Oral History of
ALAN MORRISON
Seventh Interview - March 2, 2008

MR. MARCUS: This is Dan Marcus, on Sunday, March 2nd, interviewing Alan Morrison. Interview number seven, I think.

Alan, I think we are ready to discuss the history of regulatory cases at Public Citizen. Why don't you start wherever you'd like.

MR. MORRISON: Well the regulatory cases were very high on our agenda from the beginning. By regulatory cases, essentially we meant any time the government was not doing its job. When you and I went to law school not so many years before I started here at Public Citizen in 1972, the law was that if you were a regulated company or an industry you could sue the government for making you do something more than you want to do. That produced a government that was skewed in favor of the industry because they knew that if they got sued it would be by the industry. In the mid 1960s there started to be efforts to broaden standing—the opportunity for people who said that the government either failed to regulate or was violating the law when it regulated.

The first case, as I recall, was the United Church of Christ case involving the Federal Communications Commission. I'm pretty sure that Chief Justice Warren Burger, who was a judge on the Court of Appeals, said that they did have standing, the listeners had standing. It always seemed to me to be a perfectly sensible notion that the person for whom the regulations were intended ought to be able to sue to protect them. It, among other things, opened up a whole new opportunity for public interest groups, consumer groups, listeners, environmental groups.

The second big category of cases involved environmental harm. When we got started at Public Citizen, we had a general rule (I guess I sort of instituted it) that we didn't do any environmental cases, with some exceptions, and we didn't do any standard civil rights cases—education, employment discrimination, schools, things like housing. We didn't do them for two reasons as a general matter. One was that I did not have any particular expertise in either of those.

MR. MARCUS: Was it a factor in the civil rights area that there were also a fair number of other organizations.

MR. MORRISON: Oh, yes, that was the second thing. That was the second factor. Yes.

And increasingly in the environmental area, Natural Resource Defense Council, Sierra Club, Environmental Defense Fund were all getting started or were under way and they were doing things. And in the civil rights area, of course, the Inc. Fund and the Lawyers' Committee were operating and those were—especially in the civil rights area we didn't

want to step on their toes. We didn't want to compete with them for funding and actually in the civil rights area, the private bar was doing a fair amount. We knew they weren't going to do anything in our areas because basically we were suing the government, but the real objects of our affection were the companies that were being not regulated or regulated improperly. When we sued the government, it was rarely about the government itself, it was about what the government was doing or not doing to somebody else.

Along the way we made some exceptions. I wouldn't say exceptions, just that we interpreted our non-binding guideline so that, for example, when we created our Supreme Court Assistance Project, which we want to talk about at the end, we did a bunch of cases involving what were traditional civil rights, but we did them in the context of helping other lawyers out with their cases in the Supreme Court. The same was true in the environmental context as well. In the environmental area Public Citizen set up a group to watch over the Nuclear Regulatory Commission. It's called Critical Mass and since that was a part of Public Citizen, we did a number of cases involving the nuclear industry that one could call environmental; we could call them anything you wanted, but we did them anyway. Among other reasons because very few people were doing them, and we had a substantive group at Public Citizen.

Speaking of which, a significant part of our substantive agenda in the regulatory area was the result of the work of Public Citizen and its related groups with respect to particular agencies. So for example, our Health Research Group was very much involved with the Food and Drug Administration and the Occupational Safety and Health Administration. They did a little bit earlier with the Consumer Product Safety Commission, but it became clear very quickly that it was essentially paralyzed and unable to do anything and we essentially gave up on it. They had some of the most arcane procedures involved. I didn't know it then but I subsequently saw a wonderful quotation from John Dingell who said, "I'll let you write the substance if I get to write the procedures, and I'll screw you every time." And of course, that's what happened in the Consumer Product Safety Commission. It was very cleverly done to produce an agency which, even if it had wanted to (and sometimes it did want to), it was hamstrung by its procedural rules, let alone by things like its budget.

Then we had an aviation group, Aviation Consumer Action Project. We had—there was a separate auto safety group that had spun off—set up independently—CFAS, Center for Auto Safety. We at Public Citizen did some things, some regulatory—

MR. MARCUS: You did some litigation for them or regulatory—

MR. MORRISON: Right. And other things on behalf of consumers because, of course, Ralph started with the automobile and subsequently Joan was involved in automobiles. We also did truck safety and that is, incidentally, how we ended up getting into the union democracy field because truck safety was partially about truck drivers protecting themselves but it was also about truck drivers protecting the public at large since when there is a collision between a truck and a car, the truck usually wins. Therefore, when

drivers were not getting enough sleep and were driving unsafe vehicles, it was the public that was suffering far more than just the drivers.

MR. MARCUS: But that truck safety project was a regular Public Citizen thing, not a Center for Auto Safety thing?

MR. MORRISON: Right, right. And then we ended up, of course, as these years went on, when other groups got started we would work with them on some of these things as well. The Critical Mass project went into other kinds of energy so we did some other energy things as well. People used to ask me (and this is just sort of a review maybe of what we've talked about before) where did we get our cases. I'd say they came from three places: they came from our cognate groups, people who were working on specific projects. The first couple of cases Pertschuk and Harrison Wellford were dealing with the Department of Agriculture on a bunch of stuff, nitrites and nitrates, so that was one of our first cases. That led us to a poultry inspector who was fired for kicking off too many birds, and we went and represented him and got him reinstated. Those were all kind of things that were arising out of work that people were doing. The first area was from our cognate groups.

Second (and this came more and more as we went on) people would call us or write us either because they knew we were doing things or just wrote us. So, for example, the Rosemary Furman unauthorized practice of law case, that just came out of the blue, literally.

Did we talk about the Terminix case?

MR. MARCUS: No.

MR. MORRISON: Oh, all right. Well, we'll talk about it at the end, don't let me forget. Our cases involving the Internet just came out of the blue to us. This is the late '90s version of our consumer protection work.

MR. MARCUS: It sounds like termites, not—

MR. MORRISON: Exactly. It is termites. It is termites. But it's consumer protection in a different sense. Just came out of the blue. And third, we literally invented the cases. That is, we saw the problem and we did something about it. That surely is true for most of our legal profession work. All of the First Amendment stuff was originally our idea. Many, if not all, of the separation of powers cases came into that category as well. We just saw something, we said that can't be right and so we went after it. So those were the three general areas.

In the regulatory area, it was mostly but not entirely our cognate groups that they would come up with. Sometimes we saw stuff ourselves in the litigation group and did something about them.

We did a couple of energy cases. The line between energy and the environment was always very thin. I mean, you could call them an energy case or you could call them an environment case. But our basic proposition was that if anybody else was doing it, we didn't.

From time to time we would try to get law firms to help us out. In the core cases we were doing, we wanted to do them ourselves and there was no real need to bring them in. We tried to get them—I remember we tried to get somebody to do work involving the Nuclear Regulatory Commission, the nature of which I cannot recall right now. We shopped a bunch of firms around and not all of them had conflicts, but one of them said to me that they had an anticipatory conflict, meaning that they were trying to get some clients.

MR. MARCUS: Well that's an interesting point about law firms because—I think it's true. You were litigating in areas in which the big firms would tend to be wary because of conflicts or potential conflicts, business conflicts, whatever you want to call it, whereas the Lawyers' Committee or the ACLU generally didn't have that problem with the law firms. I detect from your answer that maybe because of the general business conflict status of the law firms, you may have been more wary. I'm inventing this but see if I'm right. You may have been more wary of trying to work with law firms on major cases in the regulatory area certainly.

MR. MORRISON: I'm not so sure—there are several things. One is in most of these cases you needed one law firm, you didn't need more than one law firm. If we were going to do it—it wasn't so much working with them, it was trying to multiply our effect and if we could get somebody else to do the case, that was a good idea.

The fact of the matter is we weren't so wary of handing it over to them. They were very wary about us. Some of them had things about Ralph well before 2000 when he ran for president, they were unhappy about Ralph. Sometimes in the case of Wilmer Cutler because he had attacked the firm personally and Lloyd Cutler. Also Covington.

So we understood that but essentially the problem was that the firms either had an actual conflict or they had a client who was similarly situated to the client being sued or they wanted to or they had to deal with the agency and they didn't really want to be fighting with them.

Essentially we stopped looking for—giving cases to outside firms. It became clear that we weren't going to get very many and in most cases you had to spend a lot of time pulling the case together to a point where the firm would be willing to understand what it is about, have some idea how much time, see whether they had any actual conflicts. You had to at least do that. Firms were, of course, much smaller in those days and so the exponential conflict problems that you have now with multiple offices around the world was much less of a problem than it is today. Nonetheless, it really slowed us down. Most of the time I was the one who had to go to the firm to talk to them. First place, I knew about all these cases. The way we had it set up is either I generated the cases or they

came to me from someplace else in the organization or somebody in the office would get an idea and it would come to me and I'd be the one who would see it. My job—my first job was to figure out which cases we should do and, equally important, which ones we shouldn't do. In terms of the private firm, I was always going to be in the middle which meant a lot of my time. We did some of it and it just didn't work out very well. They just weren't interested for all kinds of reasons. Not only did it take a bunch of my hours of time, but it took a lot of elapsed time. Turning down a case or taking a case was not the first thing on the agenda when it was a pro bono case at the firm. Completely understandable but a fact of life. At least for us, we did not do that. Whereas, as you said before, in the civil rights area firms were perfectly willing to take this on doing cases. Most of their clients were not defendants in any civil rights cases, let alone in the kind of cases that we were talking about. Now you see some of it in big employment cases at the appellate level that have Washington firms who are helping them. Even then, it's pretty easy to maneuver around that and if it isn't this firm it's another firm that can do it and you have a real possibility of doing it. You have established relationships; the cases are, if not identical, they are similar each time so it takes up less of a startup. We would have new kinds of inventive cases that nobody would know anything about unless you were involved with them.

