Oral History of
ALAN MORRISON
Ninth Interview - March 30, 2008

MR. MARCUS: This is Dan Marcus on Sunday, March 30th, interviewing Alan Morrison. Interview number nine, I think.

I think the time has come to talk about the D.C. Circuit itself, both the Circuit Court of Appeals and the District Court. I know you had some official responsibilities with the court with the Judicial Conference and the Rules Committee, but let's start by talking about your arguments before the court, your impressions of what it was like to argue cases before the D.C. Circuit in the '70s, '80s and '90s, and your experiences with individual judges.

MR. MORRISON: Sure. I had come from New York and had been used to the Second Circuit, so I didn't know any of the judges here, except by reputation and even then I didn't know very many of them by reputation. The District Court, I knew almost none of them and in the D.C. Circuit I knew a couple, but not well. I don't think I'd ever met any of them before I had come down here. The District Court was, at the time, quite a variety of judges. There were some that were considered to be very good for the kind of cases we were doing and there were some that were not so good. One of the things I found in actually both courts at the beginning is that, even among the most conservative judges, there were just a bunch of things that they would not let the government—because that's who we were mainly suing—get away with. The statute said you are supposed to hold a hearing, you're supposed to hold a hearing. You're supposed to serve for 120 days, you serve for 120 days. The judges may not have liked it and may wish we had gone away, but they were doing things about it. Their willingness to do something about it was important because it meant that the government had to do something about it.

One of the judges that we encountered who falls into this mold was not particularly considered to be a liberal judge, and that's Malcolm Wilkey. He wrote a very important opinion—I think we may have talked about it earlier—*Vaughn v. Rosen*, in the FOIA area and in a number of other cases including, he did a legislative veto case that we talked about earlier involving FERC. He just wasn't going to take nonsense that he thought was wrong. So while we certainly couldn't count on him all the time, he was an okay judge. He was right in the middle and Judge McGowan was in the middle. Maybe a little—about the same as Wilkey in different ways in different areas. The more liberal judges were Bazelon and Wright. They were, interestingly, not the most interesting people to argue before because Judge Wright, in particular, rarely asked questions. I remember one argument I had before him he didn't ask a single question and we got whupped. He didn't ask one of the other side either, practically. It was very frustrating not to engage. While Judges Robb and MacKinnon, in particular, were quite

conservative, there were times when you could get to them too. Judge MacKinnon was, as I may have told you, the lone dissenter in the first legislative veto case. He had been a congressman from Minnesota and he knew what was going on up there. He knew it and he didn't like it and he saw it.

I remember we had a case before Judge MacKinnon once and he said—this was a FOIA case—Judge MacKinnon said to the lawyer who was arguing the case—it wasn't me—actually, I should say this: a lot of what my experiences are, although I probably argued I don't know how many cases in the D.C. Circuit, probably twenty, thirty maybe. I don't know, I was sitting at the counsel table for at least a couple hundred, probably, because I always sat with all the lawyers from our office when we went there. My experiences are based on that as much as anything else. One day Judge MacKinnon was up there on a FOIA case and he says to the lawyer in our office, "Counsel, I know it doesn't matter, but could you tell me why your client wants these documents?" Of course, he hit upon an essential truth, which we always try to do anyway, which I always teach my students: judges are human beings. Sometimes they don't seem that way, but they are human beings. They have natural curiosities and you must satisfy them. Even though it doesn't have anything to do with the merits of the case. He said, "I know it doesn't have to do with the legal merits of the case. I just want to know what these are for and why you want them." We told him and he said, "Oh, okay." And I think actually we got something on the case. I don't remember for sure, but it was an important lesson to learn about that.

When I started practicing in the D.C. Circuit, there was something—a paper called the *Washington Daily Law Reporter* which came out every day.

MR. MARCUS: I remember that, yes.

MR. MORRISON: I don't know whether it exists anymore. But everything you want would be online and nobody would pay for it anymore.

The panels were never announced in advance at the time, that is, any significant amount in advance. The court shifted later on to a system which was—actually I think Judge Wald put it into place. I'll talk about it a little later. The issue that came out on Saturday—or Monday's issue came in the mail on Saturday—would tell you who your panel was for the following whatever period of time it was. The point was it came in on Saturday. The court was so significantly divided even though there were fewer judges then than there are now, that I often would come down to the office on Saturday to get the mail and look and see who the panel was. Of course, you couldn't go online because there was no such thing as online at the time. There would be the listing of the panel and it would be an "Oh damn it" or "Wow, this is a great panel" kind of thing. Eventually that practice shifted under Judge Wald and had two significant changes. The D.C. Circuit was way ahead of everybody else on this and lots of Circuits still haven't followed. It used to be the—what we called the "hurry up and wait" syndrome which meant that they told you you had to write your brief and the clerk's ffice was, I think, instructed to tell everybody no extensions without proving good cause, meaning that your grandmother

had to die and all sorts of stuff you really had to have. The Seventh Circuit still makes you write a letter telling them what you are going to do for the next twenty-eight days, but the D.C. Circuit was not that bad. Basically, the message was you couldn't get very many extensions. Then you would finish writing your brief—

MR. MARCUS: And sit there for months.

MR. MORRISON: Months. It was particularly hard for the government because the government attorneys would tend to rotate more than private attorneys would. But even rotating attorneys aside, the first thing is you'd forget what the case is about. The second thing was inevitably there would be decisions that would come down in the meantime that you would have to update and so there would be a whole second round of briefs. I think it was during Judge Wald's tenure in the late '80s that they started counting backwards. You got an argument date and the second thing you did was you got a panel. You were told the panel and I understand that they are able, in part because of vacancies and other things, to keep to it a little less fully than they used to, but they still basically approach—you have a panel. When you write your brief, you know who the panel is.

My own view is that most of the time you can't—

MR. MARCUS: It doesn't affect the brief that much.

MR. MORRISON: You can't change your brief that much. I remember one case we had a really bad panel and you know what we did? We withdrew our appeal. We could see that we couldn't possibly win with this panel and we could see—I think it was a standing case of some kind—that we could have made some really bad law. We just said, "Not worth it,"and we withdrew our appeal.

But the most important thing was you would end up with your reply brief due about three or four weeks before the argument and you would know what was going on and it worked so much better for everybody. The second innovation that the court had on the briefing—and I can't remember if I was on the Rules Committee when we urged this change or not—they had had an old custom, I think, that in NLRB cases the NLRB was the defendant, technically, but, in most of these cases there was either a union or a company that was really the real party in interest. What the NLRB would do—what the court did was they would say that the party supporting the NLRB would have seven days to file their brief afterwards.

MR. MARCUS: I see.

MR. MORRISON: Then the court started doing that for everybody, for all *amici* and intervenors. That was a very sensible system. They also put in a provision that required—in order to do this they had to have a scheduling order—they started making people make their motion to intervene or provided notice that you would going to intervene or be an *amicus* very early in the process. That did not work as well and I think there were ultimately some adjustments. We tried to urge the court to say, look just build

in an extra seven days in the schedule. Because people don't know whether they are going to be—

MR. MARCUS: Months ahead of time, they don't know.

MR. MORRISON: They don't even hear about the case. And interestingly, the U.S. Supreme Court has now gone to the seven-day delay provision also. Very sensible. Of course, in theory, it enables you to say what you should say, which is, "I've read the government's brief," or, "I've read the other side's brief and we're not going to duplicate it."

MR. MARCUS: Right. It makes the *amicus* brief more efficient.

MR. MORRISON: Supposedly. Whether it does or not—

MR. MARCUS: It probably does a little.

MR. MORRISON: And if you are a smart lawyer, either for the *amicus* or for the party you are supporting, you will want to coordinate as we did in the gun case, for example, in the Supreme Court, and others, because you want them to read it. We always say—I remember in the gun case somebody had written the brief and I said—the first five pages of the brief, this is nothing but what we're saying. They are going to put it down. They don't have to read those briefs. It's definitely much better now with that system. Many courts still have the "hurry up and wait" system and if it is a hurry up and wait for a month or so—you don't know for a month or you don't know who your panel is. Some of them, the Ninth Circuit, for example, you write your brief and it could be six months or a year or a-year-and-a-half before you argue your case.

There was one other similar kind of problem the D.C. Circuit had, and that was there were serious delay problems in getting opinions issued. We all know that Spottswood Robinson was the chief culprit. He would be two or three years behind, I remember. Every once in a while—I remember one day an opinion came down and it was a per curiam opinion. The case had been argued two-and-a-half years before and there were something like eighty footnotes and thirty-five pages. It was per curiam with Robinson on the panel. Who wrote this opinion?

