ALAN MORRISON, ESQUIRE

Oral History Project
The Historical Society of the District of Columbia Circuit

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The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

ALAN MORRISON, ESQUIRE

Interviews conducted by:
Daniel Marcus, Esquire
December 8, 2007; January 11, January 19, January 26,
February 2, February 10, March 2, March 23,
March 30, April 6 and June 27, 2008

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges who sat on the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Interviews are conducted by volunteers, trained by the Society, who are members of the Bar of the District of Columbia.

Indexed transcripts of these interviews and related documents are available in the Judges' Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Library of Congress, and the library of the Historical Society of the District of Columbia. With the permission of the person being interviewed, oral histories are also available on the internet through the Society's web site, www.dcchs.org.

Such original audio tapes of the interviews as exist, as well as the original diskettes of the transcripts (in WordPerfect format) are in the custody of the Society.

[Standard Form]

INTERVIEWEE ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of [Name of Interviewee]

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Alan B. Morrison, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, transcripts and computer disk of my interviews as described in Schedule A hereto, including literary rights and copyrights. All copies of the tapes, transcripts and computer disk are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tapes, transcripts and computer disk and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, transcripts and computer disk in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

Alan B. Morrison 1/29/09
[Signature of Interviewee] Date

SWORN TO AND SUBSCRIBED before me this
29 day of January, 2009.

Darla R. Wiest-Cooper
Notary Public, District of Columbia
My Commission Expires 11/30/2010

Notary Public

My Commission expires 11/30/2010

ACCEPTED this 2nd day of April, 2009, by Stephen J. Pollak, President of The Historical Society of the District of Columbia Circuit.

Stephen J. Pollak
Stephen J. Pollak

Schedule A

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The transcripts of the eleven (11) interviews are contained on one flash card..

Standard Form

INTERVIEWER ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of [Name of Interviewer] Daniel Marcus

1. Having agreed to conduct an oral history interview with Alan Morrison for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Daniel Marcus, do hereby grant and convey to the Society and its successors and assigns, all of my right, title, and interest in the tape recordings, transcripts and computer disk of interviews, as described in Schedule A hereto, including literary rights and copyrights.

2. I authorize the Society to duplicate, edit, publish, including publication on the internet, or permit the use of said tape recordings, transcripts and computer disk in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

Daniel Marcus 2/2/09
[Signature of Interviewer] Date

SWORN TO AND SUBSCRIBED before me this
2 day of February, 2009

DRW Cooper
Notary Public

Darla R. Wiest-Cooper
Notary Public, District of Columbia
My Commission Expires 11/30/2010

My Commission expires 11/30/2010

ACCEPTED this 2d day of April, 2009, by Stephen J. Pollak, President of The Historical Society of the District of Columbia Circuit.

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The following eleven interviews were conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit

Oral History of
ALAN MORRISON
First Interview - December 8, 2007

MR. MARCUS: This is Daniel Marcus on Saturday, December 8, 2007. I'm interviewing Alan Morrison. This is the first interview. Alan, let's start by your telling us a little about your family, your background, your growing up wherever you grew up and get us to going to college at Yale.

