

**Oral History of
ALAN MORRISON
Eleventh Interview - June 27, 2008**

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison for the eleventh time on Friday, June 27, 2008. Alan. I think where we are is it's 2004 and you've left Public Citizen, taught in the spring of 2004 at NYU and then accepted an offer to go out to Stanford Law School, where you remain for the next three years. Tell us a little about your experience out at Stanford and what contacts you maintained with your D.C. past.

MR. MORRISON: Well, as anyone who has been there will tell you, Stanford is a magnificent place to be. We actually bought a house in Menlo Park which was nearby. We sold our house here—what did Shakespeare say? Neither a landlord nor a tenant be? We had been landlords and tenants at various times when we had gone to visit various other places but carrying one house was quite enough, so we sold our house here and bought a house out there for much too much money and much too much taxes, but we were able to swing it.

MR. MARCUS: But you sold it in time, probably.

MR. MORRISON: Eventually we did sell it in time, yes. As our real estate agent who became a friend told us, she closed our house in June of 2007, and she didn't close another house either as a buyer or a seller for the rest of the year. But, on the other hand, we bought one here probably at a high point in the market. But that's okay. It's only houses and money.

It was a completely different lifestyle out there, living out there. The weather was perfect all year 'round. It rains a little bit sometimes, but otherwise perfect. We lived about—well, as the crow flies or as I could go on my bike, two-and-a-half miles directly across the campus, and they had a shower there so I could ride my bike one way and run the other. I'm a longtime very mediocre golfer and they have a fabulous golf course right there. It was good enough for Tiger Woods; I figured it was good enough for me. So I joined that and played regularly. It was five minutes from the house and office. We lived in a house with a lovely garden and rose garden and it was just a very different lifestyle.

I had been teaching off and on—well at least one semester every year for twenty-five years—all the time I was at Public Citizen. I thought I knew what it was going to be like being a teacher. I found after a while that I really liked being a practicing lawyer more. While I loved teaching first-year students—especially first semester—upper class students have other things on their mind and some of them are interested in the class and some of them are not. I found that less that satisfying. I found enormously satisfying opportunities to be to run direct research projects. I had a whole bunch of things that I wanted written that I never had time to write myself so I got students to do it. Students

were very interested in doing it because it gave them an opportunity to work with somebody on a sustained basis. We would agree on a topic. Sometimes they would come in with topics, but often they would have no idea what topic was doable and interesting and worth doing. So I gave them a lot of direction. They did a lot of the subjects I wanted them to do. I wasn't opposed to them doing something if they had something else in mind.

I would make them go out and spend a little time doing a little background and write me a couple, few pages about what they wanted to do and then I would send them off and six weeks later or so they would come back and they'd have an outline or sometimes—I've always found that outlines—someone once referred to them as “the tyranny of the outline”—that they hide things and they suggest things. So I said to them, “Do you want to do an outline or a summary or a combination of whatever you want to do?” Just so I was comfortable you had an idea—

MR. MARCUS: In the right direction.

MR. MORRISON: In the right direction. And then I insisted that they do a draft, typically before Thanksgiving or spring break, and then I had them do a final version and I graded them on both of them as I did in some other courses where I had papers. Then I would give them—each time I would give them both comments on the face of the paper, but I also would typically write a couple page memo on the bigger things that I wanted them to do. And then I did at the end, also, and then a lot of them—probably half a dozen of them got published in the *Stanford Law Review* or elsewhere. That was enormously satisfying because you could see what education potential has if you could ever take the person-power needed to do it that way. I had many students say to me that they learned more in doing that than they did in anything else about it.

Of course, the other thing about it was I could write letters for people for clerkships that meant something. Not only because the judge knew me, but also because I could explain what the student had done and how he or she had taken an area about which they knew absolutely nothing—typical for a law clerk—was able to do the research, take it around and then give them general suggestions and they were able to translate it into much improved products. So that was very enjoyable. There were lots of very good things about Stanford and there were some things that I liked less well. I found that a lot of my colleagues there were more academic than I was.

There has been—and this is not my observation alone—a major increase at particularly the top law schools—of PhDs coming onto the faculty and I support it entirely for a modest number, but the numbers are getting much, in my view, too large and it skews the teaching curriculum, it skews the research curriculum; they are less able to provide advice to law students about what they can do because most of them have never practiced law. Few of them have. The theory behind it is that they have all proven they can write something. Yeah, they've all written some PhD thesis which may or may not have anything to do with whether they can write anything that anybody is going to pay attention to in the legal world. In any event, that is my own view and I express it

regularly, but to no particular avail. Overall I'm very glad I did it. It was a wonderful three years. I had a three-year contract. There was some chance that I would be renewed when I went out there although not clear that was really ever in the cards. At the end of the second year, I was essentially told that I was not going to be renewed and so we decided to come back.

I could have, in theory, stayed in California but I would have had to take the California bar exam. I didn't want to do it. The reason I didn't want to do it was because I didn't know what job I would have. I certainly wasn't going to go work for a law firm and doing it on spec seemed like a bad idea. The only thing that I did consider was I got a call from somebody who was recruiting people and wanted my advice on who should be the general counsel for the University of California system. So I said, you know, that would be a really interesting job. Turns out, it's unbelievable—there is something like four hundred lawyers and billions of dollars worth of budget. Really interesting things. I said to myself. I would take the bar exam for that and stay to do that. I had a conversation with this headhunter and I said to her at the end of this, "I'm not trying to set you up, but I'm sixty-eight years old." I said, "Is there a prohibition against people being that old? I'm not setting you up for an age discrimination case." So she eventually told me, no, they can get waivers beyond it. In any event, there were lots of reasons why I didn't get beyond the first round, but that was the only real thought I gave to staying in California. I wasn't ready to retire and I couldn't have afforded to stay where I was on whatever money I've saved in terms of retirement. It's just too expensive to live there. Much as it would have been nice... And at that time, our older daughter became pregnant, had a miscarriage and then subsequently got pregnant again while we were there. She lives in New York and that was a big incentive to come back for her, and our other daughter also lives in New York. We've seen them quite a few times since our granddaughter was born last October—much more than we would have if we had been across the country.

MR. MARCUS: As you will see, grandchildren will change your life.

MR. MORRISON: Yes, they already have.

So I thought about what I was going to do and I talked to people here at AU. I talked to Jamie Raskin and he was very forthcoming and it was quite interesting. I was giving it thought and I talked to some people at UDC. I talked to people at Howard. Howard didn't have anything. UDC wasn't sure. Georgetown didn't have anything. I guess I didn't formally contact GW. I was also thinking about doing something else, which was I felt I wanted to try to see if we could do something about getting the Bush administration replaced at the end of 2008—when they were going to leave, of course, but to get a better administration more in tune with what I think the federal government ought to be doing. I gave thought to working in a campaign and I realized that I had no political experience working in a campaign. Nobody would hire me. I was a lawyer. What I decided I wanted to do was to see if I could prevent—as I referred to it at the time—the Republicans from stealing the 2008 Election.