There is a wonderful story about Judge Gesell encountering Spottswood Robinson in the parking garage. Obviously I was not present, but I heard the story. Probably true and if not it's a good story anyway. Judge Robinson is carrying a big briefcase—he was the Chief Judge at one point—he's carrying this big briefcase and Gesell is reported to have said to him, "What have you got in there, Spotts? Footnotes?"

That was a big serious problem. There was another judge who was a very serious problem with that. That was Judge Bork. He was quite slow. He wasn't as slow as Judge Robinson, but he was quite slow in getting his opinions out when he was on the D.C. Circuit. The court was quite mixed when I got on and then in the late Carter years there

were two judgeships added. There were two vacancies that had to be filled. Those were filled by—I would say probably the four most liberal judges you could imagine coming on a court at one time. Ruth Ginsburg—at least what we thought to begin with—Harry Edwards, Pat Wald and Ab Mikva. I had known Pat from public interest and from the D.C. Bar. I had known her quite well. Actually, at that time I lived over on 28th Street and behind me in a much larger house but sharing a common alley with me, was Joseph Tydings. Tydings had been the senator from Maryland and he was asked by Carter to chair the Appointment Committee for the D.C. Circuit and for the District Court. We had become friends—not close, but friends and he asked me about Wald. He said she had never practiced—she hadn't practiced a lot. I said to him, "She is terrific. She is really smart and she's really a caring, concerned person. She will be a wonderful, wonderful judge." I think that that had something to do with her getting the nomination. She was, I think, the first woman judge on the D.C. Circuit; there were District Court judges—

MR. MARCUS: I think she was.

MR. MORRISON: There were several District Court judges, but I think she was the first on the Circuit. Then she and Ab Mikva got appointed as the first two and then a year later when the vacancies came, Ruth Bader Ginsburg and Harry Edwards were appointed. I had known Ruth Ginsburg from public interest kind of work. She had been the general counsel of the ACLU and I had put on a program once for the Practicing Law Institute and I think she was either on the program—yeah, I think she was on the program, I'm not positive. But I met her and then we talked about some issues. I didn't know her well but I knew her on a first-name basis and I knew Pat on a first-name basis. I didn't know Harry Edwards at that time. I may have met him once and I had some very casual encounters with Mikva but I certainly didn't know him at the time. I subsequently came to know all of them reasonably well.

Just recently—I'm on a committee at the National Academy of Sciences and I recommended to them that Harry Edwards be chair of this Committee on Forensics which is going to come out with a very important report in the summer. He's apparently loving it and they are delighted to have him. I said I knew he would be a great chair because he's—as people used to say about Judge Edwards when he was on the bench, he was never in doubt. You knew if he didn't pounce on you, you win his vote, and he was going to pounce on the other side. You always knew where he stood, which was fine. Although he is a liberal Democrat, you couldn't count on him. He just called them the way he saw them. He had been a management lawyer mostly in the labor management field—

MR. MARCUS: I didn't realize that.

MR. MORRISON: Before he had gone to Michigan and Harvard to teach and came on. When he became a Senior Judge, I said to him, "Why are you becoming a Senior Judge?" He said, "Well, I've been here a very long time." I said, "Yes, you were appointed when you were thirty-nine as I recall."

MR. MARCUS: Yeah, that's amazing.

MR. MORRISON: He said, "Yes, I wanted to do it and I thought"—obviously correctly—"that if I hadn't been appointed then, I would never be appointed."

MR. MARCUS: That's right.

MR. MORRISON: I think it's too bad. One of the reasons you see judges going off the courts are because they are appointed when they are too young and they get bored and/or they think they need to make more money or want to make more money. They see associate salaries going skyrocketing through the roof. I think it is more boredom. In some cases it's not just a little bit more money, it's a lot more money.

MR. MARCUS: I think that's right, Alan. I think particularly on the Court of Appeals rather than the District Court because the Court of Appeals is such a cloistered existence and you are doing the same kinds of things all the time. Reading briefs, writing opinions, listening to arguments. Whereas a District Court has a much more varied kind of experience and you are your own boss in a sense, though you can get reversed by the Court of Appeals. I think it is a mistake for a lot of people to go on the Court of Appeals at age thirty-nine. It's too long to be on the Court of Appeals.

MR. MORRISON: Harry Edwards said as much to me. That in retrospect it would have been better. But you have to make a decision at a certain point in your life and you can't—I remember talking to somebody in the current administration whose name was being bandied about for a Circuit Court appointment and I said to him, "Do you really want to do this?" And he said exactly the same thing, which is it may be now or never. He's staying for a while and maybe he'll get the appointment later on but maybe he won't.

Turns out that, of course, quite a few of the judges that were appointed left. Malcolm Wilkey left to go on an international tribunal. Pat Wald left to go to the International Court at the Hague. But of course she had served as Chief Judge. She had been there a long time. She had been there twenty years, approximately. Mikva left a little before that to go to be White House counsel for a while.

MR. MARCUS: A decision he may have regretted.

MR. MORRISON: Yes, yes, that may be so. Although I think he is an example of somebody who is basically an activist.

MR. MARCUS: Yes, who may have been restless on the court. Even Judge Leventhal, who was a natural appellate court judge in many ways, I know he was restless on the Court of Appeals at the time of his death. He had only been on the court for maybe fifteen years—a little less than fifteen years.

MR. MORRISON: Yes, he was appointed in the mid-'60s by Johnson.

MR. MARCUS: He was bridling about salary and so on, but I think he was an activist by nature, too.

MR. MORRISON: As they say, the phone doesn't ring.

MR. MARCUS: Exactly. Your friends don't call you for lunch.

MR. MORRISON: Look—I think, in comparison to some places I've practiced, the D.C. Circuit did maintain a pretty strict separation between judges and lawyers—they didn't have communication—at the Judicial Conference, yes, and committees and things like that. Yes, you didn't have to cut yourself off from your closest friends, but it had to be your closest friends. People generally sort of kept away—at least from the lawyers who were likely to have cases come before you. I think that was probably by and large a healthy thing. On the other hand, just think about it. I mean, if I were in a situation where I would have to go home every day and not talk to my wife—I mean, maybe they talk to their wives about the cases they are working on. I don't know. I suppose they can't *not*. But you certainly can't talk to your lawyer friends about the cases you are working on. You have young law clerks come in and you can talk to them about it, but that's not the same thing.

It always seemed to me that it was a mistake and the money thing I thought yes, judges should be paid adequately, but I don't think that's the reason—people don't get conscripted into being on the federal bench. There is quite a healthy competition to get there. Maybe they have some judicial remorse after a while and they see these salaries going up. But these days you can see what is happening and there are lots of good things about being a federal judge. The idea it is salary alone—it's not—there is fairness in terms of cost of living and things like that. The ultimate question is, I think, getting the people on so young because you think they are going to serve for so long is really not good.

MR. MARCUS: And of course in later years, the reason a lot of them left was to go on the Supreme Court.

MR. MORRISON: Well Bork didn't make it, Scalia did. Thomas did. Ginsburg did.

MR. MARCUS: And then, let's see—Roberts of course in very recent time, but I think there's—isn't there one more?

MR. MORRISON: Doug Ginsburg had a brief—a quick foray.

MR. MARCUS: Bork of course, didn't—

MR. MORRISON: Then he left.

MR. MARCUS: Then he resigned after that. Whereas Doug Ginsburg—of course Bork's thing was very different than Doug Ginsburg's shot at the Supreme Court, but Bork's

rejection was much more of a rejection as opposed to not just not being able to go forward. But Ginsburg went on to stay on the D.C. Circuit for a long time and become the Chief Judge.

MR. MORRISON: He's still there.

MR. MARCUS: Until very recently, yeah. Until maybe a week from now or something. He's stepping down as Chief Judge.

MR. MORRISON: Yes. David Sentelle—

MR. MARCUS: So that Sentelle can become Chief Judge.

MR. MORRISON: Actually, that of course is a maneuver that has been followed by others.

MR. MARCUS: Pat Wald did it for Mikva—

MR. MORRISON: And I think—

MR. MARCUS: On the day before his 65th birthday or something like that.

MR. MORRISON: Yeah.

MR. MARCUS: Something like that.

MR. MORRISON: And the same is true for—

MR. MARCUS: Sentelle.

MR. MORRISON: Actually, it's another thing that is interesting. I had forgotten about that. I had—I think I had written something on the subject but I know I had talked to people about the problem of Chief Judges staying on too long.

MR. MARCUS: That was the Bazelon issue.

MR. MORRISON: Bazelon.

MR. MARCUS: That's why Congress or the Judicial Conference changed the rules.

MR. MORRISON: I supported that. I thought it was wrong to have the Chief Judge stay on that long and that the compromise which they now have—seven years and you have to resign at 70, I think, and you can't—

MR. MARCUS: Start after you are 65.