We sued everybody: Nuclear Regulatory Commission, Department of Transportation, the FDA, USDA, the president. We sued the White House a couple of times. In the early 1970s they had the battle of the budget and they spent a huge amount of taxpayer money to put out these pamphlets that they were sending out around the country as to why the Democrats were busting the budget. There was a statute which forbade them from lobbying. Now one could read that statute to say that the president can't go up to Congress and tell Congress what he thinks should pass and can't send representatives. We never construed it that way. We said this was out-of-pocket money for these things and so we sued them in the days when taxpayers had standing. We brought that case against the White House.

We had another case against the White House regarding the '72 election. This was prior to public financing for federal campaigns. Nixon had a huge number of people on his staff that were engaged full time in electioneering for his campaign. We're not talking about one or two political people, but he had the whole campaign staff working in the White House on government time with government everything else. So we brought a taxpayers' suit against him. We got past the motion to dismiss. June Green denied the government's motion to dismiss so we got a huge amount of discovery and while *Watergate* was going on I got to depose Chuck Colson who was the leader of this thing. We had a lot of documents and they essentially admitted that they were doing this. They could hardly deny it because it was all over the papers.

Eventually we made a motion or summary judgment and June Green changed her mind. She tossed us out on standing grounds.

I don't know that the law had changed but she tossed this out. We went to the D.C. Circuit and we lost on standing grounds. The law of standing was moving further and further away from taxpayer standing by that time.

We had one other taxpayer standing case that was even worse. I think it was one of the very few cases that, in retrospect, I'm sure we should not have brought it. It was involving something to do with Lockheed and I don't remember what the details were. Lockheed was doing something. Anyway, we had that case and that was another taxpayer standing case.

MR. MARCUS: I don't think you need to feel guilty about contributing to the decline of taxpayer standing.

MR. MORRISON: No, no.

MR. MARCUS: The Supreme Court had its mind made up.

MR. MORRISON: And maybe even more so in recent years. One of the things that happened—and the battle of the budget case was one of them. The government was not used to being sued by people like us and as soon as we sued them cases were settling, almost immediately. We had a case—Nixon, under the Economic Stabilization Act, issued wage and price controls. He had an Executive Order and the Executive Order said, among other things, the government can't authorize the increase of prices in major industries without holding a hearing, a public hearing. So the government authorized the automobile industry to increase their prices by five percent, whatever, it doesn't make any difference. No hearing! We said to ourselves, is the automobile industry not a major industry at this time?

So we went into court and we were all set to go down and have a hearing, and I got a call as I was just about walking out the door from the government, saying that we concede. We'll hold the hearing. And sure enough, they did. So I thought that at one point I was going to write a book called *Morrison on Mootness*, because that is what was happening in all these cases. It was not because of me, it was because of the fact that nobody had been sued. So they didn't pay any attention to people who were supposedly the beneficiaries of these rules because they had never been allowed to, been organized enough to, been aware enough or had the lawyers to go into court and so that's what we were doing. We were enforcing the law. This was true at the FDA. It was less true at OSHA.

MR. MARCUS: Because you had the unions.

MR. MORRISON: Unions. And in many of the cases we actually represented the unions. The OSHA cases were interesting because we would be on one side, the companies would be on the other side, both of us in the Court of Appeals and OSHA in the middle saying, "We must be right because everybody's mad at us."

The *Cotton Dust* case was the first case we actually took to court involving what came to be a much more common practice of OMB or White House interference with the work of the regulatory agencies. That was an important part of our work over a number of years in that area. Often these cases would be tied in with FOIA cases or sometimes advisory committee cases. We would sue them for failure to follow the most simple procedures. These cases were actually easy to win because the government had no defense in most of these cases. We found out that sometimes they went back and just went through the motions and came out with the same result and in other cases they didn't. Of course, that's true in the environmental area too; the same thing happens with the environmental impact statements. Sometimes they completely change their mind and a lot of times they don't. It's always better to get them to do it at the beginning and these kind of things happened and the agencies began complying with the law, which made it better because they were complying with the law, but also harder to win cases.

The D.C. Circuit was in this fight. Bazelon on the one hand, Leventhal and others on the—well Leventhal sort of in the middle about the extent to which the court should be second-guessing agencies. They started compromising, I'll call it; instead of second-guessing the agency substantively, or saying that they were arbitrary and capricious, or violated the statue, they would say well, they didn't follow enough procedures. The court would say, well this is a fact case, you really need to have more procedures even though in was in the rule-making context, and along comes *Vermont Yankee* and the Supreme Court says, at least in the rule-making context and there are still debates today as to whether it applies outside rule making and one could make arguments both ways, no more new procedures. Congress has struck the balance and this is it. If Congress wants to change it, it can change it. But courts, you have no business telling them they've got to do more procedures.

That also made it harder because the courts had to actually second-guess the agencies.

MR. MARCUS: Let me interrupt to ask you whether Public Citizen had any role in the *Vermont Yankee* case itself?

MR. MORRISON: No, no, we were not involved. It was the Natural Resource Defense Council.

But we had other cases in which we were seeking similar kinds of things. They were across the board. They were in economic cases, economic regulatory—we did some cases involving legal services, food safety, drug safety, you name it, we did it. It was whatever came along that either one of our constituent groups wanted or somebody came to us with a problem or we saw this was a big problem and we wanted to do something about it.

Most of the cases were filed in the District Court directly, although some statutes told you to go to the Court of Appeals directly. Completely unthinking allocation. That is to say, many of the cases that started in the District Court looked the same as cases starting in the Court of Appeals and vice versa. There was no rationale; the basic rule was you

went to the District Court unless there was a statute that said you went to the Court of Appeals.

MR. MARCUS: And I take it in the overwhelming majority of cases involving federal regulatory agencies you filed your cases here in the District Court in Washington?

MR. MORRISON: Yes. Or the D.C. Circuit.

MR. MARCUS: Or the D.C. Circuit.

MR. MORRISON: And we did that for several reasons. One is the D.C. Circuit was quite familiar with these cases. The laws about standing were as good here as any place else. The substantive judges were pretty good, even when we had conservative judges on the panel, judges who were sort of in the middle, like McGowan and Wilkey, if you had a good case where the agency was not doing the right thing, they would stick their necks out and say, "No, you've got to do the right thing." And maybe they wouldn't give us all the relief we wanted, but they were okay. Also, it was a matter of finances.

MR. MARCUS: Sure, from your standpoint.

MR. MORRISON: Yeah. Less in the Court of Appeals because all you had to do was make one trip there. But the Courts of Appeals now have quite open admission standards for members of the Court of Appeals. That is, all you have to do is ask and you could be a member. You don't have to be a member of any of the local bars and you don't have to have an office in the place where the Court of Appeals is, quite sensibly. It was less so that way when we started practicing. Sometimes you would have to have local counsel—not for the District Court, which we understood, but for the Court of Appeals. And the other thing was there was just no particular reason not to sue them here.

MR. MARCUS: Right. You mentioned the standing issues. In the typical case where you were challenging the failure of an agency to act—let's take an FDA case. Was your typical plaintiff the HRG itself? Or did you have to find somebody else?

MR. MORRISON: Well we tried different things. The FDA actually was quite interesting. They gave us much less trouble on standing than other agencies.

MR. MARCUS: That is surprising because they are represented by the Justice Department which was sort of worried about standing generally except during the Carter administration when they said we're not going to make standing arguments.

MR. MORRISON: They certainly did. So the first few years they were making fewer of these arguments. We always worried about it because in some of these we were asking for information about labeling or claiming a product hadn't been properly labeled or the product was unsafe and shouldn't be taken. We sort of had a Catch-22 problem because if we knew enough to sue them then, in theory, we could tell our members what to do about

it. They never pressed us on the issue. Then, of course, there was the whole series of cases and this was a shift—I'm getting a little ahead of myself, but I'll talk about it now.

Beginning in the Reagan administration, the problem was not that they were doing bad things with regulations. They were just simply sitting on the cases. We would file petitions for rule making and they would sit there three, four, five, six years. They figured out that if they actually acted, they had to pay attention to the law and sometimes the law wouldn't let them do what they wanted to do. So they simply did nothing. In those cases, we didn't think we had much of a standing problem. At least maybe this Court now, the Supreme Court now, would tell us we had a standing problem because we couldn't prove that we would benefit from it, but the APA does give you the right to petition for the issuance of a rule and it forbids unreasonable delay. We thought that that was enough and I still think it would be enough simply to get them to say "yes" or "no" on the petition.

Anyhow, we had this wide range of cases and we won some and we lost some. We had a case involving the Department of Transportation's Tire Quality Grading system in which Judge Mikva said that the reasons that they gave were as silly as they sound. That was one of our highlights. We tried to press hard on air bags and did not succeed in getting them—of course we were putting pressure on all the time and in the Carter administration they did issue a standard which ended up getting revoked in the Reagan administration and got reinstated. We sued them because they delayed it for an extra year which took them into the Reagan administration which predictably did exactly what we were afraid they were going to do. The D.C. Circuit was not interested in that.

I felt it was terribly important that we sue them even if we lost. I think you had to be careful not to make any bad law, but in most of these cases we didn't make any bad law because they simply said, well they were within their realm of reasonableness, which is what they were contending all the time and it didn't violate the statute and we didn't, in any way, lock in a good agency to do something bad. We just said that the bad agencies were doing what they were going to do. We did it because we won sometimes. Second is they had to know that we were there, and every time we took them to court, there was a risk that they would lose. So maybe they did a few less bad things.