I talked to a bunch of people, including people at the DNC—or outside the DNC—and people who had worked on the campaigns. I talked to Bob Brandon, whom I had known for many years because he worked at Public Citizen and had kept in touch with. He set up a little group called the Fair Elections Legal Network and I was on his advisory board and helped him out a little bit. We talked back and forth—we are now talking about the fall of 2006—my idea was to work on election problems in advance, that you can't bring lawsuits and get anybody to change anything in September and October and November. You've got to do it months and years in advance. The trouble was, 2006 was a good year in terms of the Democrats not having any troubles and people got a little overconfident. Nobody wanted to put the time and money into it. I saw that this was what was happening and people were saying, yeah, that's a great idea, but nobody really wanted to—not only to fund me—I was not all that worried about that—but I knew that I needed to have some way of getting in touch with the people out in the field, either the Party people or the candidates or the groups. It was not at all clear that those people would make the commitment of time to do the things we needed to do a-year-and-a-half or two years in advance.

MR. MARCUS: The kind of issues that you would have gotten involved in were things like restrictions on voting or—

MR. MORRISON: In fact, as I'll tell you in a minute, I'm doing that now so I can be exactly concrete. In fact, we got one very interesting thing that happened today that is illustrative of the range of problems that we have. I was sitting in my office—oh, I actually had gotten a call from somebody on the Fenty transition team in October. Somebody had suggested my name and they called me and asked me whether I'd be willing to be considered for attorney general. I had never given it much thought and I said, "Sure, put my name in it." I sent them a résumé. The day after the election, I got an e-mail from National Appleseed Foundation. I had known people there, including Linda Singer, who was the Executive Director, because I had been a founding member of the D.C. Appleseed board here. Actually, I was an Incorporator, which sounds like a very impressive title, but it turns out to be I was one of three guys standing around the day the incorporation papers were drawn up and I was one—

MR. MARCUS: Like a witness to the will, yeah.

MR. MORRISON: Exactly, exactly. No, it's about the same. I think it is a fair comparison. But I was also on the board which was quite different. The organization was an organization that was unlike most others. This was another Ralph Nader idea—the whole Appleseed thing. He got the thing going on a national basis. He went to his reunion and he got the people to do it and he got people to put up money and, most importantly, he got people to put up time. His idea was that you wanted locally run groups driven by senior people who had time and wanted to give back to the legal community and get other people involved as well—their time, as well as their money, on whatever problems they decided they wanted to do on a local basis. Ralph asked me if I would go to the original organization meeting and consider being on the board for the D.C. chapter. He just sort of turned everything over to the local people. I said I would

and I decided to go on it because there were lots of people with law firm background but none of them had done this kind of public interest work. They are used to having clients walk in the door.

I remember one day we were working on a project and somebody said, “Who is our client?” I said, “The public is our client.” We had this report that we were doing and it turned out to be a really important report about the D.C. pensions and we got it right. The people at the law firms were fabulous, but it was a different way of thinking that I think I added to the Appleseed Group. It’s now taken off and gone far beyond what we had done, which is always to be expected. That is, the next generation always does great things and it is time to move on. There were term limits and then also because I went to California, I got off and stayed off.

MR. MARCUS: Linda was the Director of the national office, not the D.C. office.

MR. MORRISON: Yes, right. I had known her when we set up the D.C. office and then I had done things for her over a number of years, including several times in California, given talks to lawyers’ groups about why Appleseed was a good thing and how they should go about organizing it. And we had kept up. She would come out and see me out there when she was out there and so forth. I got an e-mail from the national office saying she had been appointed attorney general, so the fix was in. They had decided well beforehand because it came the next day. So I e-mailed her back—e-mailed her, because I got the announcement from the Appleseed organization. So I said, congratulations, fabulous, you probably don’t know this, but I’m coming back to Washington and look forward to seeing you then.

Immediately I get an e-mail back, “Please come to work for me.” It seemed immediately like that was the right thing to do because I knew her and I liked the way she did things. I liked her judgment. I then worked with her during the period between January and June 2007 when I was still in California where I was an unpaid volunteer. My voluntary servitude agreement I had to sign with the District in which I promised not to take any money, in exchange for which I would do as much work as they asked me to do.

MR. MARCUS: Long distance kibitzer—or more than kibitzer...

MR. MORRISON: But what happened during this time confirmed what I thought, which is, her judgments and my judgments were the same. We may have been wrong, but we were the same. Therefore, we worked well together.

It worked together, which is very important, that—sometimes it’s not right or wrong, if you are not on the same page and don’t think about problems the same way, you can’t do it.

I think I talked to you about Mike Hess and how Mike and I used to see things the same way; it was the same thing with Linda and me. Almost—we’d disagree on the periphery, or some little thing, but basically.... She said, “I want you to be in charge, well think of

whatever you want to be in charge of. Do you want to be the solicitor general, do you want to be in charge of consumer protection, whatever you want to do.” I thought about it and I said to her, “You know, I don’t want to do any of those things. The first place is because it’s going to take a while to get off the ground; I can’t hire most of the people there; and, third, is things are largely dictated. But I think I could be most useful to you as your Special Counsel. That is, I can be your lawyer, your advisor. I have a lot of thoughts about how an organization like this should run, about training, about ethics, about how you relate to other people in the government and what I’d like to do is to be your Special Counsel. She said, “I like that idea.”

I said, “I’ll tell you what I want to do.” We talked about it a little bit back and forth. “Let me write you a letter, not a contract, but a letter so that we both have the same understanding as to what the job is and so that there is no surprises.” So I did this. I wrote this letter and I said in the letter, this is not a contract. I understand you can fire me any time you want to fire me, which is the way it should be, but I want us to understand. She immediately wrote back and said, “Perfect, exactly what I wanted, only said better.” And so we began this relationship.

MR. MARCUS: And you started—you moved back to D.C. in the summer of 2007.

MR. MORRISON: She was taking over in January 2007 and she originally said she wanted me to come right away. Yeah. She wanted me to start in January 2007 when she started. I said to her, “I can’t do this, I’m obligated to teach. I frankly don’t want to pick up and move now. I’ve got things I want to do.” I had a trip to Japan planned for two weeks where I was going to go give a bunch of talks and I really didn’t want to do this. I wanted to have the summer to move back and get settled. I said that I’ll agree to work for you as much as you need on an uncompensated basis because I always had time when I was teaching when I wasn’t doing cases. I did do a bunch of cases with Public Citizen. I mean, more the first time I was out at Stanford for a-year-and-half, but even this time I didn’t actually do any cases, but they would send me things and I would review them, or Brian Wolfman would pick up the phone and call me and ask me about something, or I would have something that would come to me and I would say, “Can you guys handle this?” And we did it. I never thought about going back to Public Citizen. They had a wonderful sendoff for me, they named the Supreme Court Fellowship Project after me. I think they did that so I couldn’t possibly come back.