MR. MORRISON: The latter part I'm not so sure I think much of, but that's a minor matter and it's a good thing to have a rotation of the Chief Judge. Not that the Chief Judge has an enormous amount of power, but he has some power and some ability to change some administrative kind of things. We saw some good changes, by and large, in some of the Chief Judges. The change is good—seven years is plenty long enough to be able to deal with those kind of things.

The D.C. Circuit had—there were probably nine judges when I started here. It was Robb and MacKinnon there and there was—

MR. MARCUS: Tamm also.

MR. MORRISON: Tamm.

MR. MARCUS: Yes.

MR. MORRISON: Interesting—the first case I ever argued in the D.C. Circuit was a case on behalf of an organization called *Americans United for Separation of Church and State*. It was challenging the constitutionality of the antilobbying provisions of § 501 (c)(3) of the Internal Revenue Code. We said a) that they were vague, and b) that they were unconstitutional as a violation of the First Amendment—that you had to give up your right to lobby in order to get the tax break. I think we talked about the merits of this case —anyway, we let me tell this part of the story and then I'll finish up the rest of it.

I have long thought that this was a serious problem. I had heard about this case and I found out about it and talked to the lawyer. I guess, if memory is right, I came in at the reply brief stage and wrote the reply brief and then argued the case. Judge Tamm was on the panel and he wrote the opinion on the question of whether we could even be in court. The law at the time was that you had to pay—you couldn't bring a declaratory judgment action if you complained about the IRS's treatment of your tax status. You had to pay the tax that was due or you had to file in the Tax Court or you had to file in the—

MR. MARCUS: I can never remember which is which—

MR. MORRISON: The Tax Court is anticipatory and the claims and refund is in the District Court or in the Court of Claims. The problem was Americans United, like most of these organizations, was a 501(c)(4) so it didn't have any income tax to pay. At that time, the only taxes that it had to pay were unemployment taxes. It didn't have to pay social security taxes because it wasn't required. So the unemployment taxes were like $200 a month, or something like that. It wasn't even clear that you could do it that way and get into court. The issue was could we get into court this way on that or could we bring a declaratory judgment action. If it had been me, I would have filed for the refunds. I would have filed the refund suit because when you find out about it…but anyway, in my recollection, the government initially claimed that there was no way you could get into court at all. By the time some clever lawyer figured out about unemployment taxes and by the time we got to the D.C. Circuit, that was in there. It was sort of thrown in. We

argued before Judge Tamm and I think Wilkey was on the panel, too. I don't remember the third judge. Tamm wrote an opinion saying, yeah, you have the right to go to court. The government took us up to the Supreme Court.

MR. MARCUS: No kidding?

MR. MORRISON: That was my first Supreme Court argument. We lost the case eight to one or seven to two. But, everybody said, "This is ridiculous." In some cases you won't even get started because you can't get the organization up and running. But this one got started, but it's a ridiculous way to do it. You ought to have—this is people's First Amendment right. One of the things we did was we sat down with the Joint Committee on Taxation.

MR. MARCUS: You got the statute changed?

MR. MORRISON: Got a new statute. Put a special provision for declaratory judgments in these kind of cases. It's important—

MR. MARCUS: Just for 501(c)(4)s? (c)(3)s and (c)(4)s?

MR. MORRISON: Yeah. It has worked out beautifully. This is a case which is an example of what I often said is, you had to bring a case and lose it before it could get Congress's attention to fix it up. So that was what happened in this case. We sat down and we actually worked it through, and the IRS didn't care—they couldn't say that you could never get to court. Nobody was going to take that ultimate position. The question was, what was a sensible means of doing it? They wanted to be sure that you exhausted your administrative remedies, which was of course perfectly all right with everybody else and a sensible way to do it and to have some means of getting into court. Of course, once you could get to court and knew you could get to court, the IRS of course had an interest in trying to accommodate you so that you would make some changes in your (c)(3)'s proposed status in order to work it out.

That was the first case. Meanwhile, the substance of the case had not been adjudicated and Tom Field who ran a group called Tax Analysts and Advocates and Taxation Without Representation, one was a (c)(3) and the other was a (c)(4). He wanted to challenge this also and we agreed to represent him and John Sims, who came to work with me in the fall of '75, three or four months before Bill Schultz did, handled the case. As you may remember, Bill Schultz's first case was the Duke Power Company challenge to the Price-Anderson Act. John's first case was Taxation With Representation. Anyway, so we brought this case and while the case was pending—another example of Congress sort of waking up to this—the best claim we had in the case was that nobody understood what substantial—the prohibition was against substantial lobbying activities and the IRS had refused to define "substantial lobbying," the Congress had not defined it and there was no safe harbor. In the mid-'70s, maybe a little later, Congress finally woke up to this and the tax people got in and they said, look, we should create a safe harbor for this which is now 501(h), x percent and the IRS can define lobbying and they are required to

do so. It was a safe harbor. The IRS ultimately defined it in a fairly narrow way; meaning that you could do a lot of things that would not count towards lobbying. It was a perfectly fair and sensible resolution, but we continued the case anyway. We won *en banc* in the D.C. Circuit, Abner Mikva writing the opinion.

MR. MARCUS: On First Amendment grounds?

MR. MORRISON: First Amendment grounds. We also had an equal protection ground. We pointed out that veterans' groups and fraternal organizations could engage in lobbying and we all know veterans did it a lot. Legitimately, but a lot. Abner Mikva wrote an opinion which, as I recall, said something to this effect, that tax deductions are maybe a matter of legislative grace, but the First Amendment is not the appropriate coin of the realm, meaning that you can't distinguish between similarly situated groups. It went to the Supreme Court and we got whupped.

Part of the reason we lost was because this group had a (c)(3) and a (c)(4), and Blackmun and several others wrote an opinion saying, well, look, since you can move the money sort of back and forth and you can create a brother and sister, that's enough to make it workable and it's not so terrible. But it was an important—it was a combination of the legislative activity and once the law got passed, my recollection is we were significantly involved, probably with other groups, in seeing that the IRS regs were reasonable so that people could engage in lobbying. Nobody wanted to be a full-time lobbying shop. We have (c)(4)s that can do that, but it was just very important. So that was my first case and Judge Tamm, I got him reversed! I was the winner—Tamm was on my side. He got reversed in the Supreme Court. I caused him to get reversed is I guess the correct way to put it.

Then the D.C. Circuit had the four judges come at the end of the Carter administration and changed the Circuit around and made it more favorable to nonprofit organizations.

MR. MARCUS: And to consumer interests.

MR. MORRISON: Yes, and environmentalists. Although, of course, in the meantime the Supreme Court had issued its opinion in *Vermont Yankee* which essentially said, look, if you want to reverse people on the merits, you can do that. If you want to say they didn't follow the required procedures, you can do that. But you can't say, "We have some new procedures we want you to follow because we think you need them. That's up to the Congress." So that avenue was closed down.

MR. MARCUS: Do you think *Vermont Yankee* was wrong?

MR. MORRISON: No, I think *Vermont Yankee* was right, as applied to 553 rule making. I thought it occasionally has been applied to informal adjudications which I don't think is correct. And taken literally, it would apply to a lot of other things as well. In rule making, Congress did make a judgment: this is the legislative thing and this is as far as you should go. In addition, of course, in a bunch of other specific statutes it has gone further and said

you've got to have a hearing or you've got to do this or you've got to do that. So it seems to me that *Vermont Yankee*, perhaps not in all its language, but in essence is on the right track. There are tradeoffs.

MR. MARCUS: Later I'll ask you about *Chevron*.

MR. MORRISON: Well we can talk about *Chevron* later on. We can talk about it now as long as we've got it.

MR. MARCUS: Because that's another Supreme Court decision that really changed the Courts of Appeals.

MR. MORRISON: And the D.C. Circuit in particular because it has many more cases that are subject to *Chevron*.

When *Chevron* came down, of course, the interesting thing about *Chevron* was we had done a moot court for the lawyers from NRDC who were arguing the case and nobody thought that there was going to be this new rule about—

MR. MARCUS: Right, no one knew.

MR. MORRISON: And the author of the rule was Justice Stevens who, while he supported regulatory agencies, he was also a supporter of challenges and was a perfectly middle, fair judge on all these kind of questions. *Chevron* came down and I had kind of a mixed view on it because it depended who was in charge. When it came down, the line they drew seemed to me to be a reasonably sensible line and I thought that philosophically, although where you get it from is another problem—that philosophically the notion was that Congress implicitly delegated to administrative agencies a certain amount of leeway on questions involving law but also law and policy.

MR. MARCUS: And expertise.