MR. MORRISON: Okay. I was born in New York City on March 10, 1938. My father had been born in the Ukraine and had come to this country when he was four years old with his father, his mother and his older brother. They came to Massachusetts, they lived in Chelsea for a while and then they moved to Brockton where they grew up. My grandfather was a kosher butcher and they had just the two sons and then they had five daughters after that, two of whom died relatively young, one of them died when she was 13, the other one died when she was 19, and every one of their kids went to college. My father went to Clark and then was out for a couple of years and then went to Harvard Law School. He commuted to Harvard from Brockton on the trolley, except during exams when he rented a room there. He was a classmate and friend of Henry Friendly's, although he did not have an illustrious legal career like Friendly did, and he got out of law school in '27; went to New York and it was not easy to get a job in those days and he did not get a law job, he did various business and corporate reorganization things. He and my mother were married—I'll get to my mother in a second—in 1934. They lived in New York City until the beginning of World War II when my father, who was then 41 years old, was too old to be drafted but enlisted anyway, as a lawyer, got a commission as an officer, but didn't do legal work. He got somehow into lighter-than-air work; he was, I don't, I can't remember what his exact job was, he wasn't a pilot, but we went to California and were there for a few years during the war; came back to Washington for a few months and then moved to Larchmont, where my parents lived until they died. My mother was born in Troy, New York. Her father was a refugee also, came from Poland when he was about 15; became very successful in the dry goods business, had a whole bunch of stores which made a good deal of money for a while; and then he had a great idea to let people buy things on credit and he made a lot of money because nobody was extending any credit in those days; he lost a bunch of it during the Depression but not all of it; he had 20 or 25 stores in the northeast; they then moved to New York City and eventually the business went down because other people had the same ideas and better ideas. My mother went to Emma Willard School in Troy and then she went to Wellesley; and came to New York and worked for Macy's for a while and then she did not work after she and dad were married. The other interesting thing about them was that they went to what was then Palestine right after they were married and stayed there for a year and they almost immigrated—

MR. MARCUS: Wow!

MR. MORRISON: —but decided that since all the family was here in the States that they would come back and so they did, but that was the beginning of my father's involvement with Israel. And in 1947, at the time of the war of liberation from England, he became reconnected with people he had met when he was in Israel, and they were in a shipping company and none of the neutrals would ship to the Israelis when they were fighting and so they had to get their own ships and set up their own companies, and dad did a lot of that; and then he became involved with the setting up of companies in Israel and then the setting up of the Israel Discount Bank in New York City where he was their U.S. representative for a while; and then he did some other business stuff. He practiced law very briefly right before World War II and right after World War II but it was never really what he wanted to do.

MR. MARCUS: What impact, if any, did your father's legal education and sometime career as a lawyer have on your own thinking about what you wanted to do?

MR. MORRISON: Not very much because dad was never very enthusiastic about the law; he didn't say anything bad about the law, it just wasn't the right thing for him and also, it was a question of time and circumstances and so forth; but I always saw it as a respectable job. I think in many ways the most, one of the most formative things that my father did was to go into World War II when he didn't have to. Now it's true that he didn't put himself in danger, but he didn't know whether that was going to happen when he went in. And it disrupted his career. My sister is two years younger than I am, we were young children, and we got moved across the country, far away from everybody's family, and it always struck me as being an important thing for him to have done. And that was always kind of a public service message that I got from him, and the family has a long tradition of helping other people out and doing kind of public service things.

MR. MARCUS: Okay, well let's turn from your parents to your own education and maturing as a young man and your college and law school experiences.

MR. MORRISON: Okay. I went to public school in Larchmont, which is a small, suburban town about 20 miles from the city or 20 miles from downtown. We lived in a comfortable house. I went to, I'm 99 percent certain this is correct, an all-white grade school, not because it was segregated, but because it was economically segregated there; I think there may have been a couple of Japanese in the school but there were certainly—well there were no Hispanics, of course, living at the time in that area. The junior high school and high school drew from four grade schools, two of which were in Mamaroneck and both of those, especially one of them, had a substantial proportion of low-income African-Americans and Italians; it was definitely a substantial portion of lower-income Italians, there were a few non-lower-income Italians but most of them, at least in that school, were lower-income Italians who did the gardening and other kinds of work like that.

MR. MARCUS: This would've been in the early 1950s?

MR. MORRISON: Yeah, I finished high school in '55. I was always, my birthday is in March, and because in World War II, when we were in California, they wanted to get the women out of the house as soon as they could to work in the factories, and so one could start school at four and a half or five and a half, whatever the half, and so I was always younger than most of the kids in my class; in fact, most of the kids in my class were a full year older than I was. I always say this was the reason I wasn't a great athlete, athletic star, but I know in my heart that that's completely false, that my lack of speed, strength and agility were much more of a factor. The schools were tracked, didn't have labels but it was perfectly clear, certainly in hindsight, that it was a very good public school system. The one thing I think in retrospect about it that was not so good, other than the tracking aspect—and this is probably true of most grade schools and high schools—is we really didn't do much writing, but it was still considered a very good high school and we had lots of kids go on to all of the good schools.