Even when this came up, people said to me, “Why don’t you think about going back there?” I said, “No.” I said, “It’s the wrong thing to do. It’s bad for Brian, it’s bad for me, it’s bad for the organization.” It just would not have been the right thing to do. That’s a decision I’ve never looked back on at all.

Linda said, “Okay, you can start any time you want.” I agreed to start September 1st.

MR. MARCUS: September 1st, 2007.

MR. MORRISON: Actually, it was the 3rd because Labor Day was whatever it was—whatever the date was I started. When Linda was appointed, she knew and I knew that the mayor had asked Peter Nickles of Covington to be the mayor’s counsel. I didn’t know Nickles—I had heard his name in connection with some litigation, but principally pro bono stuff against the District in which he had done a good deal to cause the District a lot of trouble with things that should have been caused trouble about. Jails, juveniles, St. Elizabeth’s, I think. I don’t remember the details. I never met him, had never seen him, in fact. I was somewhat concerned about it because I knew that Nickles was very close to the mayor through the mayor’s family.

When Linda and I talked about it I think, in hindsight, which is always better than foresight, she and I probably should have talked about it more and she probably should have talked about it more with the mayor, but those are difficult conversations to have. I’ve talked subsequently to people about them, and some people have been very insistent about the way they talk to the mayor about taking a job or not taking a job when there was a mayor’s counsel. If you were in a very strong bargaining position, you could have insisted upon conditions. I think Linda was not in that position. She had not had a lot of litigation experience. And there were questions raised about her qualifications.

MR. MARCUS: I remember that.

MR. MORRISON: I am confident that if she had pressed it harder, she would have gotten the same answer, “Don’t worry, we’ve all got this thing worked out,” and I think the only way that she could have avoided the problems that I’ll talk about in a second is by not taking the job. It was extremely difficult. Peter is a very strong person. He had been at Covington for forty-something years. He was—he’s exactly my age—or maybe a little younger than I am. Actually, maybe it was six months younger. He is used to being in charge, has a very strong view about the value of law firms and a less strong view about the value of public interest organizations; and when he was there, he would say things like “This isn’t the way we used to do it at Covington,” which didn’t endear him to a lot of lawyers. But, you know, that’s the way he is and so it was a big problem and I probably wouldn’t have done anything different if I had known this. I would have taken the job anyway because I wanted to do it and I really decided that this looked like a job where I could be extremely useful and do interesting, important things. So, in hindsight, maybe I would have done it differently and maybe Linda would have done it differently, but we proceed in foresight.

MR. MARCUS: Let me ask you this. Do you think that Linda—I mean, obviously you had known Linda well, but do you think she may have thought that bringing you in as a Special Counsel with your experience and your stature would help her, sort of be a counterweight to Nickles?

MR. MORRISON: I think less on that score than she viewed me as a statement to the community that she was going to go out and hire top-flight people, that we were going to run a top-flight office and that she looked at me as somebody who would help recruit top people at the managerial level, mid-levels and entry levels. She said that to me and I

appreciated that and was glad to provide that function. I did—when I was back here in January for the American Association of Law Schools meeting—I did two things before I finally accepted the job. One, I went down to the office and looked around.

MR. MARCUS: That was a good idea.

MR. MORRISON: I've heard it's the equivalent of kicking the tires on the car. I didn't want to show up on the first day and find that there were boxes and everything was around and it was complete chaos and mess and say to myself, "What am I doing here?" So I walked around the office and that was fine.

MR. MARCUS: I think it's a lot better than it used to be.

MR. MORRISON: There was no reason not to take it. In fact, I had a very large, lovely office right next to Linda's with a nice view and so forth and so on. That was fine. The second thing I said was, "I'd like to talk to Peter Nickles and meet him." It was the Friday before the mayor was going to be sworn in on Monday. Peter was going to move from Covington, where he was retiring, over to the mayor's office. I went and set up an appointment with him around 4:30 or 4:00 on a Friday afternoon.

MR. MARCUS: At Covington?

MR. MORRISON: At Covington. It was a quite brisk meeting and was not entirely satisfying but it didn't turn me off enough to make me rethink what I was going to do. So we went ahead.

I was here—I stayed right after that weekend. I was here for another case in the Federal Circuit where I—

MR. MARCUS: This is January 2007.

MR. MORRISON: January, 2007 where we had a case that I had already started working on, I think, back with Public Citizen, involving Monsanto's claim to be able to patent seeds so that people could not replant them. It's a very difficult patent case and we were helping a farmer out there. My colleague from Stanford, whom I recruited, Mark Lemley, who is a fabulous person and lawyer, was going to argue the case in the Federal Circuit and I was here—we stayed over to do a moot court and get there.

Anyway, I went to the Federal Circuit and who was on the other side? Your old firm, Wilmer, was there and Seth was not arguing. Paul Wolfson was arguing. Paul Wolfson and I had worked together for many years and continue that friendship. I told him what I was going to do and he said to me, "Oh, I want to talk to you about this gun case." He said, "This is not the Second Amendment case. This is a case involving a federal statute that preempts all gun claims retroactively, wiping them off the books." I said, "I knew about the statute." He said, "There is a case going up in the D.C. Court of Appeals. We are representing the gun victims' families and the City is involved representing the City's

interests because the City has liens and expenses that they are entitled to because a lot of people were on Medicaid.” So he sent me the stuff and I talked to Linda about it. Linda said to me, “Oh, yes, speaking of guns, there is another gun case out there.” I had not even known anything about this case.

MR. MARCUS: Had it been decided by the D.C. Circuit yet?

MR. MORRISON: No, this was in January. She said it was argued, she went to the argument. It went very badly for the City and would I please take a look at the papers. So I had two sets of gun papers and I had a bunch of other things. During this time we also had a couple of matters in which we had conversations on the phone. There were times when some antitrust people wanted me to come in and talk to them about—so we had some phone conversations, but nothing of any great significance.