MR. MORRISON: Expertise, yeah. If you think about the *Chevron* case itself, if you start with the assumption that EPA is more or less neutral as between the proponents of the bubble and the opponents of the bubble and can be expected to reach a fair accommodation and that there are things on either side, that makes some sense as a political matter and that Congress would expect the EPA would have to make these judgments. Calling something a question of law as opposed to a question of policy or administrative discretion didn't seem to be a very sensible line. It put too much force on labels because if it is a question of law, the courts could decide.

I was not unhappy with it. Interestingly, a few years before there was an amendment to the APA that Congress was considering called the Bumpers Amendment. And Bumpers, the senator from Arkansas, had proposed—and there was a considerable support both in the intellectual community and in the outside community and in Congress—an amendment that said the court shall decide all questions of law *de novo.* Of course,

nobody quite knew what that meant and it also forced people into deciding what a question of law was which got decided *de novo* and that would have been some strange things. I never supported the Bumpers Amendment. I thought it was a bad idea. But along comes *Chevron* and comes to exactly the opposite conclusion, which is the last thing you want to do is have *de novo* review. That was a period of four or five years, maybe less, after the Bumpers Amendment.

I remember once giving my Administrative Law exam. One of the questions on the exam was—I gave them the Bumpers Amendment and said, "You have been asked to write a memo explaining what changes would be made and is this a good idea or a bad idea." That was actually a good exam question. I liked it.

So *Chevron* came along and of course everybody thought that would be the end of the discussion. We'll now know what the answer is, of course. Then we started fighting about what was clarity and is clarity, like beauty, in the eye of the beholder. We had a lot of those fights about that. Then we had a lot of fights about what the second step was and how reasonable it had to be. Then we were starting to see cases in which it seemed singularly inappropriate to apply *Chevron* for two sets of reasons. One is because the presumption of neutrality that underlies *Chevron*, meaning that the agency doesn't have a particular stake in the outcome of the controversy, seemed to be untrue. There was a case out of the Tenth Circuit in which the Interior Department was given deference in interpreting a lease under which it ended up getting more money the way it interpreted it. It seemed to me that's not what *Chevron* was about.

Second, there were all sorts of off-handed opinions of agencies on what the law meant that were being given *Chevron* deference. Finally, along came the *Mead Corporation* case in 2002, in which Justice Souter wrote the opinion for the Court, which had been chipping away at this thing for a while, in which it said *Chevron* is okay, but we need some fine-tuning of it. We are going to give deference according to the degree of focus that the agency has put on it and it has to be—now under the *Gonzales v. Oregon* case, the drug case, it has to be—they are going to see how much delegation there has been in the statute to do this. I think the most important part is the degree of care which the agency has taken and whether it is at a low level or a high level in the agency and the degree of formality and everything like that. As that now plays out, I think that is about the right balance. But of course, going back from where we were, starting in the early '70s, questions of law were questions of law. Judges felt absolutely free—indeed, even Judge Leventhal, who took a very different view from Judge Bazelon about interfering with science, if it was a law question, it was a law question. We were perfectly capable of deciding it. On the other hand, science was way out there and we couldn't do it—I think that the world has sort of come to a narrower place. The judges' role is not as circumscribed on questions of science and arbitrary and capricious review because if you let the agency say: well, it is our expertise and two and two is five. We don't have to give you any good reasons. These are our reasons and we kind of have a hunch—that you are giving them too much and, on the other hand, not as much as they should get when they do—on the law side, that there are these interstitial areas of law.

MR. MARCUS: So would it be fair, if I hear you correctly, to summarize, to say that, while *Vermont Yankee* certainly was a decision where the Supreme Court was consciously curbing a tendency of the D.C. Circuit that they didn't like?

MR. MORRISON: Yes.

MR. MARCUS: To add on—to require agencies to go beyond the procedural requirements of the APA. And was *Chevron* a D.C. Circuit case, too?

MR. MORRISON: It was. It was a D.C. Circuit case.

MR. MARCUS: Was that also, you think, a D.C. Circuit-directed thing—obviously it was a D.C. Circuit case, but was the Court concerned about the D.C. Circuit being too adventurous?

MR. MORRISON: Well, unlike *Vermont Yankee* where, if you recall, there are a number of asides—shots at the challengers to the nuclear power industry there in then-Justice Rehnquist's opinion—it's perfectly clear he doesn't like these challenges.

MR. MARCUS: Yeah.

MR. MORRISON: *Chevron*, it's a much more neutral and, of course, in the end it is a neutral opinion because it depends on who is in office.

MR. MARCUS: Right.

MR. MORRISON: When the Clinton and Carter administrations were in office, *Chevron* wouldn't have—

MR. MARCUS: Was great.

MR. MORRISON: Was great, that's right. I mean, it's what I once said about separation of powers. The reason separation of powers works is because the people who wrote it didn't know which team they were going to be on. So here, *Chevron* is a good neutral principle. It works in both directions. So it curbs the excesses but leaves a lot of room for the political process. I think rightly so. In *Mead Corporation*, Justice Scalia was absolutely furious in *Mead* that Souter had cut back on *Chevron*. He says this is the beginning of the end of the administrative state. Well, it's not right and it's not what he said and it hasn't been. If it requires people to take a little more care when they are writing opinions in which they are getting deference, so be it. And if they don't get as much *Chevron* deference, they still get *Skidmore* deference. We kind of have a sliding scale on this and that's probably about the right thing.

MR. MARCUS: Do you think it is also sort of inevitable since courts are in the business, particularly the D.C. Circuit, of reviewing decisions by administrative agencies, that while they are constrained—obviously the D.C. Circuit is constrained now by *Vermont*

Yankee and by *Chevron*, but if the judges see something coming out of an agency that they really don't like and think something is wrong, something is fishy about this, there are still lots of ways that the court can be resourceful in finding a way to send the case back or to—

MR. MORRISON: They surely have the substantive—they have the clear procedures that have to be followed in the APA under rule making, less so on informal adjudications. But often there are agency rules that will supplement it—all of that plus any directives in the statute itself that requires procedural stuff. Those are easy and have always been true. Second, the questions of law. While there is less difference between *Chevron I* and *Chevron II*, I mean, you see opinions from time to time in which one judge says the law is clear in favor of one thing and the other says clear in favor of the other. The third person says the one thing that's clear is it's not clear. We ought not to fool ourselves that these formulas are going to answer all those questions. I think the courts are equipped and they have sufficient resources and they will do it in both directions.

I can't decide whether being in the D.C. Circuit is a good thing or a bad thing if you've got administrative review. On the one hand, they see so many cases so therefore either they become jaded to all of these attempts to overturn agencies, which they by and large reject, or maybe, on the other hand, they see kind of what is the expectation and the norm for agency handling of a matter. When the agency doesn't do what it is supposed to do, the courts will come in and say no. We had this, I think, when we talked last week about the hours of service thing. I think Judge Sentelle was on the panel. He's not a known challenger to agencies. So you would see those kind of things happening and I think that there is plenty of room there. It's not as easy. The court is by and large not consumer/environmental-friendly these days but there is still enough there to be able to get victories when you—

MR. MARCUS: And they are certainly not intimidated by the government the way a judge—occasionally a judge in another part of the country—I'm thinking more district judges, I suppose, than Courts of Appeals.

MR. MORRISON: I think that's—a little bit. Some of each.

MR. MARCUS: I used to feel, when I was in private practice, that the District Court in the District of Columbia, if you had a declaratory judgment injunction action challenging the constitutionality of some government program or something, that it wasn't a bad place to be. For one thing, when the Justice Department came in and said this is the end of the world, a judge in the District Court for the District of Columbia was less likely to buy that than a judge in some other part of the country.

MR. MORRISON: I think that's right. There have been times in recent years, I know, that Public Citizen has filed some cases outside the D.C. Circuit when they could have filed them here.

That reminds me of another little venture that I was involved in. This was when I was on the Administrative Conference. You, I'm sure, recall that in cases going to the Courts of Appeals, the rule as to forum selection used to be that the first to file in a Court of Appeals, all of the cases were transferred there.

MR. MARCUS: Yeah.

MR. MORRISON: And there was this ridiculous practice—

MR. MARCUS: The race to the courthouse.

MR. MORRISON: This was before people even had cellphones. People would be standing there and it would come down and they wouldn't even know what day it was going to come down sometimes, these orders. People would be standing there for days and weeks at a time to get there and get it in, get filed. It seemed to me to be ridiculous and people were filing cases in obscure courts that had nothing to do with this, had no expertise in it, it was obviously done for the most blatant forum-shopping reason.

I was on the Administrative Conference and worked on the committee and on the report that proposed that we change this. The change was ultimately made to a system under which anything filed within the first—I think it's fourteen days after the order comes down—it's sent to a pool and there is a raffle.