MR. MARCUS: Sometimes I assume the filing of the lawsuit itself would lead them to do something without waiting to see—

MR. MORRISON: Oh, surely in the unreasonable cases eventually, yes. That would happen.

MR. MARCUS: Okay and you sue and they finally issue the notice of proposed rule making.

MR. MORRISON: Right, yes, or deny it or whatever they were going to do. At least something happened. I know, because I talked to people. They would say to me, "Please don't sue me, will you? Just call me up, tell me what you want and we'll do it."

So we got relationships with people. One of the things that was very helpful in all this was the Administrative Conference in the United States. I became a member in 1979 or '80. I can't remember which one—toward the end of the Carter administration. Then I was there all through the Reagan administration on and after that, until it went out of business in '95. I was officially a member for whatever number of years I was allowed to be and then I was a Senior Fellow (or as we used to refer to ourselves, Senior Felons) because they had an official term limit and we didn't get to vote on some things but we served on committees and participated in floor debate, which was the only thing that mattered. Aside from the fact that it was a really interesting body, you immediately met a large number of people from the incoming administration whom, especially when they were people of the opposite political party, I would never have gotten to meet otherwise. So several things would happen. One is they would know who you were. They would see that you were—maybe they didn't agree with you, but you were a reasonable human being.

MR. MARCUS: Right. Not a lunatic.

MR. MORRISON: Not a complete lunatic, that you were right sometimes and sometimes they would even agree with you. So when problems arose, I could pick up the phone and call people and say can I come over and talk to you about this. Or they would call me sometimes. It was a wonderful relationship, especially for people who were not Washington people to begin with. Coming in from other parts of the country, they got to understand about the Washington culture of no permanent friends, no permanent enemies. Somebody said to me (I think it was about Boyden Gray), "Do you know Boyden? Yes, yes. Is he a friend?, he said. "I wouldn't consider him a friend, this is what I would say." (And this is what I said about a lot of other people.) "If I called him he would take my phone call or call me back and the same is true for him. If I ran into him someplace social I'd say hello, but he and I would never call each other up to socialize together or have lunch together."

Nobody thought that it was at all improper to have that kind of relationship with people that you just knew in a professional capacity and everybody understood that that was part of the way that people operated around here. The Administrative Conference was a terrific device for making that happen in a sensible way.

We had all of these lawsuits, and in the Reagan administration it was even more important, I think, that we kept going, that they knew we were there. We may have stopped them from doing some of the worst things. We brought a whole bunch of cases at the beginning claiming that they were not spending money, they were impounding money again. We had a bunch of those cases that went on. They were cancelling regulations and we sued them about that. In general, I think we made some difference. Obviously it would have been better if they had been doing the right thing and if the courts had been better. But the courts were getting less good. Of course, the Reagan judges started coming in; time went on and Scalia and Bork came in. Although, in our view, when they were on the D.C. Circuit there was an enormous difference between them in terms of the cases we saw. Bork was always against us, never voted for us. Scalia

voted for us in a number of cases in which he certainly didn't have to. I don't recall any of them being 2-1 decisions in which his vote was decisive, but he didn't take really any positions that were really outrageous, and he took some positions in cases in which he could have easily gone the other way at least from the limited perspective we saw.

MR. MARCUS: Do you think that was partly because he was kind of an administrative law buff?

MR. MORRISON: Yes, and it was also partially due to fact that the cases on which he has been most outspoken in the Supreme Court are cases which never showed up in the D.C. Circuit. That is, there was no abortion cases, very few free speech cases of the kind that show up there, no religion cases, no *habeas.*

MR. MARCUS: But standing cases.

MR. MORRISON: Standing, yes.

MR. MARCUS: He wasn't good on standing as far as you were concerned.

MR. MORRISON: No, no. But it turned out we didn't have very many bad standing cases.

MR. MARCUS: Because you didn't have the environmental cases. That's where he really cut back on standing.

MR. MORRISON: Of course, we had a bunch of taxpayer cases and we had some congressional cases which he just was not involved in at that time. We had some involving the Federal Open Market Committee and other financial things. We had some cases involving failures to confirm, failure to send up nominations, we had senatorial standing; all these things which would probably have lost now. He just didn't happen to be on any of them at that particular time.

The second part of this was—the other thing that happened was there were a series of cases involving OMB; the role of the White House had become more formalized, there had been an Executive Order issued. The first one was the Ford administration, Carter had one also. Later Clinton had them. People would say, "Well, the Democrats won't do this." The answer is "No." This is one of the things that the White House loves. It is (as I used to put it at the time) the opposite side of the legislative veto. Congress likes legislative vetoes, White House likes presidential vetoes. They want to be able to say no and they want to be able to say no because they think they know better and also they think they have the big picture and the agencies are captured. By whom, it's not at all clear. They certainly haven't been captured by any consumer group that I've ever seen. They don't understand the overall economics and so forth and so on.

MR. MARCUS: They, the agencies?

MR. MORRISON: They the agencies, yes. Exactly.

So White Houses have all—even Carter and Clinton—and if Obama or Clinton II come in, they will do the same thing. They will never give back. They may not do it the same way and may not put the rigid cost-benefit analysis and other kinds of things in there, but they will definitely do it. Indeed, *Cotton Dust* was a Carter White House operation.

We, early on, took the position that when the statute says "OSHA," the statute means OSHA. There were statutes that say "the President shall" and that means the president shall.

MR. MARCUS: This was in the days before the unitary executive theory had really triumphed.

MR. MORRISON: We had, I think, probably not much illusion that we were ultimately going to win that. What we were most concerned about and what we had a series of lawsuits over and some of these were FOIA cases and some of them were administrative law cases, was OMB's role. We went up on the Hill; I wrote an article. I was asked to write an article for the *Harvard Law Review* and Doug Ginsburg, who was at the time the OIRA person, wrote one on the other side, about the role of the White House in rule making. There was stuff at the Administrative Conference about it, it was being written about by the academics and, in the end, we pushed, and Senator Levin and others pushed, to come up with a result in which there was much more control over what OMB did. Control came in several respects. The first problem was originally we had no idea who was coming to OMB. OMB wasn't doing this stuff on their own. They were being lobbied.

So the first question was who was lobbying them and what were they telling them. Our concern was that they were giving them legally irrelevant reasons just like back in the old ITT case. ITT came in and told the Justice Department a big bunch of stories of how the world was going to collapse and they got them to withdraw the antitrust case. We were confident that people were not telling OMB exactly the same thing that they were telling the agencies. Of course, we didn't know who was telling it and what they were saying, when they were coming in in the process. Over the years, one of the things that happened is OMB has now regularized the process; they will accept views from outside people but they memorialize, or they put them in writing. They are in the record. Second is we didn't know when OMB was meeting with the agencies. That got regularized. We didn't know what other agencies were sending to them and that got regularized and what OMB's changes were.

In the end, we had a much more open process and while, from a political science perspective, one could criticize it and say it's better that they not be involved, in the end it also became confined to major rules, those with a very large economic impact. So that lessened the interference and, in the end, I guess I felt that in most of these times the agencies were going to do what the White House wanted, particularly in the Reagan administration where the agencies were at least as bad as the White House was. It wasn't

the president who was dragging the Secretary of the Interior or the Secretary of Agriculture; they were perfectly prepared to do nothing or do bad things to begin with. So, by a series of lawsuits and other kinds of activities, working with the Congress from time to time, seeing that the worst parts of proposed bills didn't get enacted, they ended up being less bad. This is actually an interesting sidelight, I just reminded myself of—in the end of the Carter administration there was a bill before the Congress which came very close to passing that would have put into statute the express authority of the president to do all kinds of things. Lots of people were worried about it. They were equally worried that a new administration would come in and there would be a worse statute that would come in and it would codify forever. I don't remember exactly how it happened, but I was working, among others, with Larry Gold, who was then the general counsel of the AFL-CIO and who was very concerned about this, and others. We ultimately decided to take our chances.

MR. MARCUS: To kill it.

MR. MORRISON: To kill it, yeah. Which we were able to do because the Democrats—

MR. MARCUS: I seem to remember that. It was a big regulatory reform bill.

MR. MORRISON: We call it regulatory *de*form.

MR. MARCUS: It did come close to passing a couple of times.

MR. MORRISON: We said this would codify it and make it legal, and we hadn't lost any of the court cases yet and we were willing to take our chances. Surprisingly, the Reagan administration came in, they issued a tougher Executive Order, more demanding, they probably didn't need to because all of their people were doing the stuff anyway, and the statute went no place. They didn't care about it. That gave future administrations more flexibility and it also made it clearer that Congress hadn't set the balance, like *Vermont Yankee*, and said this is okay. They hadn't blessed it at least.

MR. MARCUS: I think what happened is once this stuff gets established with OMB and the greater role of the White House with respect to executive branch agencies, the trends are all in that direction in so many areas anyway, in the executive branch, it's very hard to undo it. It is interesting, because I remember when this stuff first came up we were all sort of startled. We thought it was sort of shocking that OMB was trying to tell OSHA and the FDA what to do. Now today it doesn't seem so shocking to anybody. As you say, the process has been regularized and opened up and so on, but in those days and, of course, people like Chairman Dingell saw this as a power struggle involving his power as well. While he and other committee chairmen can't really exercise effective control over White House operations, these poor heads of agencies who worry about the budget that Congress is going to approve—

MR. MORRISON: Not to mention just being generally harassed at oversight meetings.