So the gun case came along and then I became actively involved in the rehearing petition and in the *cert.* petition. They brought in Tommy Goldstein and Walter Dellinger to give them some advice about it and we worked on it with the people in the office. They were doing the primary drafting, but I did a lot of work on it. At some point during the summer I said to Linda, “Linda, I want to talk to you about the gun case.” I said, “The Solicitor General, Todd Kim, is a very able fellow, but he’s ten years out of law school, he’s never argued a case in the Supreme Court before.” I didn’t know it at the time, but his wife was going to give birth in February, although at the time, we thought it might have been argued before then. I said, “I would like to argue the case. I think I’m the right person to do it. I think it’s important that it be done in-house and that—first place, you should not do it. You’ve never argued, you don’t have the time.” She said she agreed—she wanted to think about it so she talked to Todd and Todd agreed one hundred percent that I should argue it. So before I actually showed up here—the day I showed up here, we filed the *cert.* petition. I showed up at 9:00 in the morning, at 10:00 we had a press conference and it was announced at the time that I was going to argue the case. So they got me up there and one of the reporters said to me, “What is your batting average in the Supreme Court?” So I said to him, “Better than Ty Cobb”—which was .367, but I had harder cases than Cobb did. So we filed the *cert.* petition and Linda said, “I have one hesitation. You promised that you would do all these other things. I’m not relieving you of that.” I said, “You just give them to me. I will find the time to do this.” Before *cert.* was granted, we started working on the brief. We had a full draft written by the time the *cert.* was granted. We circulated it widely. We actually did a moot court, mid-brief moot court which, I think, Tom Goldstein suggested, and I had talked to other people about it in somewhat different circumstances. I was perfectly willing to do it and we did it and what we revealed was we knew what our weaknesses were. That is, we hadn’t missed anything. We didn’t have any illusions that we had a slam-dunk answer, but it made us confident that we had done the right things and nobody thought we’d left anything serious out. We had some things that we obviously had to work on. Other people contributed. I wrote lots of sections, some of which people rewrote and some we accepted and so forth. It was a clear collaborative effort on a lot of people’s parts. I had a lot of influence and say on what it was going to say. The one thing I remember being very clear about was we’re not going to say that this thing is clear and it’s a slam dunk. I don’t want to stand up there

and anybody says to me, “It’s clear,” then would you explain what people are writing all these Law Review articles about for all these years. Because it wasn’t clear and it still isn’t clear, in my judgment.

We said, on balance, we have substantially the better of the argument, which I felt very comfortable saying, but no more. Anyway, I was quite happy there. I was doing interesting things. I had influence in substantive matters and the way the office was running. I liked a lot of the people that I met there. I didn’t have any problems with any of the people there. I thought they were good people. I think Linda was doing a wonderful job. She was—first, on the gun case itself, although she had a quite modest legal background, she pitched in and she read every significant draft of the brief. She had really good comments in terms of political reactions, in terms of substance and in terms of argumentation and she went to the moot court. She was definitely involved. She and I went over to see the solicitor general’s office, which we lobbied successfully to come in on our side on the standard of review aspects of it. She was right on top of everything there.

When she needed to do legal things—and this wasn’t the only example—there were lots of others, where she understood the legal issues and especially in those where she didn’t understand the background—usually you explain it to her and she plainly got it right away, which was very impressive to me. Second, she was doing a terrific job of recruiting people, of organizing the office, of improving the morale and doing the hardest thing you can when you’ve got four hundred lawyers, how you allocate your time. She was definitely doing a good job of that. She was spending her time on the right things. Sometimes this meant going to a meeting of a division or a section and she would sit there for an hour because she understood that sometimes it’s important to be there with the troops and to let them know that you are there, that you know what is going on, ask a few questions. Then other times she would just delegate to people and let the people do what you want to do. Morale was very high and she was doing, in my judgment, a good job. But—and this is the big “but”—probably quite early, but certainly by the beginning of the fall, Peter Nickles was taking a very assertive role toward the attorney general’s office. He was interjecting himself in cases and, I have to say this, it was with the mayor’s blessing either express or after a while implicit, because every time it came up, the mayor would say, “Defer to Peter.” The mayor did not understand, in my judgment, the importance of having a separate attorney general’s office and being able to be separate from the attorney general’s office. He gave Peter—which was, in my judgment, unwise—full responsibility for looking at the tax refund scandal that they had with millions of dollars. Certainly he should have appointed Peter as his liaison with the attorney general, but there were lots of things, even though the criminal cases were not in our office, Peter became involved in a number of civil cases involving injunctions and class-action suits. There was a question, at least for a time, as to whether he could do that or not under the terms of his appointment because he’s not a resident of the District. I think if he had been a resident of the District to begin with, he would have been appointed attorney general. That’s what I think would have happened. It now appears as though, at least as of today, he’s going to be appointed attorney general.

Whether he—he says he’s going to move into the District—whether he’s going to get a D.C. driver’s license and he’s going to vote in the District and pay D.C. income taxes, we’ll see.

MR. MARCUS: Let me ask you this. Do you think that Nickles—or could you tell—was his increasing involvement and intervention in matters basically a product of his own sort of natural wish to be involved in all these important things or was it because the mayor wanted him to be involved? Or after a while—or was it both?

MR. MORRISON: I think it was the former, that he wanted to be involved. And it wasn’t just legal matters.

MR. MARCUS: No, it wasn’t just the mayor was saying, “Gee, I don’t like the way the attorney general’s office is being run, you’d better get involved.”

MR. MORRISON: No, no, no.

MR. MARCUS: No sign of that?

MR. MORRISON: No sign of that, but every time there was a question, the mayor would back him up. Peter said sometimes it was—he thought that—my own view is that Peter didn’t think Linda was up to running this office and everything he saw, he saw through that prism.

There would be examples—a bad opinion came down—an opinion that was bad for the office came down, criticizing some of our lawyers for doing something. Clearly right to say, “How did this happen?” Peter’s response was, “Looks like I have take over this case as well.” And it comes in a brusque e-mail and he was undiplomatic to a lot of the lawyers, certainly to Linda. Not to me because I had almost nothing to do with him. In this tax scandal thing with the Bank of America, he basically cut off the investigation when what we were trying to do was to negotiate a tolling agreement that would allow us to do what we needed to do without having the statute of limitations running and there was a million-and-a-half dollars in money that had been taken in a particular time period where the statute was going to run on. All we wanted to do was to call—Linda had actually put a call in to Bank of America—the General Counsel whom she knew—at a time when we wanted to get the tolling agreement in there and we were told, stop the investigation. She couldn’t continue with that. And now he’s apparently trying to put a tolling agreement in place six months later.

While Peter said at various times he’s always willing to discuss things, he didn’t discuss any of those things with us. All he had to do was to sit down with us and say, “What’s going on?” And he could have—if at the end of that time he said, “No,” then he said no. But he said things like, “The U.S. attorney’s office doesn’t want you do to this.” So I called the assistant on the case and he said, “It’s not a problem.” He told me when these monies were coming due for statute of limitations purposes. So it was just not the case

and I don't know where he got the information from, but we never had a conversation about it or anything like that.

So starting I would say in the early part of November, Linda started talking to me about how unhappy she was in the job. Unhappy in the sense that she loved the work, she cared about the people, she wanted to do it but she wasn't being allowed, in her judgment, to do the job. We talked about what she could do and could she stay on and I counseled her, look, you don't owe anybody anything. If you really feel this way, you should do it, but let's try to do this and let's do that. Is there a point in talking to the mayor? She said, "Well, I've talked to the mayor briefly and every time I talk to the mayor, the mayor defers to Peter." So I said, "Okay, there is nothing you can do—there's not going to be a way out of this thing." There was no chance the mayor was going to fire her because he was perfectly happy having her as the attorney general doing all this stuff and Peter being able to do what he wanted to do. There were some other things that came up outside the litigation context about allocating staff for various development projects and who they were going to work for and who they were going to report to and whether they were going to report to the operating people or to the attorney general. Peter was expressing views, rightly or wrongly, on all of these issues and we were spending a lot of time dealing with these things and not advancing the needs of the office.