MR. MARCUS: Well let me ask you a question before you move on to your college experience. You mentioned that when you got to junior high school and high school there was a more diverse student body.

MR. MORRISON: Right.

MR. MARCUS: Did that have any significance in your own intellectual or social development or your own movement toward sort of an interest in public policy, social policy?

MR. MORRISON: I would say I don't think so. We got used to having—well just take the African Americans—well as they were then called, Negroes. We certainly used to have them in the school, they were all on the athletic teams, we played ball with them, but we didn't socialize with them. There was a relatively small number of them, I would say probably in my class of 200 and something, two and a quarter when I graduated, there were probably 25 or 30, I would say maybe, well probably about that, and almost none of them were in our classes. Some of the working-class Italian students seemed to be intellectually upwardly more mobile, and hard to know whether this was because they were tracked when they were in the grade school and—had less good education or whatever else it was, but we didn't see them very much in class but—they were around and that it was you were perfectly comfortable with them that way but you didn't, they were not part of your intellectual work or social life.

I mean, I don't say that we never saw them socially, but rarely. Now the other thing that happened was in the middle of my junior year an organization called the American Field Service came around and they said, "We're looking for people to go to Europe this summer." And my closest friend, who still has continues to be a very close friend of mine today, said, "What a great idea." This was 1954 and I had taken French in school—French was not good but it was okay, I mean, it was what you would expect after three years of French—and so we applied and we got accepted; he got accepted to go to Belgium and I was accepted to go to Germany. Well this was five years, seven years after, eight years after the war, and my parents were quite apprehensive and I was

uncertain about it. It turned out that the mother in the family was Jewish and the father had been in some kind of service job in the war, I mean, it was almost impossible to avoid being in the war. But we made the decision to go and that was a quite formative experience; it got me out of the United States, it got me into a different country, in a different place, and I think it was probably very helpful in getting into college because I'd done something quite different from what most people had done; and it kind of it made me think, of course, that I was a very worldly person when I came back for my senior, which was not true in the slightest. But it was a very interesting experience and I learned enough German so that I could get around then and I still occasionally can do it if necessary.

In my senior year in high school I applied only to a couple of colleges, probably stupidly so; I applied to Amherst, which is where my best friend went and I partly decided not to go because I thought I should not go to school with my best friend, rightly or wrongly; and I applied to Yale and I got into Yale, but I had also, this was in 1954, when the draft was on and everybody was going into the military and it was not a question of whether but when and how. And there was a Naval ROTC Scholarship Program which paid for tuition, and since I thought I was probably going to have to go in anyway, my dad had been in the Navy and I figured, well why don't I apply for it (and he encouraged me to apply for it), and I figured that the Navy was better than the Army and so I applied for it and I got accepted into the program; but then Yale had a limit on the number of people who were accepted into both Yale and the program and they had more people than they could take for the program. And so I tossed and turned around for a few weeks about whether I should try to go to some other school that had the program or whether I should go to Yale without it, and in the end somebody didn't accept and so they took me into the Naval ROTC program, which was actually both very good and a little less good; it was a little less good because I took some courses that I probably wouldn't have taken at Yale because you had to take them, and it was at Harvard, I think, had a program that these NROTC courses were always in addition to the regular courses.

Although there was a fascinating course in military history that I took and they had a course at that time, most of the Navy court-martials in that time, special court-martials were handled, not by lawyers but by line officers, and so everybody had to take a course in the Uniform Code of Military Justice, and that was a very useful, formative thing for me because I realized that this was fun and interesting and I was very good at it. And so, then when I got into the Navy I did a lot of court-martial work, which I could talk about if we have time. And so that was one part of it, and so I went to Yale and did that and that meant, of course, that when I got out of Yale I had to go in the Navy for three years and I ended up staying for four, which I could talk to you about in a minute. I had an okay experience at Yale; I would not say that I didn't love it; I had a bunch of good friends; I worked on the radio station, which was kind of fun, news, disc jockey, broadcast sports; and of course Yale was not coed in those days, so when you wanted to go out on dates you had to get in a car and go someplace, which was a bother.