MR. MARCUS: Well also, exactly, and being harassed at oversight hearings. They have to pay a lot more attention. So in some sense it was not only a struggle between public interest groups and the administration but between Congress and the president.

MR. MORRISON: Yes. I think that's right.

MR. MARCUS: But I think, as you say, it was probably always inevitable that the battle—the argument, the flat-out argument that you made at the beginning that the president can't tell OSHA or the EPA what he wants them to do was not going to make it.

MR. MORRISON: No, we said you could fire them. *Myers* said you could fire them and that's your only remedy.

I think in many ways that's the way that the president ought to do it for all kinds of reasons. He can't be down in the weeds about all this stuff, but it's not going to happen and if important rules are going to be done, the president is elected and he can be accountable and I can understand the other argument.

The other thing to happen is, at the beginning, one of the other objections we had besides all the secrecy aspects was that OMB had a bunch of kids over there who didn't know anything about anything, let alone anything about everything they were purporting to know about. So in response (because it was a valid criticism), they actually got more people and people developed some expertise.

MR. MARCUS: They got better at it, huh?

MR. MORRISON: They got better at it. The second thing that happened was, which we had supported from the beginning—this happened in the Reagan administration. They required that agencies pre-clear rules with OMB before they were even noticed in terms of what they were thinking about doing. In some cases it was not a problem because the statutes said you had to issue a rule. In some cases it was perfectly obvious you had to issue a rule. But one of the things that we said was it is clearly right for the president to be able to decide how to allocate his resources. He's got a budget and he should know what the agency is doing—I want you to spend time on air bags and not on brakes. That's a perfectly sensible thing for the president to do. I think air bags is a really big problem, we've got to do something about it. I want that to be your priority and don't spend time on these other things.

You have a process now under which there is a lot more front-end supervision. That is, things don't get started.

MR. MARCUS: Regulatory agenda.

MR. MORRISON: Agendas, yes. Those of course are false and misleading in their terms. If you would ever want to look at the dates, the dates of any of those things, they are all

wrong. But, nonetheless, they are useful and what they can do is you can sit down, say to the agency—it's probably useful for Dingell—you could sit down and say to the agency, how are you spending your time and the regulatory agenda is supposed to tell you this. When we got to the unreasonable delay cases, one of the things we could do is point to the regulatory agenda and say, look this is where you are and these are the things that have been going on, so we have some objective thing and they can't say we are doing a lot of other things.

And it was right from a good-government perspective. Now the other thing that happened was regulations got killed off before they even got started. Okay, that's the price we pay for losing elections and I understand that. Overall, while I would run it differently, I think that the balance between the agency and the White House is certainly a lot better than it was at the beginning. The lines are clearer, people do a better job. The major rule limitations tell you kind of when you've got to do something and when you don't have to do something. Then, of course, Congress just sort of keeps adding on with the small business thing and the unfunded mandates and a bunch of other requirements.

MR. MARCUS: Yeah, well that's a terrible problem, I think, just the weight of all these special analysis requirements. I guess there is a major issue as to whether it has led agencies to resort to less regular ways of implementing policies in rule making. That isn't as good from a notice and public participation standpoint.

MR. MORRISON: For example, there is a debate going on now about agencies issuing guidelines which are not rules—well they are not rules in that they are not published in the *Federal Register*. They don't go through notice and comment and they don't meet the emergency regs exception. They are sort of like interpretations but they are guidelines. You get criticism from both directions. One is that the Guidelines say that the agency will—it's okay if you do up to X, but not any more and we interpret our rules as saying that (or interpret the statute as saying that) and that's essentially a license for the agency. Public interest and consumer groups aren't happy about that. The industry, on the other hand, is sometimes unhappy because the agency issues guidelines that say you can't do such and such and so and so without going through rule making. So the administrative process is in a flux on that. We had a case involving that precise situation. I think it was called a guideline. Oh, no, it was tolerance level. It involved something called aflatoxin in corn.

MR. MARCUS: FDA?

MR. MORRISON: Yes. It was FDA, yes, because it's a food additive. Bill Schultz had the case and we took it to the Supreme Court and we lost on the issue in the Supreme Court on whether this was an absolute prohibition that they had to hold a hearing before they could do it, but we ended up winning on remand. Ken Starr was the judge, who was generally a pretty good judge for us. Not great, but pretty good. He said this is a one-way ratchet, in effect, that you've told the industry that you will not go after them if the aflatoxin level does not go above twenty (whatever the number was) and that is essentially, in effect, an amendment to the rule and you have to go through the rule-

making process. These were the kind of accommodations that you were working with and some of the stuff was because they didn't want to go through rule making because they didn't want to do the rule making at all and they didn't want notice and comment. We had some cases from time to time in which the agency would refuse to go through rule making and they would say there was just cause and we'd go to court with them on that. We had one, in fact, it was in the context of the legislative veto, the natural gas case. We got the court to say, look, if you can't do everything because you need to do it right away, at least do something or put an interim rule in and then have it afterwards. But you saw the rule-making process and the whole matter of the whole administrative process was worked through rather like the common law. That is, there were statutes but people understood that the statutes were general guidelines and so, by and large, and I won't say this happened in every case, people understood the APA to be a flexible charter and that is was designed to do fairness and justice. And I think, by and large, even with *Vermont Yankee*, the courts managed to do that and do that reasonably well. If you could come to court with a case and say the agency didn't do the right thing, by and large the D.C. Circuit would take care of you. Not all the time, and there were all kinds of cases where it didn't happen and we ended up having to go to Congress on it. Infant formula was one. We got beaten there and it went to Congress and got taken care of. Anyway, there were a lot of them. But again, it was really important that we kept doing this all through the Reagan administration.

MR. MARCUS: Let me ask you this. You said your efforts helped the process of opening up the OMB White House supervision of agency—regulating that process to some extent. After that happened, did you and Public Citizen embark on a process of lobbying OMB, of taking advantage of these procedures or were you—was there ever a case where you went into OMB and said this proposed regulation is really a good regulation and you ought to let it go?

MR. MORRISON: I can't think of any. There might have been, but I don't think so. Generally speaking, OMB was less sympathetic than the agency.

MR. MARCUS: So there wasn't much point.

MR. MORRISON: Yeah. We've made our case and the agency was often as good a supporter as we were going to get. Of course in many administrations, the OMB was even worse than that and we didn't have any particular inroads and they didn't have to go see anybody and we didn't have any particular political clout to get us to see anybody in the bad situations. I don't recall us—

MR. MARCUS: That didn't change in the Clinton administration when whoever it was, Sally Katzen or…?

MR. MORRISON: I don't remember. There was another provision—speaking of Sally reminded me because she was the head OIRA, the Office of Information and Regulatory Affairs. There was a statute passed at the end of the Carter administration called the Paperwork Reduction Act. I hate statutes with names like that because who is in favor of

increasing paperwork? All those in favor of red tape and bureaucracy, please raise their hand. Of course the answer is nobody—

MR. MARCUS: It's like the Protect America Act.

MR. MORRISON: Yes. All those things. The most pernicious part of that Act was that it gave OMB and delegated to OIRA the authority not simply to prevent agencies from making demands through subpoenas and other methods by which they had the authority to command somebody to answer questions, but they couldn't even ask the questions. If you asked ten or more people and some case fairly recently I saw said that if you are sending something to a trade association and they have people and you want the trade association to get the answers from the people, that you count the people in the trade association as well as a trade association.

Okay, all right, be that as it may, it was one more hurdle that agencies had to go through. It took time; they had to figure out how many times they want to pester OMB about something. Of course, it made it even more difficult for agencies to decide what they wanted to do in order to get something on the regulatory agenda if they didn't have the information that they needed. We always had the feeling the OMB would say why do you need this information? What is the problem? And we'd say we need the information to know whether there is a problem and they would say—well you can imagine this back and forth. That may be apocryphal in terms of what happened, but I don't think entirely. OMB was directed and the companies were the beneficiaries of this and so if you didn't get your OIRA number on the request—this applied to things like the IRS wants to change the tax forms around, they've got to go through OMB to do that.

MR. MARCUS: It's crazy. I know, it's crazy.

MR. MORRISON: We saw this and my recollection is we were able to keep out a few of the worst parts of this law when it was being proposed. But Paperwork Reduction Act in an election year, forget about it. Carter willingly signed it. Willingly signed it.

Throughout all this the agencies were not fully doing their job and that was bad enough. Then we started to see in the beginning of the '80s—we had seen some of it before, but mostly beginning in the early '80s and increasing and increasing more especially even today, that the industry said, well, this in an area in which there is an agency that is in charge. The agency hasn't said we can't do this and therefore we can. This principally arose in the context of tort cases, mainly product liability cases. But there were some also in the financial services area, FDA drugs, FDA medical devices, cigarette labeling, airlines, automobile safety, occupational safety, environmental, you name it and it was there.

As David Vladeck referred to it first, as the "Get Out of Jail Free" card for the industry. The federal government doesn't regulate us and we can't be held liable for in tort, state law. To give you an idea of where this was, people had been suing over bad drugs since who knows when, but certainly at least since 1938 when the Food and Drug

Administration got authority to keep unsafe drugs off the market. In '62 they got authority to ensure that they were effective as well as safe. All of the sudden in the last five years—there is not a word in the statute about preemption in the FDA statute—they are now claiming that these tort claims are all preempted for those drugs that the FDA has specifically given approval to and granted pre-market approval to. The Supreme Court is going to hear a case on that that my former colleague, Brian Wolfman, is handling. I have this bad habit. I still say "we" about Public Citizen and my colleague. He's going to argue.

