Oral History of
ALAN MORRISON
Tenth Interview - April 6, 2008

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison on Sunday, April 6th. Our tenth session. We're finishing up our discussion of the D.C. Circuit and, Alan, I know you wanted to talk about the backlog reform stuff.

MR. MORRISON: As everyone who has been in the D.C. Circuit knows, there are faster judges and slower judges. Probably true in every District. In the District Court I discovered somehow that the judges had a regular list they sent around—I think it was also true in the Circuit Court as well—of old opinions. Of course, since we had a single assignment system in the District, at least since I've been here—although it's not true in all other Districts, it's true in most now. Your case gets assigned to a single judge from the beginning. In the District Court it was obvious who was responsible for what but we didn't have the evidence in terms of numbers or delays. But I knew the evidence was there and the evidence was there because the judges had their own internal reports in terms of backlog of cases, the cases that had been simply filed more than three years ago—that was a statistic that they kept and each judge had to report to the Chief Judge how many trials had been completed; non-jury trials for which there had not been a decision; and last, how many pending motions they had. They had to all be identified. All these were reported. There was only one problem. They weren't made public.

People were complaining about backlogs and delays and it was my idea to make them all public. I consider it my most effective idea in terms of no cost, no paperwork, no bureaucracy, just publicity.

MR. MARCUS: But lots of anguish for the judges.

MR. MORRISON: Well, yes. And I can't remember to whom I suggested it. Somebody, I think, on the Senate Judiciary Committee or staff. It just floated through without any opposition at all. Of course, there was no principled basis on which anybody could object because we were not imposing any burdens and it was all there and it was factual. And so it passed.

The requirement was that these semi-annual reports be published, be made available. The first time, as I recall, they were made available, but not readily available.

MR. MARCUS: When was this roughly? In 19 what?

MR. MORRISON: I think. I've forgotten for sure, but I'm pretty sure it was in the late '80s. Judge Penn was the principal problem. He either had been or was about to be the Chief Judge—which made it even more embarrassing. One of the things that came out—it finally came out and I had to lobby The *Post* to go and look at these things and to

do a story about it. But they did a story. They did an editorial and some of the things, of course, came out to be very unfair if you just looked at raw numbers. For example, I remember at one point, I think there was an air crash case that was consolidated before Aubrey Robinson. There were a hundred cases and the case had been to the D.C. Circuit and back and maybe to the Supreme Court on various issues. All perfectly appropriate for a case of this size and issues of this size. If you looked at Aubrey Robinson's docket, he had a hundred cases over three years or older. But people got over that pretty quickly, that part of it.

Some things happened: The new judges, of course, when they came on they would get assigned to all these cases that belonged to somebody else and, human nature being what it was, judges gave the worst of the dogs to the new judges and the oldest backlogged cases, the ones in which they had done nothing. Which, of course, made sense in the sense that they hadn't invested anything in doing things. But, of course, that made the statistics for the new judges bad for a while. In any event, that sort of stuff got ironed out.

We began to see a phenomenon of large numbers of opinions being issued on the 30th of September and the 31st of March, which are the last days of the six-month reporting period. In fact, just this week, one of my colleagues sent me over something from Judge Walton. It says in an Order— "In accordance with the Court's Order in its Memorandum of Opinion that shall be issued hereafter, it is hereby ordered this 28th day of March, Defendant's Motion for Summary Judgment as to Count I is granted, that the Plaintiff's Motion for Summary Judgment in the Alternative for Preliminary Injunction is denied. It is further ordered that the Order shall not be deemed a final Order subject to appeal until the Court has issued its Memorandum Opinion in this matter." Well, whether he can deem it or not deem it—I always tell my students the word "deems" means "not so." Or "let's pretend." So you could see this was obviously done for the very purpose of avoiding the late-case report—at least I would be surprised if this particular thing shows up on Judge Walton's report. One can complain or quibble about whether it's being done, but the fact of the matter is it's done. All around the country I talk to judges and judges that I know—I said to one judge who is quite active in the rules process—somehow the topic came up and I said to her, "You probably don't know this, but I was the person who got this." She said, "No, but I wouldn't be surprised if you told me it was you." I said, "Thank you." She said, "We grumble and grouse, but everybody agrees it is a good rule."

MR. MARCUS: And it has had an impact. I'm sure it has.

MR. MORRISON: In the Circuit Court, of course, you can't have the rule because you would know who is writing the opinion. You can't make them public. It's internal. But the Circuit Court problem in delay has subsided substantially. Spottswood Robinson was really a big problem. As I said, Judge Bork was also a problem, although not to the extent that Judge Robinson was. And there were a few other isolated things and cases. The D.C. Circuit now pretty much gets their opinions out in the term in which they are done. They don't get it out by July first like the Supreme Court does, but they will finish them up over the summer if for no other reason, I think, than having law clerks around and you've

got them working on it and it sort of makes a lot of sense to do it. Every once in a while a case will slip.

MR. MARCUS: Well, it may be that the D.C. Circuit—this may sound controversial, but the D.C. Circuit's caseload has gone down somewhat over the last decade or so and my impression is there are fewer of the humongous rule making, on the record, huge dockets that they are reviewing. So I think that's helped, too.

MR. MORRISON: Yes, and part of that, of course, is due to the fact that in the last few years the agencies have been issuing no new rules.

MR. MARCUS: Yeah, right.

MR. MORRISON: That certainly was true in the Reagan administration, too. And Clinton, they issued some, but by no means what there was in either the Nixon or the Ford administrations, or Carter. There have been some very big cases but the ones you used to see were not simply a single rule making, but multiple parties with multiple claims. The D.C. Circuit at one point began rating cases as either highly complex, routine or simple. The highly complex cases were assigned a panel very early for things like motions—because there were always motions, somebody said it was untimely, you didn't have standing, or whatever else it was—and then they would say it was to go to the panel and they would actually do things like schedule—I can't remember any specifics, but my impression is that you would see cases litigated in the Court of Appeals more like you did in the District Court. That is, in phases. We would take these issues and deal with them now and then come back and deal with others later or have briefings around certain issues. For the very few big cases, it was much better organized and, of course, you knew who the three judges were on the case so there was no issue about responsibility. Those cases, despite their magnitude, tended to get litigated in a fairly complete way.

MR. MARCUS: Let me take this opportunity to ask you about something that we haven't talked about, that the D.C. Circuit started some years ago. I remember when we were in practice we ridiculed it a little because they applied it to all cases and that was a requirement for mediation, which always seemed, in some cases, pointless. But did you at Public Citizen have much experience with actual mediations of cases in the Court of Appeals?

MR. MORRISON: We did not. You may remember we had this very successful mediation with the Nixon tapes case that we talked about, which was, to my view, an example of the case that would never have ended if it hadn't been for mediation. There were a few other cases that we ended up mediating. I was never of the view that just because it was a government case, which most of them were, you couldn't mediate them. The Nixon tapes case was a government case. Sometimes you couldn't get the government agency to budge on it. In some of these cases, it was necessary to get a definitive ruling because the issue was recurring and the government agency needed to know it, the people needed to know it and, as I suggested, the Congress needed to know it because if the Congress didn't like the rule, they wanted to be able to change it.

Our cases tended to be relatively small on the fact aspects, with the exception of our electronic records case, which we had a huge amount of discovery about, and there were a couple of others in this Circuit. But most of our cases, aside from occasional rule makings which we had no control over, but when they got to court, most of our cases were not heavy discovery cases. They were not factual disputes of the kind that you would avoid a lot of effort by mediating them. The issues were usually teed up pretty well and the court could step in and decide them, so we didn't have too many mediations. We had some in other courts. The Second Circuit used to have a really nasty mediation system.

MR. MARCUS: I remember it, yeah.

MR. MORRISON: There was a guy named Scardelli and there was somebody else. I remember going up there one day and him telling me, "The judges don't like these kind of cases." I said to him, "Well, that's not my problem. I don't represent the judges. I represent my client and we have an objection. We want this thing heard." It ended up part of the case got resolved and the rest of it got heard and argued. I think we lost, but the point was I wasn't going to give up. There was no reason to give up and—

MR. MARCUS: And this guy is trying to bludgeon you.