MR. MARCUS: And it wasn't as diverse as it was—

MR. MORRISON: No. There were only two black students in our whole class. It changed after Kingman Brewster came in, in the late '60s.

Our older daughter went to Yale and I tell this story; in my class there were 1,000, in her class there were 1,400; in my class a quarter of the class came from Andover, Exeter, Groton, so forth, and there were probably 50 from Andover and 50 from Exeter more or less; in her class of 1,400 there were 15 from Andover, of which half were women. So as it changed the face of it and it's a much more intellectually rigorous and intellectually accepting place now—Nina graduated in '92 from Yale—than when I went there. But it was okay I went there thinking that I might want to be a math major and in my second year of math I realized that there were a lot of people who where much better at it than I was, and I stopped and ended up going into history. I wasn't wildly excited about history but it was interesting and I'm glad I did it. I wrote a senior thesis paper about a guy named Grover Cleveland Bergdoll, who was a famous draft dodger in World War I. And in the course of it there was a lot about his case and so I went and read Supreme Court papers, and so forth and so on, and that kind of furthered me along in my thinking about what I wanted to do when I got out.

MR. MARCUS: When you started college you weren't—well you said you were going to be a math major, so you obviously weren't thinking that much about becoming a lawyer at that point. What would you say were the other things at Yale College, in that experience, was it just becoming a history major and then sort of reorienting yourself?

MR. MORRISON: I have a hunch, I've never really given it a lot of thought, but that law was always sort of in the back of my mind. And I was very good in math in high school, as lots of people were, and so that seemed like an okay thing to do, and I think I didn't think that it would be a problem going from math to law.

MR. MARCUS: Did you ever consider an academic career in history?

MR. MORRISON: No. I would never, I was not an academic. I mean, not an academic, certainly not for history, that was never given a thought. So I finished Yale in 1959 and I went in the Navy. My first ship was stationed in Long Beach, California. Are you from Long Beach? They used to say, "Long Beach by the sea and San Pedro by the smell." And, my Navy experience, I view it with great fondness, not in any sense every moment that I spent in it, but that it was a wonderful maturing exercise for me. It gave me an opportunity to see how people did jobs properly; I learned from some of my superiors how to be a good boss and how to be a terrible boss. I got to go all over the world; and I met a number of people who are today among my closest, still closest friends, and from very, very different backgrounds, different parts of the country, different majors, different interests, religions, a quite diverse group of people and we are still, a lot of us are still very, very close today. And I always tell young people that, "Take a few years out before you go to law school." Don't do it because, "My God it's September, I've always been in school in September, I've got to do it again. Be sure you really want to go." And then when I got to law school and I was—I'll explain to you in a second, it took me four years to get through the Navy instead of the three that I had given—but

when I got to law school I was one of the—at Harvard there were 535 people and I was one of the half a dozen oldest people in my class, even though I was one year younger, in terms of time out of school there were no more than half a dozen people who were four years or more out of school. And when all the students were complaining about law school I said, "How can you complain? Does anybody wake you up in the middle of the night to make you stand out in the cold? Do people yell at you? They don't tell you what you can wear, what you can eat, how can you be complaining? You get to read all these good stories all the time." And, but more seriously, I was able to put everything in perspective in a much better way and, of course, I had real-world experiences that I could see, relate to in class, and so forth, and so that was extremely valuable. I went in the Navy, we were in Long Beach, we were there for four or five months, then went to the Pacific. When we were in the Pacific we were there, we were in Japan and then when it was relatively soon after the war, this was 1960—

MR. MARCUS: The Korean War?

MR. MORRISON: Correct and well, yes, and well for Japan, World War II.

MR. MARCUS: True.

MR. MORRISON: They had made recoveries but it was by no means what it was and there were relatively few Americans there. We went, we stopped in Korea briefly, were at – and where else did we go—into Hong Kong and then we went to Australia, too, which is very nice. And to digress for just a second, but—

MR. MARCUS: You were not married at the time?