Linda was getting more and more unhappy. I wasn't particularly unhappy because she was taking all of the grief. She was—she was running interference for everybody.

MR. MARCUS: And you were working on the gun case.

MR. MORRISON: I was working on the gun case.

MR. MARCUS: You said it was fascinating and—

MR. MORRISON: Yes, yes. But I was doing a lot of other things, too. And I was completely shielded from all of this. So finally she decided that she was going to quit and she told only three or four of us that she was going to quit.

MR. MARCUS: This is what? Around December?

MR. MORRISON: Beginning of December. She had brought in Betsy Miller, a young, very able lawyer from Jones Day whom she had met through Appleseed and she was the Chief of Staff. Betsy did a huge amount for the schools. They had this enormous problem—legal problems when they took over the schools. The mayor took over control of the schools and they had all kinds of issues and they had to find outside counsel. They finally got somebody, Jim Sandman, from Arnold & Porter as the counsel. He had expected Linda to be there. In fact, there were several other people who came on inside the formal AG's office positions rather than for the agencies. Jim Sandman theoretically reports to the attorney general. In fact, he does most things independently, but he's hired and fired by the attorney general.

Anyway, there were three or four of us who knew about it. One of the questions was what should Linda do and say about this. I said, "Look. I'll write a letter. Let me draft a letter really expressing why you are doing this, both expressing displeasure with Peter and expressing displeasure that the mayor is backing him up. Let me just write this and see whether you like it." She read the draft and decided that she didn't want to do this about the mayor and the idea would be to potentially make this public. She didn't want to do it about Peter and she ultimately decided she would write a very bland letter of resignation but would tell the mayor personally. So she did that on the 17th of December and that day a lot of people, myself not included, talked to *The Post* and others about it. Because anybody who read this letter would know that it's not the whole truth and nothing but the truth.

MR. MARCUS: It's not the whole story.

MR. MORRISON: No, no. You don't have somebody come in there for a year doing great things and being excited and then walk away with nothing else to do. Spend more time with your family, clean my garage, you know? Anyway, Peter—there was a very negative story about Peter in *The Post* the next day and then even before that, the mayor did something that I don't think anybody expected. We certainly didn't expect him to do. In the past when they have had a vacancy in the Office of the Attorney General, he's appointed Gene Adams, who is a longtime career deputy there, as the interim attorney general, and we assumed that that's what he would do. And he didn't. He appointed Peter. I don't think we would have done anything different. Linda was going to leave. She was bound and determined to leave. She made her resignation effective the day that the gun brief was due so she would be on it and she would have control over it no matter what happened.

MR. MARCUS: Was that in January?

MR. MORRISON: January 3rd or 4th or something like that. Peter came in and said that he was going to take over and he was not going to be a caretaker. We didn't know whether this meant he was going to be there for a few months or stay on. He immediately started calling people in—

MR. MARCUS: When you say he did this, this is January 3rd or even before—while she was still there?

MR. MORRISON: Well, she was there for a few days and then she went—took a vacation.

He started calling people over to his office and he called me in on Friday. The Friday after—Friday the 21st, I guess, of December. And he—we didn't really know each other, had exchanged very few words and nothing particularly pleasant or unpleasant, just I had no particular things to deal with him on. He called me in and he said to me, "I want to ask you something" and said, "Are you part of this campaign?" I knew what he meant immediately—the campaign to get rid of him, to discredit him. I said, "Peter, if the

question is, have I talked to the press, the answer is no. I did talk to Linda at length about her decision to resign and so forth.” He said, “No, no, that’s not what I want to know. I want to know if you are talking to the press.” I said, “No.” He said, “Well, I haven’t decided who is going to argue the gun case,” but he said, “I find out that you talked to the press, it’s automatically disqualifying.” So I said, “Well, I haven’t, and I hope that I—I would like to argue the gun case and here’s why.” I knew that’s what he wanted to talk to me about. “And this is what I think. I think there are some criteria that somebody should have worked on the brief; they should have plenty of time. They should have time to work on the reply brief, should be an experienced Supreme Court advocate. This is not a time for a rookie. And I think that I meet the test for all of these.”

He said to me, “Well, I’ll read the brief this weekend and then I want to think about it some more.” At one point, he said to me, “Now if you weren’t here, if you weren’t here, would you argue on a pro bono basis?”

I said, “Well, I’m not prepared to discuss that with you.” Then we had some other discussions about other things and at one point he said to me, “Well, I would expect that if you do stay around to argue the gun case, you would leave after the gun case.”

I said to him, “Well, I think that’s perfectly understandable.”

He said, “After all, you’re part of Linda’s team.” I said, “I understand that and I had thought that I would probably do that unless whoever is the attorney general asked me to stay on, I would plan on doing that.” He said, “All right, I’ll get back to you.”

So I went back to the office and first thing I did was I checked around to see what other offices were available because he was coming over on January 3rd and his office was right next to mine. There was a door between them and I didn’t want to be there and he didn’t want me there. I, in fact, found a space that I would have gone to. The next week there were some discussions about a small portion of the brief, the nature of which is not significant, and we had some exchanges and talks about that with Todd Kim.

MR. MARCUS: Nickles was involved in it?

MR. MORRISON: Nickles was involved in it. He read the brief and he had some suggestions—he’s a smart guy. He hadn’t done much of this kind of work. He was basically an antitrust and commercial litigator.

MR. MARCUS: Nobody’s done much Second Amendment.

MR. MORRISON: No, but I mean constitutional challenges. He’s never been in the solicitor general’s office or the State Attorney General’s office or anything like that. Anyway, the following Friday about noon or so, I got an e-mail from Gene Adams, who had been acting as the liaison. It said as follows: “Peter has decided that he will not need you to argue the gun case and he would like to have you clear out before he shows up.” Gene told me later that day that Nickles said he didn’t know what capacity he could write

me because he wouldn't write me himself or call me because he didn't have an official position, which was complete nonsense because he was ordering this stuff. So then I said to Gene, "Who is going to argue the case?" He said, "As far as I know, he hasn't decided." This puzzled me. Anyway, I talked to a couple of people on Friday about it, including Todd Kim, the solicitor general. He was very dismayed about this. We talked about who might do it. He said he didn't want to do it, he wasn't ready. He had told Peter that already. His wife was going to have a baby, he was planning on taking off three weeks, he'd never argued in the Supreme Court before, this was not a good maiden voyage case to argue.

I spent a very restless Friday evening, night thinking about it. I woke up and I realized that I had looked at this incorrectly. He didn't decide I wasn't going to argue the gun case and then fired me. He decided I should be out of the office because I was on Linda's team. He didn't want me around and, therefore, I wasn't going to argue the gun case.