MR. MORRISON: Oh yes. They were known for that in the Second Circuit. The Second Circuit actually finally got control over these fellows. But our office didn't have very many cases that ended up getting mediated. I thought they were good things. We did have one case involving the D.C. schools and the Control Board that I was involved in that ended up getting mediated but I think we were back at the District Court level after some things.

The other thing you talked about is lower caseloads. I was on a committee on the Civil Justice Reform Act, a statute that was passed by Congress in the late '80s that required each District to have a committee. Paul Friedman was the chair of our committee and we had judges and others on it. I think there were judges on it. In any event, we met with a lot of judges about how to move the docket and what to do. One of the things that I was always very interested in was whether we had the right number of judges here in the District and in the Court of Appeals. I was also interested in the issue about statistics on the kinds of cases that were in the federal courts. Congress was passing a lot of laws and people were making assertions about what the courts were doing and not doing. My experience was we didn't have very good data on that. For example, there have been regular attacks on diversity jurisdiction as being inappropriate. There is certainly a political question, but one of the questions was, how many diversity cases are there? The interesting thing about that is really you can't answer the question. I assume that the data on the number of diversity cases is right. But I always felt that you didn't answer the right question because the question is not how many cases there are, it's how much judge time they take up—not the number of cases alone. It turns out what data we had is that diversity cases tended to have far more trials than other cases but they tended not to be long trials. Whatever you think about it—automobile accident cases or a medical

malpractice case or even in products liability cases, even if they went on for a week it was a lot—occasionally longer cases. The other thing was that they didn't take up much judge time except in trials. At least that was the impression that people had because there weren't a lot of complicated motions. Now there would be *Daubert* motions in most of these cases, whereas in other kinds of cases, antitrust cases or securities cases, you have class action and all kinds of other motions. A lot of the cases we had against the federal government never go to trial, but involve a lot of judge time. So I always thought that we had bad data. The Administrative Office of U.S. Courts was the one who created the data system. I went and talked to them about it once and I got nowhere. "Why are you keeping this data? If you don't know why you are keeping it, why are we setting up these categories? What are we trying to learn from them?" One of the other things, there is a cover sheet that has to be filed when you file a case in the District Court. The cover sheet has remained unchanged, in terms of categories, since 1972 when I first came here and filled one out. As far as I know, they have not changed. There are categories that simply have no bearing on the way things are done anymore and there are categories that are extremely unclear. In some cases, you have two bases for subject-matter jurisdiction. There is no incentive for the lawyers—at the clerk's office, all they care is that you check a box. And nobody looks at them or does anything about them at all. This is, of course, true every place around the country. There is a committee called the Statistics Committee of the Administrative Office. I never could get anybody interested in this and I tried and we tried to put some stuff in the report.

MR. MARCUS: In what report?

MR. MORRISON: The Civil Justice Reform Act Committee had a report, ultimately. It basically said the last thing that should happen is to give Congress a bunch of authority; Congress should not be telling courts how to do things. They don't know and we can do it better ourselves. Yes, there are some problems and here are some things we could address. It was a perfectly sensible report. Not earthshaking, but fine.

MR. MARCUS: Was this a committee of the Judicial Conference?

MR. MORRISON: No. The Circuit appointed the members, as I recall. It lasted for a year or so and it did some useful things. Among other things, I think committees of this kind are useful because they get judges and lawyers talking and a better understanding of the problems and that things are learned by the court and even though they don't show up in formal rule changes and statutes, things get usefully done. This was important because basically the Congress was concerned about delay and we said, "Look, we'll take care of this problem. Just don't bother with it." Maybe it was after this time that my statute on backlog reporting got enacted. I don't remember for sure. Anyhow, I thought that the issue about how many judges each District and Circuit ought to have—we didn't know anything about the kind of cases. The other thing we found out is that the AO keeps records of how cases are disposed of. They have categories: Motions and Settlements and Trials, I think. It turns out that it's very unclear what goes into what category. The other thing is, it turns out that the judge's courtroom clerk or bailiff is in charge of this, makes the final call on its categories. So we think we have all this information—

MR. MARCUS: And they all apply different standards.

MR. MORRISON: They all apply different standards and nobody cares and nobody looks at it—or by stipulation—that could mean anything! It tells you nothing about how much work was on how many motions they had.

So my idea—this, of course, met with instant disapproval from the judges—was that at the end the judge should have to fill out a form which could be done by the law clerk perhaps, in which they would have to put in at the end, the principal category of subject matter jurisdiction. That is, this is a diversity case or is principally a federal question—and whether it is a government case or a private case. Then a category about—more than just a few, but how this case was finally resolved and then the final thing—what I think probably got the judges most unhappy—was an estimate of the number of hours that you spent on the case. My suggestion was, less than ten, ten to 100 or over 100. Now one could argue about what the other numbers were, but it seemed to me we could get a huge amount of data for almost no effort by getting judges to fill that in. But really, only the judge could do it. The law clerk probably couldn't—well, the law clerk could ask the judge, but the law clerk may not have been there for the whole time.

MR. MARCUS: Right, you needed to distinguish the Social Security Disability cases from the big cases.

MR. MORRISON: Right. And/or know how long Social Security Disability cases ran. That is, what is the gamut of them? With computers, we could have had all this information.

MR. MARCUS: They wouldn't do it, huh?

MR. MORRISON: They were not interested and you couldn't get anybody to put that in a report. The judges would have been very unhappy, so we didn't put it in the report. I put this idea out at various other times and nobody has been interested in doing it. Yet, all the time we have this debate about the allocation of resources and do we have enough judges.

MR. MARCUS: Well, the debate on the D.C. Circuit now as to whether eleven judges are enough—or ten judges, whatever it is.

MR. MORRISON: Or too many. The Fourth Circuit had a similar thing. They moaned and groaned and now they haven't got any judges and now they "need" them. So, the point is you could design a system that would—the District Court seems to be an easier system to design, but you could do this for the Court of Appeals, too—that would keep track of how many hours are they spending on various categories of cases and so forth and so on.

MR. MARCUS: Do you think the resistance was a concern by judges that if you collected this data that it would expose differences in how hard different judges were working? You know, that people would total up the hours or something?

MR. MORRISON: In the first place, there would be no way it would be public. It wouldn't have to be public.

MR. MARCUS: So why did they object to it so much?

MR. MORRISON: Because they were all at law firms. They didn't want to keep time records. It was time records.

MR. MARCUS: But you weren't requiring time records.

MR. MORRISON: They just didn't want to do it. It was clear they didn't want to do it. I was disappointed. Maybe someday, somehow we'll figure it out. It may be that I went to the wrong body. Maybe Congress needs to do it as part of a pay raise.

MR. MARCUS: Ah ha, yeah.

MR. MORRISON: So we didn't make much progress on that and of course Congress continues to issue rules. As you say, we have these debates about how many judges we need for different things and how many judges we need on the Circuits and how many on the District Courts and so forth and so on. And we don't even have any mediocre data. Actually, my view that it's worse than not having good data, we have data that is bad and we think it is good and we're not doing much about it.

MR. MARCUS: Okay. You want to talk about your D.C. Circuit judgeship?

MR. MORRISON: My non-judgeship, yes. Sure. In 1992, the year of the presidential election—I remember it quite clearly, in January, 1992, I was a member of the ABA Commission—I was on several. Even though I was never a member of the ABA, I was on one on tort reform and this was on the initiative and referendum process, which was quite interesting. On this committee was a guy who I became friendly with who was teaching at the University of Hawaii Law School and he called me in mid-January of 1992 when it was snowing out and he said to me, "How would you like to come and teach in Hawaii next year, academic year." I said, "When would this be for?" He said, "How about the Spring Term?" I said, "When does that start?" He said, "It starts in January." I looked out the window and I said, "I think I should talk to my wife about this tonight at home." We said yes, of course. Our younger daughter, Becky, was graduating from high school in '92 and she was going to be in her first semester at Wesleyan. Our older daughter, Nina, was graduating from college in 1992 so we would be around for the first semester and then we could go off and then Becky would come at spring break and come visit us in Hawaii, which seemed like a good idea for her. We thought this would be a good idea.

