce and, of course, the State Bar was not liable in any event and Judge Craven wrote a quite strong dissent saying no learned profession exception, and plenty of interstate commerce. But he agreed that the State Bar was immune under *Parker-Brown*. Meanwhile, the government, the United States Department of Justice, had finally gotten off its duff on this issue, although it had been pushed for a long time to do so, and brought a case against the Oregon State Bar for their minimum fee schedules. This was while the case was pending in the Fourth Circuit. We got the decision in the summer of—in the spring '74. Then we filed our *cert.* petition. We persuaded the government to join us at the *cert.* stage, which they did more of then than they do now. Solicitor General Robert Bork was on our side. As he reminded me several—many years later, that this was the case he and I argued together in the Supreme Court on the side of striking down these fee schedules. The Court granted *cert.* in the fall of '74. The case was argued. Justice Powell recused himself.

MR. MARCUS: Was this your first Supreme Court argument?

MR. MORRISON: It was not my first. It was my second, I think. The Justice Department came in on our side, very helpful. One of the more helpful things that happened was the Texas State Bar filed a brief supporting the defendants' case and the brief talked about how it was absolutely economically essential for lawyers to make a decent living and be able to engage in minimum fee schedules, which I promptly cited in my reply brief saying this has nothing to do with any of this protection stuff.

There was an amusing sequence in this case, and a similar one in the case I'm about to talk about, with Justice White. Justice White said to me, "Mr. Morrison, what about the rules on lawyer advertising?"

I said, "Well, many of those are imposed by the State Supreme Court and so that would be a different case."

He said, "Well, what about if the Bar imposes the rules on lawyer advertising?"

I said, "Well, in my judgment, they would be subject to the same analysis as the minimum fee schedules here."

He said—as if it was in any other business besides the law business—he said to me, "Well, what is the law about restrictions—joint restrictions on advertising?"

I said, "I'm quite sure, Your Honor, that the Court has never actually faced that issue, but the lower courts have suggested that it would violate the antitrust laws."

He said, "Would that be a *per se* rule or rule of reason?"

I said I didn't know; it hadn't been clear.

He said, “Well what do you think about it?”

I said, “I think it would violate it.”

He said, “Okay, that’s what I wanted to know.”

Of course, their whole point in all this was—it’s a slippery slope and stay out of all this and so forth and so on.

MR. MARCUS: And Burger, of course, I assume you lost him anyway.

MR. MORRISON: We did not.

MR. MARCUS: On minimum fees you didn’t?

MR. MORRISON: He wrote the opinion for the Court.

MR. MARCUS: Oh, did he? In *Goldfarb* he did? Was it unanimous?

MR. MORRISON: Unanimous. Eight to nothing. Powell recused because his law firm was representing the Fairfax County Bar Association and he had been a former president of the Virginia State Bar. It was perfectly appropriate for him to recuse himself.

No, we won the case eight to nothing and it was a—they, of course, were all slippery slopes and Burger said minimum fee schedules are price fixing and the least learned part of the profession.

It was a resounding victory. We were also—they had raised—the State Bar had also raised an Eleventh Amendment issue saying that the State Bar was immune from suit. We said—well, in the first place, nobody’s decided that below so you shouldn’t decide. Second, it only goes to money damages. Third, it’s invalid to begin with but you don’t have to decide that now.

MR. MARCUS: So you won against the—the State Bar—the Supreme Court reversed the Fourth Circuit on…?

MR. MORRISON: On everything. Everything on the State Bar.

MR. MARCUS: So Burger, I assume, wrote an opinion that probably had a footnote saving the advertising.

MR. MORRISON: There was a professional engineers case brought by the Justice Department decided in D.C. here and there was a *cert.* petition pending on that. Actually, it was a direct appeal because, at those times, antitrust cases could go directly to the Supreme Court.

They summarily reversed that case and sent it back for further proceedings in light of *Goldfarb*. The lower court said, well we don't think anything has changed and the Court ended up agreeing later on, yes we shouldn't have bothered to send it back and yes, professional engineers' rules were no good either.

That was our first big case. We won that eight to nothing, got a remand back to the District Court. They made a motion on the Eleventh Amendment. Judge Bryan rejected that. We began to engage in settlement discussions. There was no question about the injunction. The question was what could we prove. Fairfax County Bar said to us, "You can sue us for all you want. We're a voluntary association. We have nothing. All we'll do is go out of business."

Lew Goldfarb said to me, "Fine, I accept. Put them out of business."

They said to us at one point, you can pass out the F. Supps or the opinions of the Virginia Supreme Court to the members of the class because that's the only assets we've got.

And of course we understood that. They ended up paying, my recollection is, $25,000. Fairfax—the State Bar paid $225,000.

MR. MARCUS: That's not bad. Not bad in those days.

MR. MORRISON: So we had to notify all the class members. Fortunately, we had a reasonable time—we didn't have a lot of people, we had to hire some people to do it and send individual notices—you know, before the computers and everything. This was done in '75-6. We notified people, and we devised a formula by which everybody would get paid a pro-rata share—not quite a pro-rata share, but some portion of the amount over a certain amount that they got charged based upon how many claims we had. The average member of the class got $139 back, which was more than they had ever expected to get back out of closing costs. It was enough to make it worthwhile.

We, of course, decided we would take a fee in this case. We didn't take fees in many cases because they were not available, but since it was there, we took a fee of $75,000 out of about two and a quarter. I think it was fifty. I don't remember. Anyway, we had not terrifically good time records because we were not interested in those kind of things and we didn't have the staff and didn't have the incentive to keep these time records. But we had put in an enormous amount of work and in terms of changing the law and getting results for the class members. We went to the hearing to approve the settlement and Judge Bryan said, "Now I noticed that with respect to the fee you are only asking for this. Is that all you're asking for, Mr. Morrison."

I said, "Yes." I said to him, "Your Honor, I thought that in this case it would be singularly inappropriate for the lawyers to ask for a large fee."

He said, “I want the record to reflect that if you had asked for a larger fee, I would have given it to you.” Thirty-four states had minimum fee schedules. All out the window. Of course, the ripple effect throughout all of the professions. It was a quite significant case.