So I wrote him an e-mail Saturday morning saying essentially that—am I mistaken, Peter? I never heard back from him. I tried to do one other thing because I thought—not so much that I cared about arguing the case, although I very much wanted to argue it, but I thought it was a bad idea, bad for the District and potentially bad for the mayor. I have a friend who knows the mayor's family and I asked him to contact the mayor's family and say, "Does the mayor know that this is really going on?" Because the interesting thing was the day that Linda resigned, the mayor was asked who was going to argue the case and the mayor, through a spokesman, publicly affirmed that I was going to continue to argue the case.

People got through to the mayor's family, who got through to the mayor and nothing came back. This was Monday, Tuesday was New Year's Day and—

MR. MARCUS: So this was between Christmas and New Year's.

MR. MORRISON: Right. Right. And on Monday it was clear to me that nothing was going to change and so I decided that I was going to go public and I was going to go public with the real story. I was not going to hold back. I called The *Post* reporter who had been covering these things and I said to him, "Are you going to be in on Wednesday?" He said, "Yes." I said, "Call me first thing." He said, "What do you want to talk about?" I said, "Just call me. I have a story for you."

So I had the e-mail from Gene Adams and I had a couple of other e-mails from Peter at various times and other things. So I gave him the story. I said, "I got fired." Which I was. It immediately went out on The *Post Online* and I started getting calls and so forth and so on. Later that day, I got a call from WTOP asking me if I would do a television thing. I guess it was the next day—it was the next day that they did it. So they came over and did a television thing. When the guy said to me, "What happened?" I said, "I got fired." He looked at me as though—nobody ever says they got fired. They want to pursue other activities. No, I got fired and this is why I got fired. I told them essentially the same story

I essentially told you here. We talked for a while about it. He said to me, “Are you going to go see the argument?” I said, “I don’t think I’ll go see the argument.”

So they interviewed Peter and they asked Peter, “What did you—Morrison said this happened.” He said, “That’s not the way it happened.” He said, “What happened?” He said, “I can’t go into details.” Meaning he wasn’t going to give an answer. I took that essentially as an admission. He never responded to my e-mail and he didn’t respond to anything else.

I didn’t mind getting fired. He had a right to fire me and if he had come up to me the day after this thing and said, “Look, this has been unpleasant and it’s an unpleasant thing I have to do. I would really feel comfortable if you would leave. I know it’s bad for the City. Tell me what you think I should do about who could argue the case.” He could have done it in a much better way, but that’s not Peter Nickles.

MR. MARCUS: In retrospect, when you describe your meeting with him, after Linda resigned, do you think he was feeling you out as to whether you would argue the case pro bono after leaving?

MR. MORRISON: Well, he asked me about that and I said to him, “I think that’s a bad idea.” I said, “The person who should be arguing the case should be in the office working with the solicitor general on the reply brief and getting everything ready.”

MR. MARCUS: I see.

MR. MORRISON: I dismissed it for substantive reasons, not because I wouldn’t—I mean, if they had said to me—it would have been stupid, I mean, it would look ridiculous to fire somebody and then tell them to come back and argue the case. No, no.

Turned out one of the great things about being fired, though, there was one really good thing about being fired. That is when I went to file my tax returns this year, my accountant said to me, “You know, you have to work thirty-nine weeks in your new job, otherwise you can’t deduct your moving expenses. The District didn’t pay for my moving expenses, of course, and we had a big moving expense bill. She said, “Unless you got fired.” I said, “I got fired, and I can prove it.”

So it was better that I got fired. At one point, somebody in the Personnel Department said, “Well, you want to submit your resignation letter.” I said, “I am not submitting a letter of resignation. I will submit a letter saying that I have been asked to leave on such and such a date and I will be out in accordance with that.” But I would not say that I resigned because I didn’t resign. I was there to stay. You know, in hindsight, would anything have been different if anything had happened different? No. I wouldn’t have done a single thing differently. I did the right thing. Linda did what she wanted to do. He wasn’t mad at me for when I told the public I got fired. He was mad at me for whatever he perceived my role was in whatever happened before, or he just wanted to get rid of me. That’s life.

MR. MARCUS: Did he say anything publicly? I know he didn't—he never responded to *The Post* about whether you were fired or not, but did he say anything publicly about why you were leaving?

MR. MORRISON: No. And he said the brief was excellent. At one point, he did say the brief was fine and there was no problem with the brief. And, as I said, there was this one area where we had a difference of opinion, but it was a small thing. We were able to accommodate him and it was not something that anyone would ever have fired anybody over.

MR. MARCUS: So your view—your clear view of this is that you were fired because he identified you as—and this was indicated in his questions to you—that you were just part of—

MR. MORRISON: The wrong team. Yeah, yeah. You expect that to happen when the Democrats or the Republicans change places in the White House or something, but you don't expect it to happen in the same party in the same administration. It was disappointing. Somebody said to me, "Well, after this year, you can think about going in the federal government." I said, "You know, I'm not so sure I want to go in the government." It wasn't just this. I've been in the government before and this reminded me how much I enjoyed my freedom to do what I want to do and not to do what I don't want to do and to speak up when I want to speak up and not be muzzled because of the position I was in and whom I worked for. And, of course, having said that, I never say never about anything but I think that it would be a hard sell to get me to take something.

MR. MARCUS: Maybe now you are ready to be a federal judge but now you are too old.

MR. MORRISON: I don't think I'm ready to be a federal judge. Anyway, so I left. What actually happened was the day that Linda resigned back in December, I called a friend who I had talked to, a lawyer who was an outside counsel for the DNC named Jack Young, whom I had met many years ago on one of our Virginia Bar cases. He's from Virginia, he was in the attorney general's office. I knew he was working on this because I had talked to him a year or so before. I said to him, "You know that project I talked to you about, Jack? Well, I'm going to be ready to do it no later than the end of March. I want to come talk to you about it." He said, "Fine, come up." I said I could come over after the brief was filed and we'd talk about it preliminarily then. The day that I quit—or the day they went public with my firing, I called him up and I said, "The timetable has been sped up a little bit." He said, "Come see me next Monday." The Monday after I got fired I had an appointment to talk to him about it.

For various reasons, the DNC didn't work out.

MR. MARCUS: To do the elections?

MR. MORRISON: Election thing, yeah. Election thing. So I called Brandon and I talked to him—

MR. MARCUS: Who?

MR. MORRISON: Bob Brandon, this was the Fair Elections Legal Network with whom I had talked before and whom I knew for many years. So we got talking and I realized that they had a wide network of lawyers, but more importantly, they had a wide network of client groups who were doing voter registration, who were mobilizing people to vote, and who were doing things in the various states. So in a relatively short period of time, I decided that it made sense for me to work with him, and I have since become a consultant for reasons that are just bureaucratically easier and I eventually was able to raise a bunch of money. Although I didn't actually get any for over four months, so I got paid through the beginning of February and then I didn't get paid for a while. I had raised the money but it didn't actually show up until the beginning of June.