The only hesitation I had—and I told them this—was if a Democrat gets elected and I get offered a position in the administration, I might have to pull out at the last minute. I said I don't think it is very likely it is going to happen and I don't think I'm likely to take the positions that they are going to be offering and, to the extent that I am, I could probably put off something until June.

MR. MARCUS: June, yeah. Anyway, people could have told you if they had known how disorganized the Clinton administration was going to be about appointing people in the first few months.

MR. MORRISON: Interesting you raise that because I had some people who were working on the transition, people I knew and I said to them, "The first thing you've got to do is get your people in place. Stop worrying about all these other fights and get them in." They were very, very late in getting even their first ones in and then they got caught in a bunch of controversy over Zoe Baird and then—

MR. MARCUS: At the assistant secretary level, they just took forever.

MR. MORRISON: Well, because it was sort of a rolling problem. Then they couldn't decide how much they wanted the White House to be involved versus the cabinet officer and they hadn't made up their mind about that. In any event—and it turned out, as I recall—I certainly know this was true in '77 when the various assistant attorney generals and solicitor general, didn't get sworn in until May or June. The fact that the solicitor general doesn't start right away is not such a bad thing because the office is going to keep running and he can get started over the summer.

Anyway, at this point, as part of my decision to go to Hawaii, I stepped aside and let David Vladeck become the Director of the Litigation Group. So I said, well one of the things I've got to think about is do I want to become a federal judge. People had suggested it to me and from starting the time you are in law school you think—

MR. MARCUS: You think you want to be one.

MR. MORRISON: Or you think about thinking about it anyway, at the very least. I certainly thought I might want to be one at various times. At that point I was fifty-four years old, which I thought was a good age to be a judge, that I had done a lot and if I took the judgeship I would not be inclined to leave and do something else. Yet I was young enough that I could still feel I could take on the work and be vigorous and so forth. I got to thinking about it. I talked to a few people about it and I decided that I did not want to be a District Judge for two reasons. One is this was the time at which they were doing a huge number of drug cases in the federal courts—criminal cases. I had also done the Sentencing Guidelines case and knew about the Sentencing Guidelines. I just felt I could not bring myself to sentence people the way that I would be required to sentence people. In the drug area, in particular, where I think we have far too much criminalization of drugs, a very bad approach. Unwise. I would have been sworn to do what I had to do and I didn't feel like I wanted to do it. Whether I could have done it or not, I didn't want to

do it. Second is I wasn't sure I had enough patience to sit on the bench and listen to people make bad arguments and mis-try cases. I just wasn't sure that I did.

In my own mind, the criminal thing was just disqualifying and judges were saying they were never trying any civil cases. They were occasionally doing civil motions, but not very much. I said I didn't want to do that. I think that has changed some now.

MR. MARCUS: It got better because the Clinton administration in D.C., the U.S. attorneys, stopped the policy of trying all the drug cases as federal cases rather than D.C. cases. So a lot of the drug cases shifted back to Superior Court.

MR. MORRISON: Of course, even that could probably easily get reversed again. It didn't only because of 9-11 and the terrorism things. In any event, that was the choice. That was the way I was thinking of it. I thought about being on the Circuit Court and I felt I was clearly qualified to do that—as qualified as anybody else around given my broad range of experiences. But I thought that I don't know that I want to give up—as I put it, I want to decide what I'm going to have for lunch every day and I don't really know that I really want to take on all these cases that you get up there and you have to—you get your FERC cases and your criminal cases and your other cases. I just didn't think I really wanted to do that but I didn't know. In any event, the first thing I knew was that there was a vacancy. This was the John Roberts vacancy resulting from—

MR. MARCUS: So there was a vacancy right at the beginning, because they didn't act on Roberts. Right.

MR. MORRISON: I had heard a rumor, which turned out to be true, that Judy Rogers, who was then on the D.C. Court of Appeals and had been at Harvard a couple of years ahead of me, active as Corporation Counsel, African-American, she was going to get it and there was no way that I was going to get it ahead of her.

MR. MARCUS: These were rumors that—this was now—are we in the—this is after the election?

MR. MORRISON: After the election, yes. It may have been actually after I had gone to Hawaii.

MR. MARCUS: Even early '93.

MR. MORRISON: Early '93. And so I was in Hawaii and I taught a class and I got back from class and there was a voice mail for me from somebody from *Legal Times* saying that they have gotten hold of a short list from the White House of nominees for the D.C. Circuit and you are on it. What is your reaction?

I thanked whoever is responsible for voice mail for having a voice mail—being glad that I didn't have to respond immediately to the call.

MR. MARCUS: That you didn't have to respond to them.

MR. MORRISON: I didn't have to respond to them right away. Even though I had pretty much ruled this out in my own mind. When it came to me in that form, I said, "I've just got to think about this a little more."

MR. MARCUS: For you economically it was a good deal.

MR. MORRISON: I was going to double my salary. And then as my younger daughter said—

MR. MARCUS: And you get it for life. It's a good deal.

MR. MORRISON: It's a good deal. That's right. All these other people are complaining about getting drafted into the judiciary and having to take big salary cuts. I didn't—that wasn't a problem. My younger daughter said, "Oh Dad, it would be wonderful. You could wear robes all the time and cover up your ugly clothes."

So I thought about it and I said, "I should think about this seriously because I could probably make a difference. I could also mentor a lot of young lawyers and law clerks, take them through and try to push them in the directions that I went. The Circuit had gotten quite conservative and I thought I could—I would definitely change that around. I would have time. My life would be in control of myself. It would be nice. And so I talked to people. I talked to several groups of people. My friends—all of them were encouraging. I talked to Pat Wald, Abner Mikva—

MR. MARCUS: Both of them were on the court at the time.

MR. MORRISON: Yes. I talked to Ken Starr, whom I had gotten to know both when he was on the court and then when he was in the solicitor general's office. We were on the same side of some cases and the other side of some cases. He was then at Kirkland & Ellis and I went to see him. I asked him—he had, of course, left the court to go to be the solicitor general with the expectation that he would go on the high court and he had—timing was very bad for him. There was—the first vacancy that came up within two months after he got appointed—

MR. MARCUS: It was Souter.

MR. MORRISON: That was Souter and the second one was Clarence Thomas—and so he didn't get that either. Then there were no more for Bush. So I said to him—we talked about it and talked about what he liked and didn't like and he said to me—I asked him the ultimate question. I said, "Would you got back on the court if you could?" He said, "In a heartbeat."

MR. MARCUS: Really.

MR. MORRISON: So I decided to let my name be put in. I knew slightly—but knew other people who knew him quite well—Vernon Jordan. So I got to him through Jim Vorenberg who had been the Dean at Harvard Law School. He knew Jordan very well and I was very close to him and his wife, Betty. He got Jordan to write a letter on my behalf. Well, what I did was, I got ahead of myself. I decided to respond to the person from the *Legal Times* by saying, "It's a great honor to even be listed. Surely I have to think about it carefully, but I haven't completely thought it out." I put the decision off to the side until I got back to Washington because I knew I could—this was in April and I was going to be back in June and I just thought that I needed to talk to people who were there and see what was going on there.

MR. MARCUS: What was your impression as to where the decision was going to get made?

MR. MORRISON: The key—the key fact—which is why I wrongfully got ahead of myself—is that in May, Justice Blackmun resigned from the Supreme Court and D.C. Circuit Judge Ruth Ginsburg got appointed so there were now two vacancies. The Judy Rogers thing was not a problem anymore for me because she was going to get the first one. In fact, she got the first one sometime that summer—I can't remember the exact sequence. So when I got back I knew there was no obvious person ahead of me in line.

The discussions I had went on over the summer and in early fall I said, "Yes." Then I started to get some doubts and hesitation. Part of it had to do with the fact that I had started looking at slip opinions for the D.C. Circuit with a different eye. I started also thinking about—and maybe this was vain or silly, but this was part of my thinking. If I don't go on the D.C. Circuit, they'll get somebody else who will be probably politically about where I am and legally certainly qualified to do a good job. That person will probably come out of some law firm or the government or something like that and that will be fine. I'll be here doing what I've always done.