MR. MARCUS: A lottery, not a raffle.

MR. MORRISON: Lottery—you're right. That's right. Well, okay. A lottery. Lotteries are also illegal, too. What ever one calls it, it was a drawing.

MR. MARCUS: A drawing, right. It's not a lottery, it's a drawing. No one pays anything.

MR. MORRISON: Your filing fee, your filing fee. Sure enough, the problem has gone away. It was a perfectly sensible solution to a problem. It was one of those things that it was just so galling.

The other—I remember also one other thing that I had done on the D.C. Circuit when I got in the D.C. Circuit. We had a bunch of cases and most of the time—this was back in the days when opinions were being written in almost every case. Every once in a while somebody would write an opinion—issue a decision on the Court of Appeals and it would be four sentences and that would be it. So I wrote a letter to the *District Lawyer,* which got published, saying it's not fair, it's not right. You should at least be able to do it and if it's that simple, it ought to be simple to write two pages about it telling us what the reasons and what the cases are and, in particular, when you reverse something, that's just unthinkable to do it that way. They published it and I actually got some judges who said you know, that's not such a bad thing. We sort of saw less of it in the D.C. Circuit and don't see very much of that these days. At least we didn't—Public Citizen rarely saw two things. One is we didn't get denied oral argument and D.C. Circuit pretty much gives you

oral argument still. And second is you got a *per curiam* or a one-liner or something like that. Once in a while we got them and continue to get them. Other courts, of course, it's much different. They have far more staggering caseloads. It's always been one of the things that I don't think that the Administrative Office of the U.S. Courts has every really figured out the right way to weight cases at the circuit court level. Part of it is the number of judges that you have and the number of *per curiams* you have is dependent upon what you need to do to clear your workload. But the D.C. Circuit has continued to be very good about giving oral argument and writing opinions in most cases.

MR. MARCUS: Yeah, they've shortened the time for oral argument in many cases now to fifteen minutes a side.

MR. MORRISON: But they always give you more if they find it interesting.

MR. MARCUS: Yes, that's true. Which Chief Justice Roberts is experimenting with in the Supreme Court.

MR. MORRISON: But only a little.

MR. MARCUS: Let me ask you about two related things as to how the D.C. Circuit compared with other courts. One is—one probably didn't affect Public Citizen so much—I know it was an issue in the D.C. Circuit at one time in criminal cases in the old days, particularly before the Court Reform Acts where cases got shifted to the Superior Court. That is the practice of affirming by order, without any opinion. The second is unpublished opinions. I don't think the D.C. Circuit has been as big a sinner as some of the other circuits in deciding cases with unpublished opinions. But did either of those issues come up for you, either at Public Citizen or on the committee?

MR. MORRISON: Well the second one definitely did and I'll talk about that in a minute. The first one—rarely were cases just affirmed by order—few of them and that was actually what prompted me to write my little letter into the—

MR. MARCUS: It was affirmed by order or just a couple of sentences.

MR. MORRISON: Or affirmed for the reasons given by the District Court—that's better because at least you think, all right, so I didn't persuade them but they just affirmed it. The first time I encountered this problem I was arguing a case in the Second Circuit before I came down to Washington. It was a criminal case, one of the few criminal cases I had handled. The other side had a very well-known law firm on the other side representing this white-collar criminal on appeal. He made his argument, I made my argument and the presiding judge was sitting in the middle of the panel and looks to his left and nods his head, looks to his right and nods his head and then says, "The judgment will be affirmed." Now—I mean, I don't have feeling for this other lawyer, but imagine your client is in the courtroom that day, you've just made this argument and the next thing you know it's affirmed. Eventually the Second Circuit changed the practice, didn't they?

MR. MARCUS: They didn't even have to talk about it.

MR. MORRISON: They now wait until you—

MR. MARCUS: Until you go home.

MR. MORRISON: The fax machine is still wet when you get into your office with it. It seemed to be completely unnecessary, an unnecessary affront. They could wait for twenty-four hours and issue that. There was no efficiency reason for doing—it seemed to be an Eighth Amendment violation. I don't think the D.C. Circuit did that very often. Or put it this way—it may be that the cases that we had were of sufficient moment that they didn't.

MR. MARCUS: In the old days, there were a lot of frivolous criminal appeals. Not frivolous, but open-and-shut cases.

MR. MORRISON: First place, if you've got a constitutional right to an appeal, you take one.

MR. MARCUS: Especially if you are going to go to jail.

MR. MORRISON: Now, unpublished opinions—we at Public Citizen never found that to be a serious problem for us—either because we wanted to use unpublished opinions and couldn't or because the other side tried to do it and didn't, skirting around the rules. My own view was that it was never a very sensible idea. It looked like they were trying to get around something. I never was persuaded by it, but I didn't care enough about it. Other people cared mightily about it.

MR. MARCUS: Well, some people cared about it conceptually—that it was inconsistent with the case-or-controversy doctrine or something that you couldn't issue decisions that had no precedential value.

MR. MORRISON: Yes, yes. The committee—the D.C. Circuit committee I was on—I was on the Rules Committee for a number of years, it may have been as much as nine. Dan Gribbon was the chair for most of the time. Your partner, Roger Wollenberg, was on the committee. It was a good group of people from the Justice Department, from some of the agencies, Mac Armstrong from the FCC was—

MR. MARCUS: He was great.

MR. MORRISON: Bob Kopp in the Civil Division was also my law school classmate. Doug Letter was on for a while, different people. It was actually a good group of people and we worked through not high level problems of great magnitude, but—one of the things we looked at was unpublished opinions. My recollection is that Paul Friedman was the chair of a committee that wrote a report about it, decrying it, and the one change we did make was we got the D.C. Circuit to put in a rule which allowed—specifically

authorized people to request the publication of an unpublished opinion. My recollection is they started doing that and that worked out reasonably well and then there continued to be the controversy then, that the Rules Committee has changed it and now said that you can't have them anymore.

Part of the problem used to be that it gave the government unfair advantage to be able to cite unpublished opinions because the government was involved in most of these cases. It would have them and most people wouldn't have them. Of course now with the publication of everything in the world on something or other, everybody can have access to everything. I always thought that the courts could distinguish—when they called them unpublished opinions, everybody would say be careful of the dicta in there and maybe there are some more facts that we don't know about. Just be a little more careful. I always thought we could work around that. It was not such a big deal. Lots of people killed a lot of trees over that question. The judges liked it. They liked flexibility. Who doesn't like flexibility? It was not something we could ever have any effect on. We did have that one little incremental effect about unpublished opinions. Sometimes they would withdraw an opinion and then rewrite it.

MR. MARCUS: Let me go back to the forum shopping question for a minute because it occurs to me that because President Clinton did not get many appointments to the Court of Appeals here— He got a couple.

MR. MORRISON: Two.

MR. MARCUS: Two. No three—Judith Rogers, Tatel and Merrick Garland. But because of the Republican-controlled Judiciary Committee's refusal to consider appointments for two additional vacancies, he didn't get a chance to change the composition of the court dramatically from the way—

MR. MORRISON: Were there two additional?

MR. MARCUS: Yes, he nominated Elena Kagan and he nominated Allen Snyder and neither one of them—I think Snyder got a hearing. Kagan never even got a hearing, I think. That's when Senator Grassley, with some support, actually, this rather extraordinary statement by Judge Silberman, got support that—because of the declining caseload in the D.C. Circuit, we shouldn't fill these vacancies. Now the Democrats in the Senate—on the Senate Judiciary Committee are taking the same position with the same two vacancies—not the same vacancies, but the same two seats on the D.C. Circuit. But in any event, what I'm building up to is while Clinton only got three appointments to the D.C. Circuit, he nominated and got confirmed a lot of judges on the District Court. So in the 1990s the ideological composition of the Court of Appeals remained fairly conservative whereas the District Court became populated with a lot of quite liberal judges. Did you see, at Public Citizen, any difference between your affinity for bringing cases in the D.C. Circuit depending on whether it was direct review in the Court of Appeals or whether it was a District Court case?

MR. MORRISON: Let me answer the last part of the question first, which is as between the District Court and the Court of Appeals, the answer is no, because we assumed that every case we brought would end up at the Court of Appeals.

MR. MARCUS: So even if you got a good judge in the District Court—

MR. MORRISON: It might be better but we assumed every case we had would end up in the Court of Appeals because they were the kind of cases the government was not going to lie down on unless—once in a while they would lie down, but we couldn't assume that it was not going to—

MR. MARCUS: Because you were bringing lots of cases in the District Court as well as direct review in the Court of Appeals.

MR. MORRISON: Oh absolutely. Yes. I would say—

MR. MARCUS: More and more, actually.