So he and I have been working together on this. We've done lots of really interesting things. I said to you my idea was to prevent the Republicans from stealing the election. I have now decided that, yes, there may be some venality, but there is an incredible level of incompetence, not thinking about things, not reading the statutes very carefully. I said to somebody one day, Just think how different it would be if the people in charge of voting got paid for each vote that was cast; instead of—they have a fixed amount of money and they have to do all these registrations and all these people—no matter how many people show up; it would change all the incentives around.

So we've been working on mundane things like seeing that voter lists are not improperly purged under the federal and the state statutes. One state has got something called inactive voters. They are allowed to vote, but they don't get information about when the vote is going to be and they get taken off the permanent list of people who are entitled to get absentee ballots. They are the second-class citizens.

One of the problems with people having to do provisional voting—which, of course, nobody wants to cast a provisional vote, they do it because something happens—is that they go to the wrong place. Either they don't know where to go or they've moved and nobody tells them anything. So I got poking around and I said to myself, when you register to get your driver's license for your car, you get a right to register to vote. I wonder whether the states change your voter registration when you change your driver's license address. The answer is they don't. The law does appear to require them—the federal statute does appear to require them. It's put in an odd place in the statute so if you read the part that talks about Motor Voter, it's a couple paragraphs down, but it's there. So we wrote the Secretary of State's office in New Mexico about this. This is where we have a bunch of groups that are worried about provisional voting and some other stuff because they've had some problems.

Today I had a conversation with the Secretary of State—the election person there. He said, "Nobody ever noticed it"—he said, "I'm going to call tomorrow—immediately call

the Secretary of the Department of Taxation and Revenue who runs the Motor Vehicle people, we're going to have a meeting and we're going to figure out how to be able to do this." So that's that kind of thing that's going on.

We're trying, for example, some places have formulas as to how they are going to allocate machines. Others don't. Paper ballots—no problem with printing extra paper ballots. Although in New Mexico, they got criticized by the local paper because they ordered too many ballots. They thought this was a payoff to the printer. All the ridiculous things they have to worry about. Besides the fact that they don't make much money on these things, the idea that people were doing it for that purpose is just insane. Anyway, even with paper ballots, they have enough paper ballots but what don't they have? They don't have enough voting booths. People are now talking about getting tables and temporary screens that you can put up there to have your privacy for people who insist upon it.

So all those kind of mundane things so we don't have long lines on Election Day. We're working with some voter registration groups and problems happen and so we've devised means by which they can—we wrote letters for them to go to the Secretary of State, this is what you want to do and how you want to deal with them, anticipate problems so they don't come up at the end.

Student voting. Students register—they are allowed to register, if it is their residence, where they go to college. One of the problems is when they need IDs. Think about it. College IDs don't have your address on them. So we've had to work with some Secretaries of State. Ohio, for example, they have now issued a ruling, the Secretary of State, that if the college gives you something that says this is your utility bill for your dorm—this is your share, that will count as a utility bill for identification purposes and your address under state law. So those are the kind of things that need to get done and we've been doing this. We're looking at a few constitutional issues. For example, one of the groups that is trying to mobilize voters on Election Day—one way they do it is to call people who haven't voted. So the first thing was, it turns out some states actually give out lists of people who have already voted a couple of times of the day. But they give them to the parties. What about the voter mobilization groups? So we're doing some of that.

And then many states have early voting, which means you have to go to a polling place, but you get to vote early. You go at your time and place of your choosing. States have absentee voting, either no-excuse absentee, which means you just ask for a ballot, or some of them have excuses. One state, New Hampshire, has a statute which says that the list of people who voted absentee, i.e., those people you shouldn't have to call on Election Day because they've already voted once, goes to the parties—expressly forbidding giving them to anybody else. So we are thinking about bringing a constitutional challenge to that. Unlike some of these big cases like *Crawford*, the voter ID, that can't be litigated in time, this can be litigated very quickly. There are no facts in dispute. It's an easy thing. It's an equal protection argument.

MR. MARCUS: What do you guys think of mail-in voting like Oregon does?

MR. MORRISON: I don't think I or the group has an opinion about that. It's—there are good things and bad things about it. The one concern you have is that people are able to vote too far in advance. But that's long been true with absentee ballots. People have been getting them several months in advance, particularly the people who are overseas, because they have to get them in. My own sense is that the early balloting—or the mail-in ballot, which is a form of no-excuse absentee ballot—and if you confine it to two weeks before, it's not a problem. The final things that happened in the last few days probably ought not to turn elections anyway. It seems to be an area where the state could sensibly make a judgment either way, an accommodation. And having all these different options makes it less likely you are going to have big crowds on Election Day.

We're looking at all these things. One of the things that we are looking at is not only what we can do this year, but areas in which there are reforms that be needed on the state level? Are there areas that the federal government ought to come in and preempt as they've done in the National Voting Rights Act and the Help America Vote Act? Should the federal government come in and which ones in which way? What are they going to do—tricky issues like ID and somebody said it depends who is on charge as to what kind of a rule you are going to get. You've got to think about all those things.

MR. MARCUS: Very tricky. Is this something you are planning to continue with or is it just for this year?

MR. MORRISON: Well, while I was without a job and while I had not yet raised any money, I got a call from one of your colleagues here at American, Lewis Grossman, who said they are looking for somebody to teach Civil Procedure in the fall and they heard I was available. Since it's my favorite course, I said—I thought about it for a day and said, "Yes." They said, "You can come for a semester or a whole year." I said, "I'll come for the whole year but I want to teach only that course in the fall." The practice here is for people to teach two courses, one smaller, one a seminar. I said seminars are actually as much work, if not more, than anything else and I don't really have time because I want to stay on the election project. I've worked that out so I'm going to do that—continue through that through November and then that will be basically the end of the semester. I have not either committed or declined what I will do afterwards. I'm sure that I will continue to be involved to some extent with the project because there's lots of things that need to be done in the future and I will have accumulated some wisdom, I hope, along the way about what to do and what not to do and the wisdom of trying to do these things in advance.

I had dinner the other night with somebody who is the senior person in another nonprofit organization that is thinking about bringing in some senior supervisory lawyers who asked me whether I'd be interested in doing that as kind of a way to stay in the litigation either part-time or full-time. We haven't fully explored that. So I'm going to do that and, as I said, I'm going to teach here at AU, Civil Procedure in the fall and Ethics and Administrative Law in the spring. And then I'll see. I have some other teaching—I have

an open invitation to go back to the University of Hawaii Law School for at least for three weeks either in the summer or in the winter. I might do that. Who knows? I'm not ready to retire.

MR. MARCUS: Well maybe five years from now we'll have to do an addendum to this oral history.