But if I go on there, is that person out of their law firm going to come to work with Public Citizen and do some public interest work? Will the person have the same willingness to go on and take on a whole bunch of different things and feel the freedom to go out and do what you want to do and what you think is right? The more I thought about the kind of cases I would be doing as a Circuit Judge the more I didn't care about the necessity of my doing them. And remember, even in the best of cases you only have a one-in-three chance of getting on them anyway.

MR. MARCUS: And you only have one out of three votes.

MR. MORRISON: Yes, that's true. I got thinking that I just wasn't ready to give up my freedom which is the opposite of what happens to most people when they go on the court. That is, they have much more freedom. They don't have to do all these things that they didn't want to do before. They don't have to represent these clients, they don't have to do billing and all this messy stuff. I guess I felt I was one of the fortunate people who was already doing what I wanted to do, so to go on and do a bunch of these kind of cases that

I didn't really want to do and do them for fifteen or twenty years, I wasn't sure that that's what I wanted to do. Ultimately, I withdrew.

The other thing I did was before I actually put my name in, I went and talked to Republican friends. Some of them I had met through the Administrative Conference, some of them I met other places. Starr was on my list. I asked him, I said to him, "Would you support me and talk to people?" The two people I talked to who were the strongest supporters and the most help and gave me the clearest indications that I would not have confirmation troubles were Ted Olson and Fred Fielding. Both of them I knew quite well. Fred I had known way back when I was in the U.S. attorney's office in the Southern District of New York, when he had come up to work on the *Pentagon Papers* case, and we had continued to be friends throughout. When he was White House counsel in the Reagan years, he and I worked together on a number of different matters. Ted Olson, whom I met through the legislative veto case and through the Administrative Conference and we continued to work together even when he was at OLC and then afterwards and indeed—I'll tell you two stories—

MR. MARCUS: *Morrison v. Olson?*

MR. MORRISON: No, no. I was on the other side of that.

MR. MARCUS: You were on the opposite side of that one, yeah.

MR. MORRISON: But I did talk to him about that case and I told him, I said, "I think you are legally wrong and morally right. If somebody asked me to be your character witness, I would stand up for you in a moment." I still would. Both of them said that they would go to Orrin Hatch, and they were confident that I would not have trouble. The last thing I wanted to do was go have a big confirmation fight.

MR. MARCUS: You would not have had a problem because it was a Democratic Senate that first two years of the Clinton administration and everybody got through. Even Walter Dellinger got confirmed for OLC even though Jesse Helms hated him, and so on.

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

MR. MARCUS: But, you didn't want to be confirmed 55 to 45.

MR. MORRISON: Right, right, right. I didn't want to put anybody through that. So the two Ted Olson stories—one is he was arguing this—he was arguing the *Plaut* case. This is the case in which the Congress had extended the statute of limitations after the Supreme Court had reached a decision on the statute of limitations in a Securities Act case. They changed the statute of limitations and Ted's client was somebody who had a final judgment that was not subject to appeal. Because I dealt with separation of powers, he asked me if I would help him. I did because I thought he was right and did a moot court for him and helped him out.

The second case was a case called *Rice v. Cayetano*. I was in my office one day and I got a call from a lawyer in Hawaii. There was no Hawaii connection. He didn't even know that I had anything to do with Hawaii. He said to me that I had been recommended to him by some people to file a *cert.* petition and he was representing Mr. Rice, who wanted to vote in the election for the persons who control the Hawaii Trust Fund—for which only Hawaiians could run and in which all the money was going to benefit native Hawaiians.

MR. MARCUS: And only Hawaiians could vote, right? Only native Hawaiians could vote.

MR. MORRISON: Only native Hawaiians could vote, yes, yes. He was a Haoli, that is, a Caucasian. I said to him, "Send me the papers." I looked at them. There were two things that were good. First is there is this big, hot political issue. Second, there were three claims and the only one that was before them now was the voting claim. The second claim was dubious, the third was a much harder case. The third thing was that even though I felt that he was right, there would be a lot of people in the broader public-interest community who would be very unhappy that I took this case.

MR. MARCUS: Sure, yeah. In the affirmative action world.

MR. MORRISON: Yes. It would be politically incorrect for me to do this.

MR. MARCUS: It was a big problem for the Clinton administration. I was in the Justice Department at the time and I remember the discussions about this. I believe that the government ended up supporting Hawaii, but it was not an easy decision.

MR. MORRISON: So I said to them two things. First, I know some very able lawyers who I would call and see if they would do it. Second, if I couldn't get somebody, I would do it. The first person I called was Chuck Cooper, whom I had gotten to know through the administration. He was representing the State of Hawaii in some other matter, so he couldn't do it. So I called Ted Olson. Ted said, "Send me the stuff." Of course, his politics lined up perfectly with it, and it was a Section 1983 case, so they could have some potential of getting paid and they actually ultimately did get paid a whole bunch of money for it.

He said to me, "Yes, I'll do it, but will you help me?" I said, "Yes, I will help you." I think I did not put my name on the brief, but that was okay. So they made basically a Fifteenth Amendment argument and there was a Fourteenth Amendment argument which they put in because it was there before and they had to put it in because you've always got to—you've got a race issue, you've got to have equal protection. But if you couldn't win on the Fifteenth Amendment which deals specifically with race and voting, they weren't going to win on the Fourteenth Amendment, in my judgment. Ted asked me if I would come over and do the moot court for them. I said, "Of course." I could do that. This was—we're talking now about '98 or so roughly.

MR. MARCUS: Probably '99.

MR. MORRISON: So I went over to the moot court and who should be one of the other judges of the moot court, but Robert Bork.

MR. MARCUS: Ah ha.

MR. MORRISON: He was very cool to me, which I understood and I didn't hold it against him. I had some part in seeing that he did not get confirmed. The one thing I remember about the moot court was Bork saying, "The Fourteenth Amendment. You've got to argue the Fourteenth Amendment." I said to him, "I'm sorry, I disagree," for the reasons you and I just discussed. Ted basically made the Fifteenth Amendment argument and he won it on the Fifteenth Amendment grounds. So there were times when I couldn't do everything that I wanted to do but I ended up being able to steer the case to the right person and a couple of years later, when Kathleen Sullivan was representing the Kamehameha Schools, she asked me to help her with the case a little bit in the District Court and then on appeal. They lost before the panel, they got *en banc* and they won it *en banc* and the other side filed a *cert.* petition. It did not get acted on one week and then the case got resolved.

MR. MARCUS: They settled it.

MR. MORRISON: They settled it, yeah, yeah.

MR. MARCUS: It was like a seven-to-six decision in the Ninth Circuit, I remember, *en banc*.

MR. MORRISON: But the surprising thing was that there had been settlement discussions which had not gone anyplace and then there was a very brief window when the Court put it over—in very uncharacteristic fashion and nobody could figure out what was going on.

MR. MARCUS: I always thought that the Supreme Court probably would have ducked that case. Although who knows?

MR. MORRISON: It was completely unique, of course. There is only one school and this was a section 1981 case and there was very bad 1981 law. Not at all clear that it was ever intended to apply to schools. The other thing about the school that is unique is that although unlike the white private schools or the white flight schools in which everybody paid full freight, this thing was endowed and eighty-five percent of the tuition for everybody was picked up. That is, nobody paid any more than fifteen percent and most people paid five or zero. One of the things I had said to them they could always do is it would be much harder if it was free. The question was whether there was a contract.

I continued to kind of keep up my Hawaii stuff.

MR. MARCUS: That's ironic. Did you work with Kathleen Sullivan on that?

MR. MORRISON: Yep.

MR. MARCUS: So you switched sides, huh?

MR. MORRISON: No, one was a Fifteenth Amendment voting case. I have been asked to go back to Hawaii at some point and I think I will try to find some convenient time to do that.

MR. MARCUS: So let me just ask you on the judgeship—so you basically took your name out of the running.

MR. MORRISON: I never had an interview. They were moving very slowly.

MR. MARCUS: And who was doing this? The White House Counsel's office?

MR. MORRISON: Joel Klein was the person.

MR. MARCUS: Joel was the deputy counsel, yeah. Bernie Nussbaum was the Counsel, I think.

MR. MORRISON: I think he was still the Counsel.

MR. MARCUS: Yeah, for the first year.