MR. MORRISON: More of our cases. The second thing is I would challenge you a little bit on the liberalness of the District Court judges. They were Democrats, but a lot of them had been in the U.S. attorney's office, government officials, they'd been Superior Court trial judges some of them. There were in the District Court almost no, if any, what I would call public interest lawyers.

MR. MARCUS: Well, there was Gladys Kessler.

MR. MORRISON: Yes, but she had been a Superior Court judge for a very long time before she—she had been a public interest lawyer when I came to Washington. She is of our vintage.

MR. MARCUS: Yes. That's what I'm thinking. She's the Pat Wald era.

MR. MORRISON: Yeah. Almost. About ten years younger than Pat. But she had been a Superior Court judge for a very long time and Paul Friedman, who is a friend and a very able judge and had many progressive views, came from White & Case and he had been an assistant U.S. attorney.

MR. MARCUS: And Jim Robertson, who is a pretty liberal judge, came from Wilmer, Cutler & Pickering.

MR. MORRISON: All I'm saying is it was not monolithically that way. We had a bunch of Superior Court judges and former—people who had been in the U.S. attorney's office for a number of years, either in the criminal or the civil—mostly the criminal side. And then, of course, you know, in the Reagan era, you got a couple of judges who were appointed by Reagan who turned out to be pretty good—Stanley Sporkin, who would take no nonsense from anybody, and Royce Lamberth, as your firm knows—but lots of

other people, including the government, know you don't get crosswise with Royce Lamberth. I always knew that I would get a fair shake in front of him because he knew, as Sporkin knew, what the government was supposed to do and what the government was not supposed to do. When they didn't do it in front of them, they really got mad.

MR. MARCUS: Royce Lamberth held government lawyers to a very high standard—and government agencies.

MR. MORRISON: That's the way he practiced. I knew him back then.

MR. MARCUS: When he was in the U.S. attorney's office.

MR. MORRISON: In fact, one of the things—there was a time we had—a group of us and I can't remember which connection—on matters about attorneys' fees. Attorneys' fees were always controversial and always acrimonious with the U.S. attorneys' office. They originally tried to really hold your feet to the fire. Two things came up. One was what the hourly rate should be. There was a case called *Laffey*, that said we were entitled to market rates and the government could have continued to fight us for years. What the government eventually did—I think Royce was in charge of this at the time—they agreed to have an index every year—publish a Laffey Index every year that the government would say is acceptable. They do a pretty good job of keeping up with inflation and what the market is, well above the Equal Access to Justice hourly rates. Royce was very instrumental in putting this in, recognizing that neither the government lawyers nor anybody else likes to fight over attorneys' fees. It's unpleasant and nasty and so the government agreed to do this, which was a very progressive thing for them to do.

The second thing, there were some cases that came down, including one called *Evans against Jeff D.*, in which the Supreme Court said that in a class action, the government—it's ethical if it's not prohibited by any rules to say, we'll settle the case but not give you any fees as a condition.

MR. MARCUS: That was a big problem for public interest lawyers.

MR. MORRISON: Absolutely. Not only in class actions, but in other cases as well. Take the FOIA context. You could have all your documents and then you can give twenty percent of the documents as a contingent fee. Nobody quite put it that way, but that was sort of the thing. Royce set the policy for his office, saying—at least until this *Buckhannon* case came down, which screwed it up even worse—at the time when if you substantially prevailed you were entitled to fees, Royce said we will not put you in that dilemma. If you've done good work—but if this is one of those cases where we think we could—we have a reasonable argument but we are not going to want to waste any more time on it, we may argue with you about fees as a result of that. It was a perfectly fair and sensible combination.

Then along comes this case called *Buckhannon*, by which the Supreme Court by a vote of five to four says that "substantially prevails," means you must get an order on the merits—

MR. MARCUS: That's terrible—

MR. MORRISON: And settlements don't count. Worse than that is—we saw this in a bunch of FOIA cases—the government would litigate, make you go through all the hoops and then "volunteer" to give you the documents.

MR. MARCUS: At the very end.

MR. MORRISON: At the very end and you wouldn't get fees. Or you would get fees—or they would give you almost all the document in which case you could litigate but you probably would lose and get no fees. Finally, last year, 2007, Congress made some amendments to the FOIA eliminating the *Buckhannon* rule for FOIA cases, but not for other cases. So that's still a problem from the public interest perspective. But I give Royce credit and we worked with him on this issue. One of the issues was an opinion from the Third Circuit, in the context in which it came up, which seemed to say that you couldn't negotiate fees until you had negotiated the merits of the settlement. Royce never liked that rule because he wanted to be able to say—we wanted to tie the package up together. What they were concerned about is situations in which people would use the fee leverage to get more in fees than they did on the merits. That, of course, is a context in which we would support that kind of rule. But as a general proposition in some cases it didn't work at all and Royce understood that. The U.S. attorney's office took that position. As far as I know they've never been really hard-nosed about it. There was a period of time we were just having constant battles with them about it and all. I had my philosophy, which I refer to as my Woody Allen view of attorneys' fees—Take the Money and Run. If they would make any offer I think there was a rule that was passed by the District saying that you had to make an offer. You were supposed to write people a letter and tell them what you were supposed to do, what you wanted from fees and we were often able to settle it. It was just brutal without it. That was a good period of cooperation with Royce and the U.S. attorney's office. Our office, there were other people who worked on it. I think that was outside the Rules Committee context, but it may not have been.

I thought I'd talk a little bit about Justice Scalia on the D.C. Circuit. I had met him the first time in connection with the legislative veto battles when he was the head of OLC and then, as I think I related, when he went back to the University of Chicago, he wrote an *amicus* brief for the ABA on the case.

MR. MARCUS: So you started out as big allies.

MR. MORRISON: Yes. And he was also on the Administrative Conference of the United States at various times.

MR. MARCUS: Yes. I remember that.

MR. MORRISON: We were friends from that as well. He got appointed to the D.C. Circuit in '82. Bork was the first appointment. I knew Bork also because Bork had been the solicitor general in the Nixon years. He had been arguing for the government as an *amicus* in the *Goldfarb* case alongside me. So I knew—I wouldn't say I knew Bork well, but I knew him—we knew each other. Scalia I knew better and he was appointed and confirmed and that—I knew him. On the D.C. Circuit—he was only on the D.C. Circuit for about four years and we had, I think, four cases in which he sat. Put it this way—we had four cases in which he sat that were somewhat controversial in which he easily could have gone the other way, but he voted with us. He was not the deciding vote in any of them, but these were administrative law and FOIA cases and we had probably lost below or we had won and the government had taken appeal. These were not run-of-the-mill cases. I knew him personally and of course he's a very likeable person. He had been the Court of Appeals judge who had sat on the *Gramm-Rudman* case that I had argued before a special three-judge court in January or February—early February, late January of 1986.

MR. MARCUS: That was an easy vote to get. I don't mean to diminish your achievement, but—

MR. MORRISON: Well, actually he voted against us on the delegation argument and voted with us on the separation of powers argument. We did not know this, but at this time Warren Burger was considering stepping down, which he eventually did that spring. In June the announcement was made that Burger was stepping down. In fact, his last opinion was the *Gramm-Rudman* opinion, the last opinion he wrote as the Chief Justice. The president announced that Rehnquist would be made Chief Justice and he was going to nominate Scalia to be an Associate Justice of the Supreme Court. So immediately the question arises, what should we do about the Scalia nomination? We had had an informal rule which I had instituted that said that we at Public Citizen would not take positions on judicial nominations. I said this for two reasons. There are a bunch of reasons. If we like the candidate it looked like we are pandering. If we didn't like the candidate we could potentially have somebody up there who was voting against us after we had attacked him or her. Since our positions were quite eclectic because we took a wide range of cases—yes you could predict on some of them that some of them would be less favorable to us. On the other hand, others would be more favorable on different issues and so we thought about this both from the D.C. Circuit perspective and also from the Supreme Court perspective, that it was just better for us to stay out of it. In addition, it was tremendously time consuming and diverting and everything else.

People knew that I had known Scalia and had worked with him and I had been on the D.C. Circuit Rules Committee. People asked me about him. So when people asked me about him I said several things. First is we had four cases in which he sat in which he voted favorably to us. He didn't have to. On the other hand, it wasn't the deciding vote. We've seen nothing on the D.C. Circuit that would suggest that he is going to be a terrible Supreme Court Justice. He is obviously very smart. It's true that he had written administrative law cases and written stuff at OLC which looked like he was a strong proponent of presidential power, but not an unreasonable proponent of it. We didn't know anything about his views on a whole range of other issues which, of course, had

never come up in the D.C. Circuit. Most of the things for which he's most known had nothing to do with the D.C. Circuit or, for that matter, most lower federal courts. So we couldn't predict it. So I said, we're not going to stick our nose in this. Nobody had any particular disputes about it.