Just two weeks ago we lost—Public Citizen lost a case involving medical devices. One difference being that there is an express preemption provision in the Medical Device Act. Whether that will make any difference or not, we'll see. Point being, here's what happened. The industry started taking advantage of the absence of regulation which got more pronounced in the Reagan administration, and they started saying it's not only a floor, but it's also a ceiling.

MR. MARCUS: And sometimes they went to agencies and got agencies to, as part of the deregulation, to engage in what's called agency preemption, right?

MR. MORRISON: Well they did, but most of the time the agencies did not by regulation—they didn't do it.

MR. MARCUS: The FCC did it in some cases.

MR. MORRISON: A couple of cases, yes. Of course, in some areas they went to Congress. In airlines, for example, and trucking they went to Congress and they got broad deregulation statutes. Some of which the Supreme Court completely abused and gave far more than they were intended to, others of which they did not. Some of the cases had preemption provisions in them, some of them didn't. Having looked at these statutes and legislative histories in all of these cases, the one thing that is absolutely clear to me is that Congress never contemplated massive tort reform through preemption. First, they were clearly concerned in cases about alternative regulation systems. The Medical Devices Act is a clear case. California was already starting to regulate the Dalkon Shields and other things through their own little FDA. Plain that Congress didn't want them to do that, although they did allow FDA to say it's okay to do in some cases.

MR. MARCUS: It never occurred to Congress.

MR. MORRISON: It never occurred to them at all. So the problem was in some cases they wrote preemption provisions that were plainly intended to preempt many things, tobacco being one of them. They certainly did not want, and nobody could suggest to the contrary, that each state should be able to have its own warning label for tobacco advertising. *Time* magazine, after all, can't be expected to publish, certainly back in 1969, in fifty different issues. They might be able to do it today, but they couldn't do it back then. NHTSA, Highway Traffic Safety Administration, has got to be able to decide what pressure air bags can be allowed and what height of the bumpers can be and what

kind of standards there are going to be. You can't let cars that are sold all around the country be subject to all kinds of affirmative state regulation.

The question is; what do you do about tort cases? The first problem of course is that the industry always portrays this as juries telling companies what they can do. We always say, no, the jury doesn't tell you what to do, the question is whether you have to pay any money or not. We started to get into these cases through the backdoor. Plaintiffs' lawyers bringing individual damages cases started getting in these cases and they would be losing these cases.

MR. MARCUS: On motions to dismiss.

MR. MORRISON: To dismiss or for summary judgment or something. Or they would win them and go to the Court of Appeals, a Court of Appeals would do it. People started contacting us to do this. One of the first serious cases we got involved in was tobacco. One of the most interesting parts of all of this was that the Courts of Appeals have generally been much worse for the plaintiffs than the Supreme Court has been.

MR. MARCUS: Really?

MR. MORRISON: The Supreme Court is catching up with them lately.

MR. MARCUS: Yes.

MR. MORRISON: But in these cases—in the *Medtronic* case, which is the most recent one, it confirmed what all the rest of the Courts of Appeals had said before. In the prior case, the Supreme Court had gone against most of the Courts of Appeals. In *Cippolone*, the tobacco case, it had—the Courts of Appeals were virtually unanimous in supporting preemption completely. There were a couple of state court cases that had sided with tobacco. That's the way you've got your conflict. Lower courts were almost always on the side of the companies on the preemption issue and the Supreme Court was more reasonable. Not perfect, but they were better. This was true in boat safety, pesticides, trucks, some auto cases, but not others. The point was that they were better. We saw this as regulatory lawyers and we understood things that, to me, the Supreme Court doesn't understand—still doesn't fully understand although there are people there who should understand it, but don't want to.

The notion is that the administrative agency sits down, has all the information at its disposal needed to decide these questions. It has full disclosure from the companies. It has all the expertise and all the time it needs and it sits down and it makes carefully calibrated judgments about what should or shouldn't be allowed on the label and that is able to keep up when the agencies, like the FDA, get thousands of pages every year of adverse reaction reports completely undigested. They have no budget with which to do this, they have no incentive to start lengthy proceedings all over again. The question is: does that strike a fair balance between industry needing to know with some certainty that

they can do things and the public being caught in a position of we can't get anything from the agency, and the tort system is the only way we are going to get any redress?

We found in many cases that much of the information had not been disclosed or adequately disclosed or the tests were not fully explained to the agency. The agency, we know because we see it all the time, doesn't have the time or resources and it's gotten worse at the FDA because all the money is being diverted into approval instead of into review. I was at some program the other day where somebody was complaining about how all the incentives are at the FDA to disapprove something because they are still thinking about thalidomide . I said, you are centuries old. They want to know how many you've approved and when you are going to get it done and have to get them out the door. All the pressure is in the opposite direction. We brought to these cases our regulatory perspective and what we tried to do was to make the courts understand what was actually happening and not happening. We took over a large number of these cases from lawyers who handled them in the lower courts who were, by and large, not appellate lawyers at all and certainly not regulatory lawyers and then ultimately had no Supreme Court experience. So they brought us in and we managed to salvage a lot of cases. Preemption has become an enormous part of Public Citizen's practice because the effect of losing these preemption cases is disastrous. The medical device cases, it's just a complete catastrophe. Kennedy and Waxman are going to introduce legislation and whether it will succeed or not, I can assume that it cannot possibly get buried and put on anything. Bush will veto it now and next year we'll have the drug case and we'll see whether the problem is an enormous problem or it's confined to medical devices.

MR. MARCUS: Well it's always harder to get new legislation passed than to block legislation and I think that is the problem in the tort area. There has been greater success on the public interest trial lawyer side of the tort reform issue in blocking legislation than in overturning Supreme Court decisions like the medical device decision. Were you guys involved in the *Cippolone* case?

MR. MORRISON: Yes. Matt Myers who was originally in private practice and then went to the Coalition for Tobacco-Free Kids, got me involved originally and I wrote *amicus* briefs for the Cancer Society, Heart and Lung Associations, in a large number of cases. I argued as an *amicus* in quite a few courts and then occasionally on behalf of actual plaintiffs. When *Cippolone* got to the Supreme Court, it was argued twice. A lawyer, Mark Edell, argued the first time, and we had written an *amicus* brief and helped him with his brief and helped him with his moot court. My recollection is there was a vacancy and they had to reargue it. Larry Tribe argued the second time and I worked with Larry on that argument. While the decision was mixed, we were ultimately reasonably pleased with the outcome because what they clearly left untouched was the ability to show fraud by the industry. We felt, as a matter of trial strategy, that unless you could show fraud against the industry, the people were not going to win these cases anyway because the juries were going to say, well even if you didn't know everything, you knew enough. Everybody knows—people thinking with hindsight now—you could have quit, lots of people quit and you didn't, and that's the reason you're here. But if you could show that

they are really bad guys, you have a chance to win. In fact, in every one of these cases, that's what's happened.

MR. MARCUS: But in terms of the development of preemption law overall, as I recall the bad part of that case was this notion that, in a preemption provision, when Congress tries to preempt state requirements, that that applies to requirements established by courts in tort cases.

MR. MORRISON: We had made an argument in that case and, if I had argued the case myself, it would have been much more significant. The history of the use of the word "requirements," in that context, seemed to me to be—it was—the words were not "requirements" alone, it was "prohibitions and requirements." If you read the legislative history (much too long to go into now), and see the course of how it developed—remember it was a '62 Act and this was in the '69 Act. "Requirements" was intended to prevent states from doing things—prohibitions were you can't say this and requirements were you have to say that. It was prevented from doing through the backdoor what they couldn't do through the front door. There was never any mention of tort cases at all. It wasn't on the horizon because, in fact, at that point nobody was bringing tort cases involving tobacco. This was a hiatus period and if the tobacco industry had gone to Congress and said, by the way, preempt all these tort cases including the ones for fraud in 1960, they would have been shocked. They would have been laughed out of the room. Even the tobacco industry wouldn't have had the guts to do that. Now maybe somebody figured out what they were doing in this preemption provision. Maybe they thought they were getting this. I don't think so. I think it just happened and they took advantage of it. So the tobacco one wasn't bad. The problem was that tobacco in '69 and then in the Medical Devices Act a few years later they had requirements, no prohibitions, in a different context when they were talking about affirmative rules. There were lots of reasons to think that those were not analogous but, boy, we've lost that debate. I just read Scalia's opinion and he says, well Congress is entitled to know when it uses the same words and they will mean the same thing.

Just nonsense. I mean, it's just nonsense. Nobody was thinking about any of these things. Remember also Justice Ginsburg's dissenting opinion points out this was a time that they were trying to do more—nobody had the notion that all these cases which could have been brought before were suddenly not going to be able to be brought, because this was a Congress that was trying to help consumers and not hurt them.

MR. MARCUS: Do you think that one of the problems here is that while Scalia is not winning his argument that you should never look at legislative history, that you have a court now that is less willing than it used to be to accept the kind of arguments that you were just making and that Justice Ginsburg made in her dissent that, hey what was Congress really trying to do here.

MR. MORRISON: Absolutely.

MR. MARCUS: And I think there is also—the Court is just more susceptible or more amenable to the arguments about the need for national uniformity, national marketplace, all this stuff on a policy level.

MR. MORRISON: Yes, and the tort reform, drumbeating for that and it ties over to punitive damages cases, although none of these cases came up in the context in which there had been a massive punitive damages award. All of those things are concerned.

MR. MARCUS: That's right; the Court doesn't like tort suits very much anymore.