MR. MORRISON: But actually, I was told the letter that Vernon Jordan sent on my behalf went to Web Hubbell—

MR. MARCUS: Who was the associate attorney general. Of course, Hillary Clinton was very much involved in the judgeship selections at the beginning of the administration, too.

MR. MORRISON: She may have been, I don't know.

MR. MARCUS: So that's the seat that David Tatel got.

MR. MORRISON: Yes, which of course, it's hard to imagine somebody that I would rather have there than myself.

MR. MARCUS: It worked out well in that sense.

MR. MORRISON: Certainly for the Circuit Court it did.

MR. MARCUS: Very interesting. Do you want to talk about the D.C. Rules Committee and the Judicial Conference?

MR. MORRISON: Well let's go with the Judicial Conference.

MR. MARCUS: When did you start going to D.C. Circuit Judicial Conferences?

MR. MORRISON: I think around the middle of the 1970s.

MR. MARCUS: So fairly soon after you came down here.

MR. MORRISON: Yeah, but it was not without some struggle. The Conferences used to be quite closed. The judges would invite their old buddies.

MR. MARCUS: Former law clerks.

MR. MORRISON: Yes, which they still do.

MR. MARCUS: That's how I got invited a couple times.

MR. MORRISON: But people also were invited on a friendship basis without regard to whether they had any cases before the Court. This was a time when there was a whole new breed of public interest lawyers bringing suits against the government, taking up large amounts of the District Court and the Court of Appeals docket, who were simply not represented at these events both in terms of informal meetings with the judges and other lawyers and in terms of the substantive programs. They just were not there.

Victor Kramer, who had been at Arnold & Porter and was then at the Center for Law and Social Policy for a while, and then went to Georgetown and set up the Institute for Public Representation, still managed to be on it and I think was quite helpful in getting this done. We had some connections with judges. People had connections with Judge Bazelon. I don't remember Judge Leventhal being particularly active, but Bazelon was the Chief Judge. There was a change made sort of in the mid-70s. The other problem was none of us had much money in our budgets—

MR. MARCUS: Right. And they had it in these fancy places. The Homestead—

MR. MORRISON: Homestead sometimes. They had them in Williamsburg; they had them in Hershey, Pennsylvania, a couple times. I felt it was important to go and, by this I'd been elected to the Board of Governors of the D.C. Bar. I'll talk about that in a minute. So that gave me another reason to go.

Over the years things changed quite a bit. The Conference opened up—it opened up substantively, it opened up in terms of who was participating. I was on the committee at least once and I think twice and was invited pretty much regularly throughout this time period. Occasionally not when I was away or something. I know I didn't go the year I went to Hawaii and things like that. And then, at some point in the mid-'90s, I think, they shifted to every other year.

That was a financial decision. The D.C. Circuit putting these conferences on takes a lot of effort by various people and I think every other year is about right. The judges ought to

meet more often and if they want to bring lawyers in they could meet them there, but getting away, getting everything done was a big burden on the taxpayers. I came to enjoy them and it was expensive but we managed to find the money—I just said that I was going to do it and it was part of the budget. You needed to go and meet the judges and talk to them and see what is going on, and they need to see you off and on the program—if you weren't on the program, you made suggestions.

I remember one time—I think she was still on the Circuit Court—there was a program in which we were talking about the quality of representation in the D.C. Circuit and Justice—Ruth Ginsburg, whether she was Judge Ruth Ginsburg or Justice Ruth Ginsburg at the time, I don't remember for sure—probably Judge. She was on a panel and there were complaints about the quality of briefs and arguments, essentially saying most of them were acceptable, some were really good and some were bad. I got up and I said, "Well most of us don't know when we've written bad briefs. Don't you think there would be some way to have some feedback from the judges?" Judge Ginsburg said, "I gave that up when I stopped being a law professor. I will not start grading papers again." I said, "Okay, well then, that's fine. I understand that. But then you can't complain about us if you don't tell us what mistakes we are making. You can't expect us to get any better." And that, of course, was the problem that they wanted to deal with.

At some of these Conferences, though, some of the discussions were pretty interesting. Others were a little testy from time to time. Lawyers supposedly being able to talk equally with judges on programs, but not entirely. The Chief Justice always gave a talk. Warren Burger gave the same talk at least two or three times and it wasn't a very good talk even the first time.

MR. MARCUS: I always thought it was ironic that in some of the early Conferences I went to there was some awkwardness with Burger—it was kind of sweet revenge for Burger to appear at the D.C. Circuit Judicial Conference as the Chief Justice of the United States and as the Circuit Justice to sort of be superior to his former oppressor, Judge Bazelon, who was still the Chief Judge. It must have been somewhat awkward for Bazelon because they were never great buddies, that's for sure. Although I think they—obviously they treated each other okay once Burger moved on to the Supreme Court.

MR. MORRISON: Then Justice Ginsburg's husband, Marty, was always the Master of Ceremonies and he was the funniest tax lawyer you ever saw. He was really very, very humorous. Then usually I'd play golf. I played tennis a couple of early years and then I started playing golf with different people. That was always nice—and I got to meet lawyers I didn't know before also. I think it is a good institution.

MR. MARCUS: Do you think over time it helped you—it made some of the more conservative judges on the court feel more comfortable with you or not? Did you notice any—that's hard to evaluate, obviously—any carryover from the Conferences?

MR. MORRISON: Some of them you just knew from other places and, remember, some of them were also involved in the Administrative Conference.

MR. MARCUS: Yes. Like Scalia.

MR. MORRISON: Silberman was. Silberman's wife, Ricki, was involved and I actually knew her through that more than I knew him through the court. Other people were involved that I had not known. It turns out I knew a lot of these people before they were on the court. I knew Doug Ginsburg from when I taught at Harvard and just knew other people around, and so when it turns out that most of the judges are younger than you, the first time they ever saw you was when you were arguing when they were a law clerk to somebody, it does change things around.

I haven't been to the Judicial Conference in quite a few years because I was in California, so I don't know what is happening there now, but it was a useful institution.

MR. MARCUS: Do you want to talk about the Board of Governors?

MR. MORRISON: Yes. The D.C. Bar. The best day I ever had as a lawyer was, I think, June 22nd of 1975. That was the day I won the *Goldfarb* case nine to nothing—eight to nothing—no, nine—eight, eight. Powell didn't sit. Eight to nothing.

Bigelow v. Virginia, which was the case leading up to, the following year, the *Virginia Board of Pharmacy* case, the abortion case, that was won by a large vote and we had written the *amicus* brief, the approach which Justice Blackmun followed that day. I said to reporters, none of them paid the slightest attention to me, "In terms of the lawyer advertising debate, *Bigelow* was far more important than *Goldfarb*." That was the day I found out I got elected to the Board of Governors of the D.C. Bar. So that was a pretty good day all around.

When I came to Washington, the D.C. Bar was literally just getting started.

MR. MARCUS: The unified Bar, yes, after the court reform.

MR. MORRISON: Court reform—and Barrett Prettyman was the first president. And, in fact, my getting to know Barrett through that and some other things eventually led him to ask me to join the American Academy of Appellate Lawyers, which is an honorary body for appellate lawyers, of which I eventually became the president in 1999 and 2000. There are now 250 or 300 lawyers, and that was a wonderful experience for me because I got to meet all sorts of lawyers all over the country. I'm less active now than I have been although I still do things for them. Barrett was the one who got me involved in that. I got to know Barrett first through the Bar and then through some other Supreme Court stuff we worked on together.

MR. MARCUS: So what year was it you were elected to the Bar Board of Governors?

MR. MORRISON: It's '75. And I had come in '72 and I had joined the Section on Courts and the Administration of Justice and been elected to the Steering Committee. In those days it was very different than it is now in terms of getting elected. You needed a few people to organize and if you had a name that was at all well-known—there was something called the Washington Council of Lawyers which was young lawyers both at the law firms and in the nonprofit world—and I got my name on the recommended list for the Section and then for the Board of Governors. I just swept right in. It wasn't even a close election even though I was not at a big firm. There was no campaigning, there was no money.

So I went on the Board of Governors and I think Dan Rezneck was the president the first year I was on there. I was on for three years and then I did not run in '78 because I was going to Harvard that year. Took a year off and then I was elected twice again. At some point term limits kicked in, but because I had one year off in the middle, I got to serve nine years.