As you may remember, the principal focus at the time was on the elevation of Rehnquist to be the Chief and there was a revival of all the stuff that had gone on in Arizona when he was a private lawyer for the Republican Party. The Rehnquist confirmation hearings went on for weeks and debate and eventually he was confirmed by a fairly wide margin as I recall.

MR. MARCUS: Yeah, I think there were twenty or so votes against him.

MR. MORRISON: Twenty to thirty, yeah. And then they were scheduling Scalia. Well, of course, by this point the Democrats were exhausted and they didn't want to have a fight. If they had known what was going to happen they would have had a different fight, but their problem was they had no ammunition on Scalia.

MR. MARCUS: Right.

MR. MORRISON: So the day before the confirmation hearing is scheduled, I get a telephone call. The operator says Judge Scalia's office is on the phone for you. I had a feeling I knew what was going on. He calls me up and says, "Hello, Alan. How are you?" I said, "Fine." He said to me, "I have a favor to ask you." I said, "I was afraid this is what the call was going to be about." He said, "My hearing is tomorrow. There is no known opposition to me as far as I know, of any substance, and I don't expect any. But if there is some opposition, I want to know whether I could ask you to testify." So I said to him, "It is our practice not to testify at these hearings. I don't want to be seen as either for or against judges that we are going to appear before on a regular basis. I don't think it is appropriate for any lawyer to do that. I know other lawyers have different views, but that's my view about it. Second, on the other hand, I do know you and I know your work and I've seen you in the D.C. Circuit and if some skeptic says you are intellectually dishonest, you always vote for one side rather than the other, our experience is to the contrary and so I would not accept that. If the situation is such that you are going to be attacked about things that I know not to be true, I don't promise that I will testify but I do say if you would come back to me and let me know what the circumstances are, I would be willing to think about whether I want to do something about it." Fortunately—

MR. MARCUS: You didn't get asked.

MR. MORRISON: He didn't get asked anything, it was a complete love—it wasn't a love-fest but they just went through and—

MR. MARCUS: He refused to answer a lot of questions, too.

MR. MORRISON: Sure.

MR. MARCUS: He stretched the "issue-may-come-before-me" thing very far, as I recall. But he had no trouble at all.

MR. MORRISON: There was nothing—unlike Bork which I can talk about in a minute, there was nothing that he had written.

MR. MARCUS: It's interesting. Although he'd been a professor, I guess he hadn't written the kind of provocative stuff that Bork had.

MR. MORRISON: Whether it was because he was thinking ahead—probably not—or because his areas of expertise were administrative law. Maybe you could have found in the depths of the OLC files a bunch of stuff, but I doubt it, that he had written that was provocative. But even then, he would say, "I was representing the president."

MR. MARCUS: It's ironic, because Bork—when I went to law school and took antitrust from Bork, he was just an antitrust guy, but a few years later, because he became very friendly with Alex Bickel, he became a con law guy. That's when I think he wrote a lot of his very controversial stuff. It is interesting because both of them are such provocative writers. I think you are right. And people weren't focused on the issue of presidential power so much at that time, I think.

MR. MORRISON: No. And there were no religion issues that came before the D.C. Circuit; there were virtually no criminal cases. Certainly no *habeas* cases. There were no abortion cases. There were no affirmative action cases. On administrative law cases, we knew he was a devotee of the art of the law of standing and, okay, that was fine. He's taken it to new heights—or depths—depending on your view of him in the Supreme Court. But if he had written those things today, nobody would say you shouldn't be on the Supreme Court because you took those views on administrative law issues.

MR. MARCUS: I suppose standing was the one area where his views were pretty clear by then, which were not so good for Public Citizen.

MR. MORRISON: Yes, but we didn't think they were as bad as they turned out to be. And, of course, he took advantage.

MR. MARCUS: It got worse after he got on the Supreme Court.

MR. MORRISON: The other problem was that he was always one step ahead of the plaintiffs on the law of standing. My view about most of these—the *Lujan* cases, in particular, is if you knew what the answer was going to give you then when you filed your complaint, you could structure your case to get the right people in most of these cases. Not all of them, but most of them.

MR. MARCUS: You could have bought the ticket—the plane ticket to go see the elephants.

MR. MORRISON: Or you would have made it a lot harder—exactly—you would have made it a lot harder.

MR. MARCUS: The lions—whatever it was.

MR. MORRISON: Final thing about Scalia which you know, is I represented the Sierra Club in their case in the Supreme Court against the Cheney Energy Task Force. They recruited me to do the case. I took the case on. They filed it. We filed the opposition. The D.C. Circuit had ruled there was no jurisdiction to review the discovery orders and they were right and I thought they were right and we had very strong arguments. We filed our *cert.* opposition and it sat there one week, two weeks, three weeks, finally the fourth week they granted *cert*. So I was unhappy because this was not a good sign.

MR. MARCUS: It was a case they could easily have ducked.

MR. MORRISON: Ducked, yes. So the government's brief went first and in the middle of January—early part of January—two things happened. The first thing that happened was my clients reported to me that there was a sighting of Cheney, Rumsfeld and Scalia having dinner together at a restaurant in the Eastern Shore. I said, "Well, okay. It's certainly not in and of itself enough to make a fuss about." Thinking to myself, I have dinner with Justice Breyer from time to time and I certainly wouldn't think that that disqualifies him forever, even if the case is pending.

MR. MARCUS: Right.

MR. MORRISON: Then comes the duck shooting story and the first thing—my first reaction was, "Oh shit." I said this is—I know what is going to happen and I know I don't want to do it and I know what I've got to do, but the first thing I've got to do is I've got to find out what the facts are. I then called an old friend who is a Republican lawyer and I won't disclose his name because it just doesn't matter. But he is a very wise person and I told him the story and his reaction was, "Oh shit." Let me think about it some more, what should I do? I talked to a couple other people. And then about three days later I got a call from David Savage who was the reporter from the *Los Angeles Times* on the Supreme Court beat, whom I've known for many years. He said to me, "Have you heard about this story?" Well, as soon as I got the call from him, I knew that the answer, burying the idea, was gone.

And I said, "Yes, I've heard about it." He said, "What are you going to do?" I said, "Well, I'm trying to find out what's happened. It's not the most reliable source and I don't go do things—" So he said, "Well I'm trying to find out what happened, too, so I'm going to write a letter—an inquiry through the Press Office to Scalia." He sent a perfectly reasonable inquiry and Scalia came back with a quite snide—I think is a fair way of putting it—response. This was—then the story. My clients started, of course—more and more got involved. Then we found out that he went on the Cheney airplane and then we found out that they had been in the duck blind together and that Cheney's son-in-law or

daughter-in-law or somebody had also come with them. Maybe Scalia's—Scalia's son-in-law.

I had—I was moving in the direction of filing a motion to recuse because my clients wanted it and because I thought it was the right thing and because I didn't think I was going to get his vote anyway. If we got a four-four, we got affirmance. But I didn't do it for the tactical reason. I did it because I didn't-to-think he should be sitting.

And then the editorials started—the newspapers—the editorials started coming. There must have been fifty editorials my clients collected and half a dozen cartoons and then there was the Jay Leno Show where he said that Cheney got stopped at the White House gate because he had Scalia in his pocket.

And we thought all this was relevant on the question of what the perception was because it says partiality could reasonably be questioned under the statute. So with considerable personal reluctance, but knowing that I had no choice as a legal matter and, because as a matter of principle, I thought it was wrong and the Supreme Court Justices shouldn't be cozying up to the vice-president or any other litigant while cases are pending. Remember, *cert.* had been granted and then they went duck hunting right after *cert.* had been granted. The argument was scheduled for April.

I made the motion and of course it got big press. Nothing happened. We got a letter from—I made the motion to the whole court and I got a letter back from the clerk saying, "As is the Court's custom, the matter will be referred to the Justice for further action." My position was that's the appropriate first step but that if he refuses to recuse himself or he takes no action, then the full Court is obligated to do it. I felt that was another important principle. But I knew that as unhappy as the Court was going to be with the filing of the motion, if they had to get involved, they would be even more unhappy because they would have to say what they thought about it. So I said, "All right. Let's see what happens." Three weeks went by—a little less than three weeks went by and nothing happened. Meanwhile, I had prepared a very brief motion to the Court saying we have received no response from Justice Scalia, it is now the obligation of the Court because that statute says "shall" do it and you have no more—if he had refused to recuse himself because his son was arguing the case or because he had stock in the company, the Court would have to act and it has to act here, albeit on a different part of the statute. You have no choice.