MR. MORRISON: Well among other things, none of these guys has ever been a plaintiff's tort lawyer and none of them has ever sued a federal agency for not doing what they are supposed to do. These are people who have either represented the government or have represented big companies or been in the government or both.

MR. MARCUS: Or been law professors.

MR. MORRISON: Some of those, too.

Anyway, preemption has been an enormous problem and getting more so all the time. In a few places Congress has put in provisions saying nothing shall affect any state law, any liability under any other state or federal law—kind of an anti-preemption provision. There was one of those in the Medical Devices amendments and Scalia says, oh, that. It doesn't mean what it says. Actually, I've always counseled people, don't write one that broad because this is what happens to it. Well, you can't really mean everything and so therefore we don't think you mean anything, so you've got to tailor it more narrowly. But, you know, there is a point, just as *Vermont Yankee* has a point, which is that there are times when Congress or an agency sits down and actually says enough is enough and states shouldn't be able to go further. The problem is there is a big difference among people as to where that line is to be drawn. Second, the thing that gets you about an opinion like the medical devices case is somebody is going to pay for the injuries. The question is: who is it? That's the question that you've got to address. If we had a Workers' Comp system or if we had national health insurance so that at least the medical expenses were paid and your lost wages were paid, maybe that would be one thing. But the notion the industry shouldn't have to pay for these costs—

MR. MARCUS: Because they didn't violate a requirement of the Food and Drug Administration, right?

MR. MORRISON: And that's a serious problem and I think that there is going to have to be a serious debate about this on a general level. Justice Ginsburg in her dissent in the *Riegel* case says how can it possibly be that these two statutes administered by the Food and Drug Administration should get different results? And Scalia says, not so fast, we haven't decided the drug case yet and second is, guess what, Congress wrote them differently? Well maybe.

MR. MARCUS: You know, I think—and maybe part of what we're seeing is that in the New Deal—starting with the New Deal days, Democrats and Progressives tended to think federal regulation and federal preemption were good ideas.

MR. MORRISON: That's surely true in the labor area.

MR. MARCUS: In the labor area, for example, where preemption was very important to the labor unions and then suddenly, in the Reagan administration, these people who came into office trumpeting federalism as such an important value in states' rights, the business community convinced them that preemption was different. There actually was, I think, probably a little battle to some extent, an intellectual battle within the Reagan administration, but the business community won out.

MR. MORRISON: Always. Big business always won out. Let federalism take a back seat.

MR. MARCUS: Now you have these Justices who, in other contexts, are champions of states' rights, being willing to find preemption at the drop of a hat. I think Rehnquist, to some extent, resisted that a little. I mean, he was more of a true states' rights guy. Well, I'm not sure, actually. I'm not sure. But these guys who, like Scalia, who believed in the Eleventh Amendment and the Tenth Amendment on commandeering the states and so on, they just forget about federalism and states' rights when it comes to preemption now.

MR. MORRISON: Well there is another statute which we haven't mentioned and we had a moderate amount of involvement, less than some others, and that's the Federal Arbitration Act, where essentially the Court has read that as being perhaps the single broadest preemption provision imaginable. Well they had one case involving whether something was interstate commerce about termites and they said, well the products were sent in interstate commerce and therefore it satisfies the interstate Commerce Clause. This is a statute written in 1925, you remember. There was an exemption for labor contracts in interstate commerce and the question is—it obviously applied to airlines, trucks and so forth and so on. Did it apply to everything we now think of as interstate commerce? By a vote of 5-4 the Court says, even though (he doesn't say this, this is my reading) even though in 1925 Congress could not have regulated any of these industries. In this case this was Circuit City who was selling radios—couldn't have regulated the employment conditions of Circuit City, they would have been found in violation of the Commerce Clause. It nonetheless intended to include contracts which it couldn't regulate among those things which are now subject to the Federal Arbitration Act, by a vote of 5-4. Probably the worst preemption decision and it made it clear that the Federal Arbitration Act cannot be fixed in any respect by the courts and that if anything is going to happen, it's going to have to happen in the Congress.

MR. MARCUS: And your interest, Public Citizen's interest, in the Federal Arbitration Act, was, I assume, because of the widespread presence of mandatory arbitration clauses in consumer contracts?

MR. MORRISON: Consumer contracts, yes. And of course there are no federal agencies regulating those, but it's sort of an outgrowth of our preemption thing and that sort of gets us into a whole other area we had of consumer cases. Actually, it kind of ties back into the regulatory. You asked me for a case that we brought that I think is a case that affects literally every American. Ralph Nader was going to make a speech in Hartford, Connecticut. He was running late for his airplane, as always, and he got out to the Allegheny Airlines counter at National Airport—

MR. MARCUS: Allegheny was awhile ago.

MR. MORRISON: Yes, in 1974, 3 maybe. And Allegheny was the airline that he had made a reservation on. He was there before the flight was taking off and the plane was then filled up.

MR. MARCUS: Ah, they had bumped him.

MR. MORRISON: He gets to the gate and he says to them, "I have this speaking engagement, people are waiting for me."

They said, "The plane is full."

He said, "I know, but go on board and ask, maybe someone will be kind enough to give me the ticket. I'll be glad to help out or do…"

Allegheny absolutely refused to do anything. He said, "I have a ticket, I have a reservation, confirmed reservation."

He said, "Was the plane overbooked?"

They said, "No, the plane was not overbooked."

MR. MARCUS: Oh my gosh.

MR. MORRISON: So anyway, he doesn't get on the plane and he brings a lawsuit.

MR. MARCUS: This is one you had to bring.

MR. MORRISON: The first thing happens is, in discovery we find out that the airlines have their own terminology and the term "overbooking" means intentionally selling more seats than you think there are passengers who will show up for the flight. Overselling. So they never did that because they never would sell more than they thought were going to show up. Overselling is selling more than you have seats on the plane with the expectation that ten percent will not show, knowing that most of the time you will be right and there will be seats on the plane. But they never told anybody that they were a) overselling and b) overbooking didn't mean what people ordinarily thought overbooking meant.

We brought this case and we had it tried before Judge Charles Richey, who was completely outraged by the whole thing and awarded Ralph judgment. We went to the Court of Appeals. We got a really bad panel. We had alleged fraud and deceit.

MR. MARCUS: Was the agency involved or not?

MR. MORRISON: The agency had done nothing. The Court of Appeals said this was subject to the primary jurisdiction of the agency, and you couldn't file a lawsuit. Primary jurisdiction, which almost nobody hears about anymore. So we filed a *cert.* petition with the Supreme Court and lo and behold it was granted. I think it was granted because the Justices fly around on airplanes and they want to know what is going on and this was an interesting case.

We were really surprised that they took it. There was a problem. That was that sitting on the Court was Lewis Powell. Lewis Powell had been a partner at Hunton & Williams and was legal advisor to the U.S. Chamber of Commerce. He had written a paper, given a talk, anyway it was written down, in which he described Ralph Nader as "the scourge of business in the United States."

MR. MARCUS: That's a compliment.

MR. MORRISON: I don't think he thought of it that way. He said Nader was the most dangerous—something about the most dangerous man and that you've got to do something about him and his work and you've got to respond. Many people think that the Powell speech led to the creation of the Business Roundtable, that you can't sit back and expect things to happen in Washington the way they used to happen before. You've got to go on the offensive and the Business Roundtable and others did. The Business Roundtable, I think, is much less significant now than—I don't hear about it at all. It got unnecessary. But the Chamber and the NAM are, of course, very powerful. So Ralph said to me, "What are we going to do about Justice Powell in this case?"

I said to him, "Ralph, nothing." I said, "He will not recuse himself if you asked him and it will only make things worse. I don't know that you have a legal basis, but don't do it." So he didn't.

The case was argued. We won the case 9-0 and who should write the opinion?

MR. MARCUS: Powell! That's wonderful. You won the case on primary jurisdiction?

MR. MORRISON: They said primary jurisdiction has nothing to do with it. The agency hasn't done anything. They sent it back on some other grounds and we lost on remand. We lost—Ralph never collected a penny from Allegheny Airlines, but while the whole case was going on, the CAB woke up. People were completely outraged by what was going on, as they should have been, and the CAB issued these compensation rules which, by and large, worked pretty damn well.

MR. MARCUS: There was always some kid who—

MR. MORRISON: Kids wanted to do it. Every once in a while I've been tempted to take—$300, no. $400…What time is the next one going? That kind of thing. So it was a big—in many respects it was one of the most significant cases that we brought. As I say, everybody who flies on airplanes these days is affected by that. I always treat that as kind of our general consumer cases. We brought a bunch of them as well where there was no direct regulation involved, but they were consumer cases and sometimes we had to go through the agency, sometimes we didn't.

I remember when I got here I opened my savings account—did I talk about this?

MR. MARCUS: I think you did.

MR. MORRISON: The reason, I guess, that's one of the first things. We reached back and we did some other banking cases and some other kinds of other things like that. We had a long history of doing these kind of consumer cases. Maybe that will take me up to our Internet consumer cases.

MR. MARCUS: Okay.

MR. MORRISON: In the late '90s I was in my office one day and I do not remember whether it was an e-mail or a letter, but I was contacted by a woman in California who had purchased a home there. She'd been a longtime California resident. She had paid for a termite inspection from the Terminix company. Terminix promised her that there were no termites and that her house was fine. Sure enough, a few months later, massive termites. Terminix refused to do anything about it and so she sued the company. The day she got to court, her expert did not show up and the case got dismissed.