MR. MARCUS: So you served under a lot of different presidents, because they are only president for a year.

MR. MORRISON: Yes. Most of them were big-firm presidents, but there were a couple that were not. Well, I think Chuck Work was with McDermott, Will & Emory, but it wasn't a big firm then.

MR. MARCUS: And he had been in the U.S. attorney's office.

MR. MORRISON: Yes. Jim Bierbower was—

MR. MARCUS: Oh, he was the conservative candidate, right?

MR. MORRISON: Well, sort of the old-line—

MR. MARCUS: The old-line law firms, the Voluntary Bar people against the limousine liberals from the big firms.

MR. MORRISON: Absolutely right. It was on the Bar that I first met your partner, John Pickering, got to know him and respect him enormously. Charlie Horsky of Covington, John Douglas of Covington—let's see—Dan was then with Arnold & Porter. Brooksley Born from Arnold & Porter. A lot of other people. And the Bar was just getting started and there were quite a contingent of public interest people. Ralph Temple, who was then the Legal Director of the ACLU, Florence Roisman, Gladys Kessler, I think was on the board for a while. We had a good, solid group and we were doing good things. Almost immediately we ran up against the efforts of one Nathan Dodell—

MR. MARCUS: Oh, I remember—from the Justice Department.

MR. MORRISON: U.S. attorney's office.

MR. MARCUS: He claimed abuse of mandatory dues for all these left-wing causes.

MR. MORRISON: Absolutely. The way Nathan put it. He rallied people.

MR. MARCUS: And he won.

MR. MORRISON: And he won. He had a referendum.

MR. MARCUS: It was terrible.

MR. MORRISON: Everybody thought it was the end of the world, and it wasn't. It was annoying and it was bad and for a while the Bar couldn't even lobby on behalf of its own powers—on behalf of the courts. So they got a few things worked around and then they would have referendums and they would have meetings, and it basically kept the people from being quite so controversial. But Dodell was really a demon on this.

MR. MARCUS: Relentless.

MR. MORRISON: There was somebody else in the Justice Department who worked with him whose name I've now forgotten; but Dodell was on a bunch of cases on the other side of us and he was a relentless person to have. I always thought that his relentlessness sometimes showed up in representing the government in ways that were not particularly becoming or very helpful to the government. But in any event, he was there and he was always coming up and worrying about the dues.

I got there and one of the things I started looking at was finances. I don't know who was in charge. I'm not an accountant, but I took accounting when I was in law school and sort of started to understand what was going on. The way the books were set up is that there was no functional showing of how we were spending our money—I don't know who did this. It was really very bad, so I spent a fair amount of time trying to get ourselves to have some sensible books and having accounting methods that would keep track of things not by the number of copies of Xerox, but what functions we were serving so we could figure out as a Bar board what to do.

One of the first things that I worked on was a letter from somebody who was complaining that they were in a fee dispute with a lawyer—it may not have even been a lawyer in the District of Columbia, but a lawyer; this is right after *Goldfarb* came down, so everybody who had fee disputes were writing me. They said, "I had a fee dispute with this lawyer. I can't possibly go to court to do anything about it. I have to hire another lawyer to go." So I approached Dan Rezneck and said, "Dan, you know, we ought to think about setting up a voluntary fee arbitration dispute mechanism here." He said, "Why don't see what you can think about that." So I poked around and pulled together a recommendation and got the board to approve it and it set up a system. We had a little unit that would be in charge of finding lawyers who would agree to sit on this. It was all entirely voluntary. Lawyers were not required to do so although my recollection now is that lawyers are required to mediate on fee disputes. Of course, it mainly applies to

smaller cases. Wilmer's clients didn't need to avail themselves of that. But lots of people did.

It got started and was going nicely and then the second problem we had was—later on—and I may have been off the Bar board by this time. I think I was. People realized that, in many of these cases, there was a dispute that dealt with malpractice. They claimed that the lawyer not only had overcharged them, a contract dispute, but that the lawyer had actually botched the work. Often the two of them went together. So I did some more work and we got the things through the Bar board for setting up a malpractice component as well. That was always entirely voluntary. Maybe the fee thing is still voluntary because if it weren't, the court would have to then issue a rule about it. I haven't checked lately, but those were significant things that we accomplished.

The second thing we accomplished was—I don't remember who was in charge of it, but I was definitely a strong proponent of it—we got citizen representation. We had a Citizen's Advisory Committee almost from the very beginning of the board. We ended up getting citizens—non-lawyers—on the board. Initially non-voting, and ultimately voting. We also got them on the Board of Professional Responsibility and on the hearing committees. Now one out of every three members is a non-lawyer. And on the Ethics Committee. That was work that I substantially pushed. It fit in very much with my views about the unauthorized practice of law and the need to have non-lawyers having a say in what was going on so it wouldn't be part of a club entirely.

MR. MARCUS: It's interesting—so this was really a natural outgrowth of your interest—even before you came to Washington, this was one of your first issues.

MR. MORRISON: Absolutely. And I saw it not as a political opportunity to have a gold star, that I was a member of the board, but it was absolutely part of this. The things I learned there I took to my cases and back and forth.

MR. MARCUS: That's an area where there has just been enormous change, not just in D.C. but—

MR. MORRISON: One of the early disputes that we had was at the D.C. Judicial Conference, which, unlike the Circuit Conference, didn't meet away from D.C. It always has been here in a local place. There was a proposal to change the rules on Bar admissions. D.C. had been quite liberal in terms of Bar admissions from other places. It ended up even becoming the most liberal and now all you have to do is ask to come in, which I always thought was a very good idea. Washington would take lots of people's money to support our Bar.

There was a meeting, in which the proposal was to make it more difficult so we would be like Virginia and Maryland. No residence requirement. Nobody was saying residence because nobody—but five years experience and admission on motion—

MR. MARCUS: It was an anticompetitive thing.

MR. MORRISON: Yes, this was the first time I ever encountered Jake Stein. Jake was on the "cut back on the admissions" side.

MR. MARCUS: Probably the voluntary bar association was pushing it.

MR. MORRISON: He and I had a quite unpleasant public exchange. Not personally unpleasant, but acrimonious and difficult on the floor on this thing. We ended up not making the change—

MR. MARCUS: Not making the restrictive change?

MR. MORRISON: The restrictive change. Subsequently, when Jake became the president, he was a much better president and a more forthcoming president than Jim Bierbower was.

MR. MARCUS: I had forgotten Stein was president of the D.C. Bar.

MR. MORRISON: Jim was president and it was actually okay because he didn't seem to care very much about anything except himself being the president and one of those bad guys not being the president because he didn't do very much in the year he was the president.

I was on the board when Jake was president, and Jake was a much more open person to have. I've come to know Jake and really like him a lot. He's done a lot of good things in addition to writing his wonderful column in the *Washington Lawyer.* Amazing column. He's a very interesting guy. He always used to go to the Judicial Conference—he was always invited. He played tennis in his white linen pants.

MR. MARCUS: Yes, I remember that.

MR. MORRISON: Anyway, then there was at one point an effort to cut back on people coming to D.C. who would go to Pennsylvania and take the bar exam in Pennsylvania.

MR. MARCUS: Yeah, I think at one point it was really easy. You only had to take the multistate bar exam there.

MR. MORRISON: If you got a certain score on the Multistate, they didn't grade the other half and everybody was doing that. It was bad. It looked bad and so I was on some committee and we recommended that you only allow people to come in if they graded the entire exam. This was aimed at Pennsylvania. We thought if you want to do that for your purposes, that's all right, but you had to pass the rest to be able to come in. It was too much of an affront to the District.

MR. MARCUS: So you finally found a restriction you would support?

MR. MORRISON: Yes. It wasn't so much a restriction, it was an embarrassment. Because, remember, you didn't have to prove that you could write. If Pennsylvania wants to do that for whatever reasons, that was okay. But we weren't going to—we shouldn't do that.

MR. MARCUS: So you got that through.

MR. MORRISON: That got through, yeah. It was actually—it may even have been a kind of a less restrictive alternative to what some other people had proposed. I don't remember for sure. The other thing about the Bar admissions, of course, is that almost nobody takes the D.C. bar exam.