I had done a little poking around and the motion was five or six pages. I had the motion all drafted. I was going to file it on Wednesday. Through our Supreme Court Assistance Project, we came upon a case in which—it was on the conference for that week—in which the Ninth Circuit had ordered a district judge recused for I don't remember what, but I think it was some sort of an appearance of impropriety question. So I said, you know, let me wait until Monday when the order list comes down. If by any chance they granted that case, it would give me a big leg up in saying that the full Court should hear this motion. That was Wednesday. Thursday Scalia issues his opinion. Twenty-one pages.

MR. MARCUS: I read it.

MR. MORRISON: I read it too.

MR. MARCUS: Of course you did.

MR. MORRISON: Of course, I had several reactions. One is there was a lot of facts in there that if we had known we certainly would have put the motion differently whether we had made it or not. It was his fault for not disclosing them and accusing us of not knowing the facts when he refused to talk about them—and by the way, he had been very consistent in not talking about them and giving people with questions about them the back of his hand. He gave a talk at Amherst in which he just pooh-poohed the whole thing. Second, several people commented to me, if it takes twenty-one pages to explain why you shouldn't do something, you should probably not do it. Third, as you may recall, at the end of the opinion, he quoted a letter that I had written him—

MR. MARCUS: I didn't remember this.

MR. MORRISON: —in the fall of that year, in October. I had written him for two reasons. The letter had three parts. One is that I had written a piece about *Republican Party v. White*, which was the case that he had written in the Court saying that it is unconstitutional to forbid judges from stating their opinions about legal issues in their election campaigns. The rule was much too broadly drawn. You could narrowly regulate statements about cases that are likely to come before them, but that you couldn't forbid them. They weren't required to talk. It was a very big First Amendment opinion, five to four, and I thought he was right. I actually thought he was right before the opinion came down and I wrote an article which I had been working on before the opinion came down on the normative basis. That is to say—well you can get it from the title of the article is—"The Judge Has No Robes-Keeping the Public in the Dark About Judicial Views." My view was it is better to know what their views are before they go on the Court than after they go on the Court. So it was published in the *Indiana Law Review* and it came out and I sent him a copy, saying to him "I agreed with your opinion," but there were other things as well. Second, I heard you had run into one of my colleagues, Allison Zieve, at a dinner in New Orleans. She had clerked for—or her husband had clerked for a judge there and the judge was having some event. Scalia was there and she was there and she got talking to him and he said he didn't think that he knew what my plans were because by this time I had decided to leave Public Citizen. I said to him, "I'm hoping to go out to Stanford, but you know faculty politics for what they are. Until I have an offer, I won't have an offer. But if I go out there, maybe if you are out in that part of the country some time, you will come by my class and you'll see that two people can disagree on many things but agree on some others." I wrote him as I always wrote him and I always addressed him, "Dear Nino"—"Dear Justice Scalia" was typed up and then I put it in there and I sent it out.

MR. MARCUS: I didn't remember that—Oh, my God.

MR. MORRISON: He quotes this letter—

MR. MARCUS: And says, "Does this mean...?"

MR. MORRISON: Yes, that obviously—and I was really annoyed at that. I could take everything else but that. But that seemed to me unfair. And then when I thought about when he had asked me to testify in his favor, it just seemed to me to be really sour. I haven't seen him, except across the bench, since the argument. It made me feel very unkind toward him—ungenerous.

MR. MARCUS: It was kind of the kind of thing—it's a little like some of his footnotes or his statements in dissenting opinions really going after O'Connor or Kennedy or whomever. Even the Chief in a concurring opinion or something.

MR. MORRISON: I don't think he cares. Anyway. So I was quite unhappy with that. Of course, the *Wall Street Journal* reprinted my letter and that was the—no paper had editorialized in favor of him until he wrote his opinion.

MR. MARCUS: And then the *Wall Street Journal*—and a few others perhaps. I mean, he had one argument that I always thought had some plausibility to it, which I thought it was kind of a close question. I thought he should have recused himself, but the fact that Cheney was being sued in his official capacity but not in his personal capacity, this wasn't a tort suit against his friend, Dick Cheney, whom he had just gone hunting with.

MR. MORRISON: No, but this was something he was personally invested with.

MR. MARCUS: Of course. If there ever was an official capacity thing which really involved the strong personal interests and views of the official, this was it.

MR. MORRISON: Oh, in the meantime, there is one little reverse back. After Scalia was appointed and sworn in, I think he invited everybody in the Administrative Conference to a reception that he had at the—not at the Arboretum, but at the hothouse down on—

MR. MARCUS: It is part of the Arboretum.

MR. MORRISON: It was a very nice reception and I remember chatting with him. He was very gracious, as always, and I remember him saying to me, "The thing I want to know is—my biggest worry is whether I'll be able to go to Hechingers on Saturday morning without everybody recognizing me." Anyway, a few months later, I got a call from John Kramer, who you probably remember.

MR. MARCUS: I remember him.

MR. MORRISON: John, he was at this time the Dean at Tulane Law School and I had known John in his early years when he was here in Washington. Tulane had a summer school program that they taught that they ran in various places, this time in Greece on the

Isle of Rhodes. John asked me whether I'd come teach it. He said, "Justice Scalia will be there for part of the time and I think it will be very nice for you to come. We'll pay your expenses and a small honorarium and you'll teach three weeks in the morning for a couple hours." So I said, "Gee that sounds like a wonderful idea. This is the Rhodes Scholarship I never got close to winning." Anyway, so I said, "Let me just do this. Let me call Scalia." So I called Scalia up. He was on the Court. He had been on the Court for four or five months, took my call. I said to him they had offered and he said, "Oh, please come. It will be wonderful. We can have some time together and our wives. We can go out and have dinner." Sure enough—so I said yes and so I went and did it. I was in charge of the class and he came and kibitzed and interjected things. He had an entourage with him—actually just one of his former law clerks who was subsequently a high Justice Department official and became a Court of Appeals Judge, Mike Luttig who was at this time very junior, he was an aide-de-camp to Scalia. Scalia went to all sorts of things. So we saw them a fair amount. Not a lot, but a fair amount. We got talking and he said that they had had a place in Virginia Beach that they had been going to but it was getting crowded. We said to them for a number of years we've rented places in Duck, North Carolina, and been down there. It's a really interesting place to go and it's not developed and everything like that. He said maybe later in the summer when we were going down there.

So sure enough, later in the summer he and Maureen and a couple of their kids came down from Virginia Beach for a day—half a day. We walked the beach and talked and showed him around a little bit and he looked at it. He ultimately—we have a photograph of him surf-casting before he had the "no bathing suit" rule on his photographs. Eventually they bought a place in—

MR. MARCUS: In Duck?

MR. MORRISON: Actually in Corolla, I think. We have only been down there once or so since then and well before the Cheney thing we called him and he didn't call back so we didn't see him. Our older daughter said, after a while she said, "He's not coming to our house anymore." Because of his views on abortion.

MR. MARCUS: Well it's too bad that the recusal business interfered with a long relationship.

MR. MORRISON: Yes, yes. But maybe it was not going to last anyway. The other thing—say a word about Bork. Turned out that the Bork nomination was made at the very time when we were on the Island of Rhodes with Scalia there. Needless to say, we didn't talk about it. Meanwhile, back at our office at Public Citizen, people were very much concerned about Bork in a way that they were not concerned about Scalia, as was everybody else. They called me long distance and I did talk to them. They wanted to do something about Bork. Unlike Scalia, Bork had been against us in every case of any significance in which there was any divided vote. He had been on the court for a little longer. So they said they wanted to start to do a study of his opinions. I said, "All right, but let's just think about how we are going to do this. I want to think about it some more

when we get back." So we put together a study and Bill Schultz was the principal architect of the study. What we did was we examined every one of Bork's opinions in the D.C. Circuit in which there was a divided vote. Sixteen of them it turns out. Bork had been put forth as a strict constructionist, calls them the way he sees them. We looked at these sixteen opinions and in every single one of them, he cast a deciding vote—or cast a dissenting vote—in favor of the big guys against the little guys, the government against the private person, the government against the criminal defendant. Every single one of them! Sixteen opinions down the line. We issued a report titled ,"The Judicial Record of Robert Bork." We didn't lobby, didn't do anything else like that. There were many causes of Bork's defeat, but this report made it impossible for them to say he was a strict constructionist, a neutral, he calls them the way he sees them. You can't explain it any other way. That argument essentially disappeared from the administration's arguments. They said he was a strict constructionist but they stopped trying to say—because there was nothing they could say. The study was carefully done. We had gotten all the cases and he was—as it appeared to us—an ideologue. If they wanted to vote for an ideologue, they could vote for him. He ended up getting defeated, of course, for many, many reasons.