MR. MORRISON: So two other things I want to talk about. One is a follow-up on the D.C. Circuit Judicial Conference. I got a call from Chief Judge Royce Lamberth who said, "I've just become Chief Judge"—I knew Royce when he was chief of the Civil Division of the U.S. attorney's office and we were on the other side of many cases. But we were also able to litigate without any acrimony. He was extraordinarily fair even on touchy things like attorneys' fees—he said, at a time when the law was that defendants could insist that they wouldn't give you any money as a condition of settlement, his office never did that. They would say to you, "Look, you didn't have a real good claim here, so we're going to discount it," which was a fair argument. But they never took that hard-nosed position and they were extremely fair on other things. They were always extremely fair in the way they litigated cases and yes, of course, you had disagreements. Of course you are going to have it. But I got to know him then and liked him a lot. I sent him one of his favorite law clerks of all time, Tom Perrelli, who is now with Jenner & Block.

MR. MARCUS: Oh, yes.

MR. MORRISON: You know Tom?

MR. MARCUS: We worked together at Justice, yes.

MR. MORRISON: Well he's a lovely man and extremely able lawyer and I said to him when he was thinking about clerkships, I said, "Tom, if you want to learn how to be a lawyer, go to a judge who was a lawyer first and really can tell you a lot." He loved his clerkship with Royce. So Royce called me and said to me, "One of the nice things about being the Chief Judge is you get to invite your friends to be on the D.C. Circuit Panel—

MR. MARCUS: Conference.

MR. MORRISON: Conference. And we pay your way. I said, "That's good, because I don't have anybody else paying my way these days." He said, "I want you to come talk about separation of powers." He said, "Justice Scalia is going to be on the panel." I said, "Fine." He asked me who else and I suggested somebody, one of the people being Mike Davidson who ended up being on the panel. He got Miguel Estrada who I also knew a young woman who teaches Constitutional Law at Notre Dame, Tricia Bellia. She had the unenviable position of trying to deal with all of these people, including Justice Scalia. Anyway, so Scalia said that he was going to be on the panel and, unlike virtually every program I've ever been on, we didn't have a conference call beforehand. He said he wanted to go first, and he's a Justice of the Supreme Court. It didn't make any difference

who went first anyway. He said he wanted to talk and he gave a perfectly appropriate talk about the separation of powers—it's really important and it's more important—if he had to choose between separation of powers and the Bill of Rights—lots of countries have Bills of Rights that don't mean anything—separation of powers is what keeps it all together.

And then they asked us what we wanted to do, and when Royce had originally asked me about this, I said, “You know what I'd like to do? I'd like to go back and look at the opinions in the *Steel Seizure* case because there is all this business in there about congressional silence and implicitly rejecting the president's power and Congress reserving to itself—all by silence—and I'd like to talk about whether that stands up in light of *Chadha* and what it means and—congressional silence. She said, “That's fine.” I actually suggested this to Royce and then I sent her the questions. She's actually written a piece on *Steel Seizure*. That was all fine. So I did that. We only had ten minutes. Mike talked and Miguel talked—Miguel said something very funny. He said, “I was asked to do the executive branch provision and I almost said, ‘Why am I doing this? Justice Scalia is already presenting it.’ but,” he said “I didn't say it, so I did it.”

So during the course of the conversation, the topic turned to a subject which—actually, Miguel raised it, but I expected it to come up, which is the congressional subpoena enforcements. And Miguel first said, somewhat tentatively, and then Justice Scalia said, quite un-tentatively, “No business being there.” So I started arguing with him. They were on one end of the table and I was on the other because that's the way somebody else had set it up. He said that they should just negotiate. I said, “How can they negotiate when one side—when you can't go to court? There's no room for negotiation.” He said, “Well they can do other things like they can refuse to confirm judges.” I said, “The House of Representatives can't do that!” He said, “Well they can cut off their budget.” I said, “That's war!” He said to me, “Aw, come on!” and I said, “Aw, come on!” back to him. And he said “Aw, come on!” back to me and I said “Aw, come on!” back to him, and at that point the discussion ended. But it was—lots of people told me afterwards it was the highlight of the program to see this real tension on an issue that everybody understood what the importance of it was who goes to this Judicial Conference.

MR. MARCUS: Arguably, he shouldn't be commenting on it—

MR. MORRISON: Well, he's already so clear on it.

MR. MARCUS: Yeah, yeah.

MR. MORRISON: The other thing is—and I felt sad about this—sad is the right word—is beforehand and afterwards, he declined to say hello to me, to shake my hand and to come up to me and talk to me even though I'd known him very well. I think—I can only surmise that it's because he's still unhappy with the motion to recuse in the duck-hunting case. He said some unkind things about me in the opinion and I've gotten over it, but I don't think he's gotten over it and I'm sad. I was a friend of his at one point

and I use that word not ill-advisedly. Indeed, I think he used the word in the duck-hunting opinion himself—a friend. And so I was sad about that, but it happened.

Then yesterday, the Supreme Court came down with the gun case. That’s a topic for another day. The only thing I would say about it is—I didn’t go to the argument. I didn’t even listen to it on C-SPAN. I read the transcript and that was enough. I just didn’t feel like I could do a lot more. I had talked to Walter Dellinger some about the argument and given some suggestions about the reply brief. But when you’re out of it, you’re out of it. So it was just better I didn’t go. And I didn’t go to the Court yesterday to hear them hand down the opinion.

The only thing is it would have been nice to argue the case, but given the tone of the majority opinion, it wouldn’t have made any difference what I said. I could have stood on my head and bounced six balls at a time. It would have made no impression. It was clear that the majority—and I assume that’s as compromised an opinion as anybody could get out of it—that nobody was unhappy with anything that was said in it and that the dissents—Justice Stevens’ dissent was essentially the main arguments that we had made in our brief. He had other things and didn’t put everything in there, but the main arguments—and Justice Breyer had much of what we said, although less because of the way in which the case came out. He had seen how the majority treated the merits beyond the basic Second Amendment question which, of course, we couldn’t know. Therefore, we were not able to respond in the same way, but many of our ideas including that gun owners are not exactly unrepresented in the Legislature, and why should they need special protection, and so forth and so on, was in Breyer’s opinion, as well as many other things. And so, you know your friends are your friends when they say to you, “If you had argued the case, you would have gotten the fifth vote.” I said to them, “Not any chance in the world!”

MR. MARCUS: I agree with you on that, I think. Your batting average would have slid down a little closer to Ty Cobb’s.

MR. MORRISON: Yes, yes. But the other thing—the good thing about having worked on the case is I now know so much about it. I do think it would be a really interesting case to explore from a jurisprudential perspective and how we look at historical events in the context of constitutional construction and what an originalist means. After all, both sides were originalists. We’re all originalists now. And there were some people talking today about some of the parts of the opinion—reading it as a natural law opinion. Well, maybe so. I don’t get very enthused about that particular brand of interpretation. So it will be there and lots of people will see it and talk about it. People will litigate it, but not me I don’t think. I think I’ll stay out of it.

END TRANSCRIPT