MR. MARCUS: I know. Because you can get two for the price of one. Well, not quite the price, but two Bars. I took the D.C. bar exam, believe it or not, in 1966. In the old Georgetown Law School at 5th and E.

MR. MORRISON: I took the New York.

MR. MARCUS: Of course, yeah.

MR. MORRISON: Speaking of bar exams, this shows you how old issues never die. I think I told you that I had this reciprocity case when I was in California, involving North Carolina. This week I got a call—I got contacted anyway—it was a circuitous way it got to me. Virginia has what I think we've referred to as the "full-time victimization rule." If you want to come in on motion, you have to promise to practice full-time in Virginia. Otherwise you can't come in on motion. The rule says you have to intend to practice full-time. Turns out, first not only do they ask you what your intentions are, but they require you to produce either a letter from a law firm saying that you are being offered a job in Virginia, a full-time job, or if your firm has a Virginia office, a letter saying you are going to be located full-time in Virginia. Or if you are going to set up your own practice, a copy of a lease on a commercial property, and you can't operate out of your home unless you have zoning that allows you to do that. So they really were serious about it.

Okay, if you are going to have a rule, you might as well have a rule that you really do intend to enforce. You can't just go out and say it. A guy who lived in Colorado and practiced there for many years moves to Virginia for personal reasons. He and his wife bought a piece of land, they built a house. He took a lease out, he opened up a practice and got admitted to practice in Virginia. He practiced in Virginia for two full years, lived there for almost three, and for personal reasons he had to go back to Colorado. He had one pro bono case that he still wanted to keep. And he—he probably would have done some other work for some Virginia clients, but he was going back to Colorado. He gets a letter from the Virginia Supreme Court saying, "You are violating our rule because you no longer intend to practice full-time in Virginia." Completely unreasonable interpretation of the rule. So he explains all this stuff to them and they revoke his Virginia Bar license. Not only that, but they refuse to allow him to continue on this case which is going to be argued in the Virginia court and it is going to be in February and it is

now set for April. He had to walk away from this case. He came to me and he is in the process of preparing a *cert.* petition—

MR. MARCUS: On the revocation of his license.

MR. MORRISON: Yeah, yeah. It's a due process notice problem, and he wrote a very good four-page letter explaining why it is unfair and silly and why it violates the Constitution. But, you know, apparently now in Virginia you have to promise forever. If they said "promised to and carried out for a period of time" if that was in the rule, maybe you could get away with that as a means of ensuring that you did intend to practice. We always felt the basic rule was unconstitutional. So who knows? Anyway, we've got a very tricky problem because there is no record on any of this stuff. There is a one-line letter saying we are going to revoke—one paragraph letter and a one-line order saying this and so there is no reasoning so who knows whether the Court will take this or—I mean, maybe we get them to do a remand.

These issues never go away. Just this week, the issue came back again and he's trying to worry about what he's going to do. I mean, ideally he could bring a section 1983 action and challenge it, but the problem is he's going to get *Rooker-Feldman*, stuck in the state—he's in a state court and he may have to go that way and then be blocked anyway, so we're worrying.

MR. MARCUS: It never stops. That's amazing.

MR. MORRISON: They never die. All right.

MR. MARCUS: So are we ready for your cigarette story? I think we've covered everything pretty much for the institutional stuff we wanted to talk about.

MR. MORRISON: I guess around 1990, I got a call from Morton Mintz, who was a reporter for the *Washington Post,* who covered consumer affairs, wrote a book called *America, Inc*., which was very influential in my decision to take up a public interest career, and he was a Supreme Court reporter for a while for The *Post*. He said he wanted to come over and talk to me, so I said, "Sure."

He said he had gotten initially a call and then some documents from a man in Kentucky who identified himself as somebody who was then working for a law firm that represented the Brown & Williamson tobacco company. He was a paralegal and his job was to categorize and sort through thousand and thousands of pages of documents. They had a whole warehouse full of people doing this stuff. This was at the beginning of the second or the third or whatever wave of tobacco litigation that was going on. The law firm, Wyatt, Tarrant & Coombs, had hired a bunch of paralegals, including this guy. This guy, who had been a cigarette smoker, took the job. He had been a teacher and kind of bounced around a fair amount—a smart guy, no legal training. He took this job because he needed a job, and he soon became appalled by what he saw there. What he saw was huge amounts of evidence about everything tobacco companies had been doing and he

wanted to write a book about it. He wanted Morton to help him out and Morton came to me for advice. So Paul Wolfson, who was then in our office, and I huddled about this. Paul did some writing and I did some thinking. We ultimately concluded that there was no chance this book could get published because no responsible publisher would ever publish this book without doing some fact-checking and they would get back and find out what was happening in lawsuits and they wouldn't—

MR. MARCUS: Breach of employment agreements, whatever, yeah.

MR. MORRISON: And they would try to impound the book—all this stuff was attorney-client privilege, work product and so forth and so on. I did not look at these documents at the time, but the way they were described to me, what was in them, one didn't actually have to know what was in them to know what was in them. So I advised Morton not to do this, that it would never get published. I said, "Second, do not go to Kentucky because if you go to Kentucky"—the man's name was Merrell Williams—what Merrell Williams was doing is he was taking copies out and making copies of them. We looked at some Kentucky statutes. We also looked at some federal statutes and there were some arguable criminal violations. I didn't think Kentucky could go after Mintz in Kentucky. Unless he showed up in Kentucky, he wouldn't have to worry about it.

MR. MARCUS: Oh, the guy was sending the stuff to Mintz?

MR. MORRISON: But he would have had to send more to him—I wasn't worried about what he had done so far because, as a practical matter, if he didn't do anything it wasn't bad. And so I said to him—also interstate shipment of stolen materials, you get a nasty U.S. attorney which you easily could do in Kentucky on tobacco and they could come after you and you have to fight about it. I think by this time he had retired from The *Post* and was an independent writer. Nobody was going to protect him and he didn't want any part of it, so he didn't do it.

When I got back from Hawaii in the fall of '03—

MR. MARCUS: '93, you mean?

MR. MORRISON: '93, excuse me, you're correct. It turns out that in the meantime, Merrell Williams had left Wyatt, Tarrant & Coombs. The work was winding down, they didn't need him and they discharged him. Meanwhile, he'd had a heart attack, in part almost certainly due from his earlier smoking. He had stopped smoking while he was at the law firm. He was there almost four years. He had gone to see a lawyer in the summer of '93, named J. Fox DeMoisey. It's a wonderful name. It's an old French name. Fox was a local lawyer, had his own practice, partner with another guy and had done a lot of litigation and he's a smart, smart guy—a nice guy. I liked him a lot. Merrell Williams walks into DeMoisey's office with this box of copies of the key documents and also tells him that he's doing this narrative about what he found. Because until you pull everything together you can't put the story together. And he wants to sue Wyatt, Tarrant & Coombs for intentional infliction of emotional injury and for forcing him to see all these

documents which caused him great pain and suffering. Besides, he thought they had a grievance. So Fox writes a letter to Wyatt saying he has a client, unnamed, who has suffered a heart attack as a result of smoking cigarettes and also from working on this and so forth—working on all this stuff. The heart attack was also due to the stress from it. He writes them this letter and doesn't tell them who it is. He says, I'd like to come and discuss this with you. So then a week later he writes a letter and says, I have a box of documents here to substantiate this claim, but I want you to know I have not opened them. I have not looked at them yet. My client tells me that they will help establish this case.

The next thing you know is Wyatt, Tarrant & Coombs brings a lawsuit against Merrell Williams—

MR. MARCUS: They figured out who it was.

MR. MORRISON: Yes, yes. They get a temporary restraining order requiring him to turn over the box of documents and all other things. They get a preliminary injunction a week or so later and the next thing I know is Fox DeMoisey—or Merrell Williams is calling me and wants me to help him. So I say, "Sure, why not? This looks like an interesting case." We had been doing some peripheral tobacco work. We had done the *Cippolone* case, we had been poking around with the FDA stuff at the time although nothing really was happening yet, and Public Citizen had a long-term interest in tobacco in general.