MR. MORRISON: No, no. No, we got, I didn't get married until after I got out of law school. They used to say to us that, "If the Navy intended you to have a wife they would've issued you one with your sea bag." And it was a good thing for everybody, I mean, it was okay, people did it, but this was…just better, your life was better.

MR. MARCUS: Simpler, yeah.

MR. MORRISON: Simpler, yeah, yeah. Went to Australia and when I was in Australia my aunt had some friends down there and she asked, suggested that I call them. And when I called them they invited me for dinner; they were in the motion picture business there, my aunt and uncle were not in the motion picture business; they invited me to dinner. So I went to dinner and who should be there but Charlton Heston. Well what's really funny is when we were getting ready to come back to Washington this year, I found some old photographs and one of the photographs is of Charlton Heston and his son, who was then eight years old, whom I invited aboard the ship the next day.

And we have this photograph of Charlton Heston, his son and me in front of these enormous guns; and now I'm going to be arguing the gun cases in the Supreme Court with Charlton Heston on the other side. I think he'll be quite embarrassed by the picture;

well, of course, he's not embarrassed by much of anything anymore because he's not at all with it. So I went to Australia and we came back; and then our ship was sent to a shipyard in San Francisco and so we spent four months in dry dock in San Francisco; and then we moved down to San Diego and we were there for a while; and then we went back to the Pacific again, and this was, we're now in the fall of 1961, and the Berlin crisis has just taken place and the Navy is involuntarily extending people for six months. By this time, I had done a lot of court-martial cases onboard ship. I was principally the prosecutor; although in one case I defended an enlisted man who had been on the beach and gotten drunk and picked up by some gays; and they took him someplace and they were performing sex acts on him, and the cops caught them; and the Navy had a proceeding to drum him out of the Navy for whatever they called it, and I defended him unsuccessfully and he got a general discharge; maybe that was a success because they didn't court-martial him, they did an administrative proceeding and he got a general discharge, which meant that he could get a job. General discharges were under honorable conditions, as opposed to less than honorable conditions. But generally I was a prosecutor and most of them were relatively straightforward cases; usually unauthorized absence or missing ship or things like that. I did prosecute somebody for negligent homicide; a marine had discharged a gun and killed somebody onboard ship, got a conviction which was later overturned; I don't know whether it was the right answer or not but the guy was clearly negligent and whether it should've been a homicide or not I don't know; it wasn't my decision to charge him. I said to one of the commanding officers, "I'd like to be the defense counsel." He said, "No, no, you're too good, I don't want you as the defense counsel." But that pretty much cemented my interest in doing that. So I knew I wanted to go to law school after I got out and I was not happy about the potential for six months' extension, and I had no idea whether it would come or when it would come. So I called a former commanding officer of mine, who had by then become an admiral, and I said to him, "If I'm willing to extend for a year, what kind of interesting job could you get me? Could you do that?" He said, "I'll be glad to call the Bureau of Naval Personnel. The next day he called me back and he said to me, "I have two potential jobs for you; one is an aide to an admiral, which would've been quite interesting, I didn't know the admiral or anything about him. I said, "Where is that?" And he said, "It's in Norfolk but that they go all up and down the East Coast and probably go to Europe." I said, "Okay." I said, "What's the other one?" He said, "It's on the *Springfield*, which is the flagship of the Sixth Fleet which is based in Ville Franche, France, five miles from Nice on the Riviera.

MR. MORRISON: And I said, "This is five miles from Nice on the Riviera?" And I remember my father said to me once, well it was probably more than once, he used to say this about letters and big decisions: "Sleep on it." So I said, "Can I call you back tomorrow?" He said, "Of course." And I called him back tomorrow and I said, "I'll take the *Springfield* job." And so in the end of December of 1961 I left California; came back East; went to Europe; and then went on the *Springfield* where I had a glorious time in the south of France, traveling all around the Mediterranean and doing all sorts of interesting things, met a whole bunch of interesting people there. And it turns out that I would probably not have been extended but I never cared about it, it was only one more year of my life and so this was much more enjoyable and interesting and fun to do that.