She decided that she would go after Terminix in another way, by starting a Web site attacking them for being a bad company. Terminix sued her for libel in California. She got a lawyer and she won the case. She got attorneys' fees against them under the SLAP statute in California that says it is protected speech, you have no basis for doing it. Terminix took the next step, which was they filed an action in Memphis, Tennessee, where their headquarters were, and they claimed that her Web site, by using Terminix's name, infringed their trademark. They sought an injunction against her using their trademark on her Web site. Money damages against her. At this point, she got in touch with us. We had never done any Internet cases to that point.

MR. MARCUS: When was this? In the 1990s?

MR. MORRISON: Late '90s. I think '99 or 2000. We hadn't done any cases, but it seemed to me to be just a really big consumer, potential consumer issue. Being of my generation, I didn't know much about the Internet or how it worked and I walked into Paul Levy's office. Paul, as you'll hear later, had done a lot of our union democracy work and in that context, a lot of it involved free speech by union members and Paul knew a lot

about the First Amendment; didn't know anything about trademark. I said to him, "Paul, we've got to look into this case." So we did. We got a local lawyer in Memphis who knew something about trademark, and it turned out you didn't have to know too much about trademark at this point because it was, among other things, not commercial. We filed a fifty-page brief saying, among other things, that they had no personal jurisdiction over her. She had never left the State of California, certainly had never been to Memphis, the trademark claim was frivolous and besides that, if it weren't, it violated her First Amendment rights of free speech. We served this fifty-page brief on them and at the same time we delivered a copy to the *Wall Street Journal*. The *Wall Street Journal* a few days later ran a huge story on the right-hand column of the B Section about Terminix and what bad guys they were and the complaint was withdrawn.

So this started happening. We got some publicity and we started doing a bunch of these cases. My favorite one involved a young man living in the United States. He's of Indian extraction, as in from the country India, and he was invited to go to a wedding in India and he bought all these special clothes and booked his flight on Alitalia and they completely lost his baggage. The baggage never got there. It certainly never got there in time for the wedding so he had to go out and buy more clothes and it was terrible for him. I think $750 was all they offered him and said he had no legitimate claim for anything more, that's with tariffs and so forth and so on.

So he took out a Web site called "Alitalia Sucks." Sure enough, what happened? Alitalia sued him for trademark infringement, confusion. Of course, he didn't know what to do, so we represented him and we got them to walk away from that one, too. We started doing these cases.

The next round of cases we dealt with were cases in which a company has disparaging remarks put out. Yahoo ran these company-specific sites about every company and people went on and did informal chats about the company. Sometimes they said nice things about the company, sometimes they said neutral things and sometime it was quite disparaging things. According to the companies, sometimes people were leaking information or doing other things that they were not supposed to be doing. So what the companies started doing was they started serving subpoenas on Yahoo in California. They bring a lawsuit against Yahoo, serve a subpoena on them to identify the name of the person who posted on Yahoo. Initially, some of the service providers were responding and giving—

MR. MARCUS: Giving them the information.

MR. MORRISON: Sometimes they weren't. We got involved in this and got them all to not provide the name. They would give notice to the person and that person could come in and we started coming in and we had a whole bunch of cases in which we were representing people—often these were employees who were not divulging any confidential information or were not trade secrets or anything like that—and won a series of cases in which the court said you have to have a threshold showing of a violation of some law or actionable claim in order to be able to get access to the name. It wasn't a

"you can't ever have it," but you have to have a threshold showing, and saying that they are disparaging your business is not enough to do that.

The office has kept up on all these Internet cases. They got a case involving Wal-Mart where a guy, and this is the latest wrinkle, had a Web site in which he was selling T-shirts and coffee mugs with Wal-Mart-like names on them. It's commercial although he's clear that he's not making any money on this, he's simply recouping the costs of managing the Web site of T-shirts and coffee mugs that say "Walocaust" on them. Wal-Mart says they did some fancy study of some phony confusion. Wal-Mart is doing that itself. They think Wal-Mart is sponsoring these things. It's a big case and they've been fighting him for two or three years now. But it's obviously an important consumer free-speech issue and the ability of companies and their lawyers to silence people who were not represented was perceived, quite correctly, I think, as a really important thing to get into. Eventually, the judge in Atlanta sided 100% with the plaintiff and Wal-Mart did not appeal.

MR. MARCUS: Let me ask you this—take this as an example. You've said before that over the years you've had a lot of freedom, you and your colleagues, in deciding what areas you wanted to get into and that the—but something like this, when the light went off in your head and you said, "Gee, this is an interesting and important area from a consumer protection standpoint and we ought to get into it." What, if any, kind of conversation did you have with Nader as to whether this made sense, whether—in terms of the priorities of what you were doing and so on, was Public Citizen—I have the sense from you that it was really pretty much that Nader knew what was going on and if he had views he might tell you, but it was really your call. Is that—let me just ask you—use this as an example.

MR. MORRISON: I'll answer that question two ways. First is a small factual matter. Ralph stopped being president in late-1980.

MR. MARCUS: Of Public Citizen?

MR. MORRISON: And walked away from the board. By this time, in early '82, Joan Claybrook, who had been the Director of our lobbying group, CongressWatch, and was head of the Highway Traffic Safety Administration, left. Sid Wolfe, who was the head of the Health Research Group, was the president for a-year-and-a-half. When Joan came back she became the president, so Joan was the president.

MR. MARCUS: In the public mind, I think, they assume Ralph is still the president, right?

MR. MORRISON: I know we get blamed for—we were responsible for costing Gore the 2000 election. Of course, we had to be very careful about what we did and what we didn't do in that election.

So from the beginning Ralph gave me huge freedom, unbelievable amount of freedom for which I am eternally grateful. He often suggested cases and many times his suggestions were absolutely right and we did them. Sometimes the cases, he was right on the law but we had real standing problems or other things like that. I can't think of a case which I really wanted to do that he didn't want to do. I do remember one funny case. In the first year I was there Carl Mundt, who was the senator from South Dakota, had a stroke and he was completely infirm and I said to Ralph, "The people of South Dakota are entitled to a representative in the Senate. He shouldn't be allowed to stay there and do this. We should bring an action on behalf of South Dakota residents to have his seat declared vacant because he's as much as dead. He shouldn't do it." Ralph said, "I don't think we'll do that." I said, "Ralph, he's not…" "I don't think we'll do that." I didn't care that much about it. I think it was right that we should have done it, somebody should have done it and he was bilking the taxpayers for money. No question he was probably still entitled to his medical expenses, but they should have had an election. He only had another two years or so to serve. That's one of the few cases, I think, that Ralph ever told me no.

MR. MARCUS: Veto, yeah.

MR. MORRISON: And it wasn't even a veto. If I had really fought about it I would have been able to. It wasn't a case that I was dying to bring in any event. He gave me this freedom and in exchange—it wasn't even in exchange—I felt that I needed to do this for him. I gave him a monthly report in which I told him all the cases we were doing and what the status was. The monthly report became a big joke because it was written very cryptically. It was before computers so I dictated it into a machine and I had somebody, always had somebody there, at least until recent years, who could take dictation and type it up and sent it to the other group directors within Public Citizen. In truth, it was in code and if you didn't understand what was going on—if you hadn't seen the last episode, you couldn't figure out the next thing that was going on. I didn't put the name of the case because the name of the case often didn't tell you—Public Citizen against FDA wouldn't tell you very much—against FDA could have been number 400 in the list of cases. So I had to describe it. So I sent them to him every month and the joke was nobody except the two of us could understand what they were about.

MR. MARCUS: But he could understand.

MR. MORRISON: He could understand and I kept doing—I did this for the whole time I was there, I think. I may have stopped near the end, because it got large and complicated. I felt it was important, first, because every month I would check with the lawyers to see what was going on in their cases, so it kept me from forgetting about cases. It made sure that he knew about the cases while they were going on. I would always, always tell him before we were going to bring any significant case. Certainly at the beginning. Many of these cases he didn't know—or certainly Joan didn't know—every case that we brought. If it was politically controversial—

MR. MARCUS: You would tell him.

MR. MORRISON: If it was an important area or we were suing a friend or it was potentially a significant commitment of resources, yes. But otherwise, no. In a way, it was better. So when this Terminix case got started I remember Joan said to me, "What is this case all about? Why are we doing this?" I said "Joan this is the"—she didn't quite get it for a while and then finally she understood when we started winning these cases why they were there and how they fit into our consumer protection category, that these were really another means by which consumers could represent themselves. That's the Internet kind of cases.

So every once in a while there would be some questions raised and there were some times when one part of the organization was doing one thing and the other part was doing something else and there was a little bit of a conflict which I'll talk about when we get to the union democracy aspect of it. By and large, it worked fine and the thing about Ralph was his management strategy was to hire good people—

MR. MARCUS: And then let them do it.

MR. MORRISON: Let them do it. I felt the same way. I supervised my people a lot more carefully than Ralph supervised me, but they were very junior—although I wasn't so senior, I was only six years out of law school when I started—five-and-a-half, actually when I started working for Ralph. But I'd had a lot of experience. He wasn't in a position to supervise my direct legal work, in any event. He would let us do what we wanted to do and his philosophy was there are so many things that are wrong and that need doing, let's don't spend a lot of time prioritizing which ones we are going to do. I felt the same way and I also felt that although I generated a lot of cases and the other groups generated cases, that if somebody came to me with an idea for a case, I would almost always let them do it if it was viable. I had felt that, as I said, there were so many things that needed to be done and fixed and it's important to give people a chance to work on things that they are interested in. I did that with all the lawyers. If they came to me with a case, if they wanted to do it, they got to do it. Increasingly, as people became specialized in areas, that happened more and more, the specialization worked out to be completely randomly. Bill Schultz came in—

MR. MARCUS: He didn't know when he came in that he wanted to do FDA stuff.