I, of course, knew from Mintz that there was stuff in there—lots of stuff in there if these documents ever got out. Anyway, fast forward. The first thing we do is we look at the preliminary injunction and it says that Merrell Williams cannot talk to anybody about the content of these documents or anything that he learned while at Wyatt, Tarrant & Coombs. He's the defendant in this lawsuit. So we make a motion.

MR. MARCUS: He has to be able to talk to his lawyers.

MR. MORRISON: And we say, by the way, this means he can't talk to the Antitrust Division of the Justice Department. The Justice Department files a brief saying he can't talk to us either, and so forth and so on. Motion is denied. No, this is what we meant. So I said, "Yeah, the rule in Kentucky is if you take attorney-client privileged documents, your penalty is you lose your right to counsel." So we filed an appeal to the intermediate court for failure to amend the preliminary injunction motion. It's denied. We got to the Kentucky Supreme Court and we argue this case and they end up throwing it out on jurisdictional grounds, on the ground that you had to take an appeal from the original order, not from the amended order. Completely ridiculous. Even though we were not objecting to the preliminary injunction, we were objecting to the precise language, which we couldn't have known about until they issued it. We thought we ought to go to the trial judge first before taking an appeal.

I argued the case in the Kentucky Supreme Court. The argument went okay and a week or two later we get the dismissal. So in the meantime, Merrell Williams is in touch with Richard Scruggs who is now—

MR. MARCUS: Infamous.

MR. MORRISON: Doubly infamous Richard Scruggs, and Michael Moore, the attorney general of Mississippi, and they get him to come down to Mississippi and they persuade Williams that it is okay to give them the documents because Moore is with law enforcement. In theory, he has turned over all the documents to Wyatt. But in fact, he hasn't. He has a set which he has kept by a friend in Florida someplace. He, of course, never told—

MR. MARCUS: He, in theory, returned them all to—but he had never done that.

MR. MORRISON: And a good thing it was for the world, but not for him. So he gives them to them and the next thing we find out is they start appearing in various places, including in Henry Waxman's office, in Stan Glanz's place at the University of California at San Francisco, at the FDA. Brown & Williamson goes nuts. So they bring a claim for criminal contempt against him and they start to try to take his deposition and we say, "No, whatever you had before, surely you can't take his deposition when he's got a criminal contempt without letting him talk to his lawyer and he can't talk to his lawyer." Of course, one of the things that happened was because they got this order and he couldn't talk to his lawyer, Williams said, "Well, since I couldn't talk to my lawyer, I couldn't ask anybody whether I could give these documents to Moore or not, so I just acted on my own best judgment." Which, of course, hoists themselves completely by their own petard. So we refused to do anything. They didn't know what was going on. One thing they tried to do was they hired Ken Starr, to bring a replevin action against Henry Waxman and the Judiciary Committee.

MR. MARCUS: Or the Commerce Committee.

MR. MORRISON: The Commerce Committee, the Government Reform Committee. Whatever committee his—

MR. MARCUS: It was probably Commerce at the time. He was chairman of the Subcommittee on Health.

MR. MORRISON: This would have been in '94. I think he was still the chair.

MR. MARCUS: Of the subcommittee, yeah.

MR. MORRISON: This was after those notorious hearing when they had all the tobacco executives lined up.

MR. MARCUS: Yeah.

MR. MORRISON: They lost that case. We filed an *amicus* brief in support of Congress. They were completely stymied because they had no game plan for getting out of all of this. And they were really in a box. So meanwhile, there started to be not only the Mississippi case, but all these other tobacco cases. Then in the mid-'90s there was the first big national settlement which eventually blew up and they ended up having a second settlement. But at the time of the first settlement that blew up, meanwhile, there had been another whistleblower from Brown & Williamson.

MR. MARCUS: The guy they made the movie about?

MR. MORRISON: Yeah, yeah, the company. As part of their deal, they paid him a bunch of money and they also agreed to let Merrell Williams go. Of course, they couldn't do anything to him anymore. These documents were out there. A lot of the documents were not worth anything, but there were huge amounts of stuff in here.

One other wonderful thing that happened in the meantime—they eventually produced a privilege log in the Kentucky case. We contested that these things were not properly privileged and we had several sets of arguments. We got a privilege log and so we had a big proceeding down there fighting about their privilege log and there was stuff that was unbelievable in there. I mean, they said everything was work product. Everybody in the world knew about these documents except us because we were under a court order. We couldn't get them from our client; we couldn't talk to our client about them.

The judge finally issued an order saying that they had to send a box of the documents to me and I put them under my desk and never opened them. I wanted, if I ever needed to, to be able to say I'd never looked at the documents and that we agreed that at some point if somebody had to look at the documents, that Fox and I agreed—Fox and I were working together on this case. Although I was doing much of the work, he was very valuable. I said, "Fox, I am less valuable than you are because you are probably the only lawyer in Kentucky that Merrell Williams will be able to get. You could probably find some other lawyers who will help you out." We had this big proceeding that went on for a couple days and the judge just issued a blanket order saying everything was attorney-client privilege or work product. Just everything. One of the things we learned they were doing and you could actually see some of this stuff on the privilege log, is that they were routing all of their research through a law firm and the law firm would say it is attorney-client or work product privilege. There was at one point a question about whether they could take a research tax deduction for this work that they were claiming was attorney-client privilege. Anyway, it was one of the great examples of tremendous overbreadth on attorney-client—

MR. MARCUS: And the Kentucky courts just—

MR. MORRISON: They didn't—the judge wasn't interested. It's not clear that he looked at any of this stuff. He just said it's all privileged.

MR. MARCUS: This all went away after the settlement?

MR. MORRISON: They actually paid Williams a whole bunch of money. He went off someplace. He had been divorced in the meantime.

MR. MARCUS: The company paid him some money?

MR. MORRISON: Oh, yeah, they paid him a whole bunch of money—I don't know, probably as much as a million dollars.

MR. MARCUS: Really?

MR. MORRISON: Just because they were paying everybody.

MR. MARCUS: And they wanted to get rid of everything.

MR. MORRISON: Yes. I mean, they had no end game. They couldn't figure out what to do—here was this guy who they thought they had completely tied up in knots, but they couldn't do anything with him. Because he didn't play by their rules.

MR. MARCUS: So did he ever end up writing anything?

MR. MORRISON: No, but I had all of my files and I sent them to Stan Glanz at the University of California San Francisco and they are all there. These records are all out in the public now and lots of people have seen and done lots of things with them. So one of the arguments we made, and it's an argument which I've pressed in other contexts, is that the Bar's rules on secrecy are too strict and the attorney-client privilege is too strict insofar as we are talking about serious health and safety matters and that they ought to be opened up. The Bar rules are somewhat less restrictive now than they used to be, but attorney-client privilege does not allow even a judge to say that the evidentiary value of this in saving lives ought to overcome the privilege.

MR. MARCUS: This ties into a lot of issues that are still raging about settlement secrecy.

MR. MORRISON: We've been involved in this—actually that's what got me thinking about it this week because I was on a program talking about it. It isn't the secret settlement so much that is the problem, that is, the amount of money that's paid to it. It's all the documents that are—

MR. MARCUS: The documents that are tied up as a result.

MR. MORRISON: You are buying secrecy. We, of course, saw it in the product liability area, tobacco being one, Dalkon Shield—

MR. MARCUS: Automobile companies.

MR. MORRISON: Automobile companies, silicone gel breast implants was a big problem. Six years that everything was tied up and nobody knew anything about.

The other area where it has been a problem and which really crosses political lines is the priests and pedophiles. The Catholic Church paid huge amounts of money to families for not telling the police, not telling anybody else and for allowing the priests to be transferred to another jurisdiction where they preyed upon young men as well.

When you get the corporate people who are talking about secrecy, we talk about that and that gets them very nervous. So that was an issue that we were working on off and on. Never made as much progress as we wanted. It used to be that you couldn't even exchange data among plaintiffs' lawyers. That has all changed now. Mutual protective orders work pretty well. Agencies still do not get access and lawyers are permitted by the ethical rules to buy secrecy, get their clients better paid and get themselves better paid with no fiduciary responsibility, indeed, no ability to tell the regulatory agency or the Congress about a very dangerous product.