MR. MORRISON: Didn't have any idea. There are two cases I gave him the first day. One was the over-the-counter drug case. The FDA had assiduously failed to regulate over-the-counter drugs. I said to him, we've got to sue them about this and get them to do it. Eventually they ended up doing it. Not completely, but it's a huge problem and it's one of those things where if we had not been there—another great lesson of the groups is you have to be long-distance-runners. You have to be there and keep on them because if you don't they'll backslide, they'll forget, they won't do anything and so the Health Research Group and we got together, just kept on the FDA, kept on the FDA and finally things got taken care of. So Bill started with that case and the second case he started was the *Duke Power* case, challenging the constitutionality of the Price-Anderson Act, which created a limited liability for nuclear disasters of the government and that case went all

the way to the Supreme Court. Bill's first case in the office, first day, it went to the Supreme Court.

John Sims, who came in shortly before him, John got a case that also was his first case and went to the Supreme Court. It was the constitutionality of the antilobbying restrictions under 501(c) of the Internal Revenue Code. His case was *Taxation With Representation of Washington*. We ended up losing the case, but this was a case that we lost but while the case was going on, Congress passed a statute, Section 501(h) which specifically defines and authorizes substantial lobbying by c(3) organizations which took the worst out of the law and also clarified what was and what was not lobbying. Took the worst sting out of it and so when we ended up not winning the case, part of it was we had gotten a good deal along the way on it.

So both of them, the first cases they got when they walked in the door went to the Supreme Court and they argued it themselves. That was another thing, if it was your case, it was your case and you argued it all the way to the Supreme Court, certainly in the D.C. Circuit, not a question about it. I didn't take cases away from people. I promised them that they would be able to have their cases, that they would get close supervision from me. Initially I read every paper that went out of the office, as I had done in the U.S. attorney's office in New York.

MR. MARCUS: How did you find and recruit people?

MR. MORRISON: Can I finish one—I want to tell a story on myself.

MR. MARCUS: I'm sorry, okay.

MR. MORRISON: Eric Glitzenstein came to work for us and the first thing he did was write a brief for the Court of Appeals in a FOIA case. He spent a lot of time working on it. He hands me the brief and I read it over and I go back the next day or so and I say to him, "Well, it's salvageable." He took this as a great insult. I said to him, "Well it's better than telling you to start all over again." That was a big joke around the office, "it's salvageable." But they knew that they would get that and everybody got it. I would never send anything of mine out without other people in the office reading it, absolutely. Two or three times. And we did moot courts for everybody and I did moot courts and everybody understood that that's the way we did it here. People could come into my office at any time and ask me about a problem and I would deal with it. One of the things that I did was I was really good at putting other people's work first. I was not a roadblock for their work. I felt that in the U.S. attorney's office, too. I had seen where my predecessor had been a terrible roadblock and it was a real big problem. So I vowed not to do that. I confess that every once in a while I would procrastinate, but I knew why I was procrastinating; because somebody had submitted something (fortunately this happened rarely) that wasn't up to par. I didn't know how to fix it and how I was going to deal with it and I knew it was going to take more time so I just shoved it off to the side for a while.

All right, so how did we recruit people? Turned out that our AAA farm team was the Institute for Public Representation at Georgetown Law School, Victor Kramer, about whom I talked before. I decided that Victor was a very good person and Victor decided that I was a good person and so he sent me people. He sent me David Vladeck, he sent me Diane Cohn, he sent me Larry Ellsworth, all of whom were terrific.

MR. MARCUS: The Institute for Public Representation—

MR. MORRISON: Was a one-year Master's program—

MR. MARCUS: Where you could do public interest cases?

MR. MORRISON: Yes and they supervised third-year law students at the same time. Victor was in charge of the program, kept track of it and he was a real tough taskmaster. If Victor said somebody was good, I didn't have to worry about it. Many of our other people were law clerks.

MR. MARCUS: Who did not want to go to law firms.

MR. MORRISON: John Sims was in that category, Tommy Jacks was in that category, Glitzenstein was in that category. A couple of other people worked for related organizations. Mark Lynch had been a lobbyist for Congress Watch, Kathy Meyer had worked for the Center for Auto Safety. Con Hitchcock had worked for the Aviation Consumer Action Project. And then other people had come in from other places. A relatively few came from law firms. That was principally because of money. I would have taken them from any place.

When I originally started the organization we did not hire anybody right out of law school. We did that for what were three reasons. First, they weren't admitted to the Bar so they couldn't start doing anything and we didn't have a lot of memos for them to write. Second is they didn't have as much experience as people who had been out a year, had been a clerk and so forth and so on. I eventually realized that those two were not good reasons for not hiring people. There was a third reason, and that is: we knew that even on a regular basis, hiring people who had been out a year or two we saw a lot of people who came in and said they really wanted to work for us. We'd tell them the salary right up front and go through the process. It always mattered to us more than it mattered to the employee, although the employee never thinks of it this way, if they don't work out because we have limited slots and it's painful because these people are all nice people. They all want to do the right thing. Some of them just don't work out. We've had a few, relatively few, but enough that it's been difficult.

Some people are really the tops and other people are very good and solid, but there were a few people who just didn't work out for whatever reason. So in our process, everybody would see the candidates. It was terribly time consuming and then it started to happen at the end they would say to us, "I feel so bad about this. I really want to come to work here. I tried, but I just have done the budget and I can't afford to do it." So we realized

that more law students would be in that category. They would want to do it. It's a fun place to come down to interview, meet all these cool people who are doing all these exciting things that we hear about. I'll interview with them and I really do want to go to work for them. They would be less grounded in reality. So essentially we did that and it was only later on when we had the fellowship program through the Supreme Court Project, which I'll talk to you about next time that we started hiring somebody out of law school.

The one exception that we made was—and we've had a problem at Public Citizen and everybody recognizes it—we have had a terrible difficulty hiring minorities. There are lots of reasons for it. I've been very aboveboard about it. First is we're not working on minority issues, second is they are less likely to be able to afford it because they have no family to go back on. If they are good, and many of them are, they can get a whole lot more money or work for a civil rights organization. Why should they work for an organization that is working on these unrelated issues?

MR. MARCUS: On the consumer stuff, yes.

MR. MORRISON: And then of course, if you don't have any minorities—we have them, we have minorities at Public Citizen, but not in the professional capacity and not in the Litigation Group, it's harder to attract them. Perfectly understandable.

I was interviewing in the fall of 1973 at Harvard and I met a young man named Gerry Spann, who now teaches at Georgetown. He was a terrific candidate, African-American—and I said—we're going to offer him a job and I said, "This is a rule I made. I'm going to break it."

MR. MARCUS: Now you say you met him at Harvard Law School when you were teaching or when you were—

MR. MORRISON: No, no, I was recruiting, recruiting.

MR. MARCUS: Oh, I thought you said—oh, I see. You *were* recruiting.

MR. MORRISON: Yes we were recruiting maybe for Public Citizen generally or maybe we were thinking of—or maybe long-term recruiting. I can't remember why. Maybe I hadn't thoroughly established the rule yet or was just thinking about it, but, in any event, I saw him and he accepted the job which I was very pleased with. He turned out to be a terrific lawyer and then, unfortunately, left after four years to go to Georgetown where he's been a terrifically successful scholar and teacher.

We have had several other African-Americans who have been Fellows, but I don't think we've ever hired another full-time African-American lawyer and no Hispanic lawyers. We didn't hire any women for a while, not for any particular reason, just didn't have any. We soon hired them and now—

MR. MARCUS: You've had a lot of them.

MR. MORRISON: Lot of women, yes. Many of them stay for very long periods of time and so that's not been a problem.

MR. MARCUS: You had lots of people knocking on your door and sending you résumés and sort of an *ad hoc* process?

MR. MORRISON: Yeah, yeah. Salary was always a problem.

MR. MARCUS: Yes.

MR. MORRISON: I started at $15,000, the people who worked for me were getting $10,000 at the time a year out of law school. At that time we used to say if we could pay half of what Covington or Wilmer was paying, we would be okay. That quickly eclipsed. It started going completely through the roof and then we'd say if we could pay half of what the government was paying. Then even that got to be difficult. That has continued to be a major problem. Salaries have gone up. They are better, but they are below Legal Aid levels, less than the public defenders, and it has been a problem. The money has just not been there to pay people what they deserve. Everybody could be making a lot more money in other places, and what we offer you is the chance to do what you want to do, the chance to argue cases in court, to not have to work on cases you don't want to work on, and to work on cases you do want to work on. I've lost track, but the office has now argued more than fifty cases in the Supreme Court. Never more than ten lawyers in the office at any time. No institutional clients of any kind. Maybe fifty-five Supreme Court cases now, because they got four this year, they're arguing this year. Hundreds of cases in the D.C. Circuit and other Circuit courts. There are periods of time—two, three, four years—where we have no vacancies other than the fellowships which were one-year programs. That has made recruiting even more difficult. In recent years we've managed to hire a few people who have had substantial experience, four, five, six, eight years doing other things. That's always very good when we can hire them. On the other hand, we've lost people to the government, mid-level people to the government getting double their salary. Pretty hard to tell people who have got a family to support they should not do that. My attitude has always been I hate to lose people but I'm a big boy. It's sometimes not bad to lose people even though they are your very best people because you get new blood and new ideas. As long as they are going out and doing other good things. Kathy Meyer and Eric Glitzenstein have started their own environmental firm, so that's good. Bill Schultz is out doing a lot of different good things, public interest kind of things. John Sims is teaching at McGeorge Law School and other people are doing other things.

END TRANSCRIPT