MR. MARCUS: Yeah. But you didn't do any court-martial work during that period?

MR. MORRISON: Oh, no, I did some more court-martial work on ship, we still did a bunch of them. It wasn't until a few years later—these were special court-martials, the maximum penalty was six, six and a kick; six months in the brig, six months loss of two-thirds pay and benefits and a kick out of the military, and so they were not the most serious crimes but we still did some of those. And then I came back and went to law school.

MR. MARCUS: Did you apply to law school while you were in the Navy?

MR. MORRISON: Yes, yes, in fact, probably also unwisely, I applied only to Harvard and Yale and I didn't get into Yale and I had gotten deferred at Harvard and I suddenly panicked and then about a week or two later Harvard came through and accepted me and I said, "Yes," and went there; this was in the fall of 1963 and as I said, I was more than happy and ready to go to law school. I did not want to live in the dormitories so I took a small apartment. Law school at that time was, I think, $2,000.00 a year; my father was able to afford that.

MR. MARCUS: I take it because of your ROTC scholarship you were, that pretty much covered your college costs?

MR. MORRISON: It covered the tuition portion and they gave me, I think, $50.00 a month, which didn't cover the rest of them, but my parents were certainly able to afford that. I mean, they could've afforded the rest, then they wouldn't have been pressed, they would just have preferred not to have it, and since I was giving my time to the Navy nobody thought that that was an unreasonable thing to do. Yale was, room, board and tuition was $1,800.00 a year and it had just increased from 1,600 and stayed the same for four years. My recollection of Harvard Law School tuition was 2,000 and—with your other expenses it would probably be around—is that what you recall law school being about that price at that time?

MR. MARCUS: Yeah, right.

MR. MORRISON: And…probably another 1,500 or $2,000.00 a year; a little different from the cost of today.

MR. MARCUS: So you lived off campus?

MR. MORRISON: Yes. I went to law school and I loved it from the day I walked in. It was absolutely, it was the right thing for me. I had actually gone—I had a friend at Yale and one of the trips back across the country, maybe it was when I was going over to Europe, I went up and saw him in New Haven. I went and sat in on a couple of classes, and this was in the middle of the year. I had never been to law school, but I could understand everything that was going on, I could answer some of the questions and it seemed to me, "Okay, that's what this is about, that's this." I don't know whether I'm

smart or not but I'm law smart. And I realized that that would, that I had sort of figured this out before that this was, although I had not done particularly well on my LSATs, and so I loved law school; I loved it from the first day I was there, I participated lots in class. We had a small study group; one of the other members of the study group was one Larry Tribe and we were very close friends in the same class section in law school. In those days in law school, at Harvard at least, you had the same 125 people in your section the whole time for all of your classes.

MR. MARCUS: Just for the first year or for the three years?

MR. MORRISON: For the first year and then you had a section in the second year which took up—I think we had accounting for half a year, tax, corporations and constitutional law for a whole year and then you had a couple of other electives, and then third year there were no sections because you didn't have any mandatory classes. Stanford has sections but they have six sections, because only 170 students and there are 30 people roughly in a section, and you pair up with one of the other sections so that you get to know everybody in the class. But with Harvard, you had 120 or 130 people in your section and you had the same section for all your courses. And, of course, in those days you all had the same classes and the first semester you had legal research and writing and then all the rest of the classes were year-long classes and you took no exams until June. And you had a practice exam which everybody did badly on and you learned from that. And so we had our study group, we had, my recollection is, I'm pretty sure I'm right about this, we had six days of classes; we had Saturday classes…

MR. MARCUS: We did too, yeah.

MR. MORRISON: …and Louis Loss always used to say, "The beginning of the end of the Harvard Law School was when they abolished Saturday classes." Most of us thought that Louie said that because he could consult more easily and teach class on Saturday, which he did, and then he could have other days during the week to do his outside consulting. First year, six classes at 9:00 in the morning and then we had an hour break and we had six classes at 11:00, and every day we would go over to the Harkness Cafeteria, sit down and have a cup of coffee and a doughnut and talk about either the last class or the next class, and then we all had lunch together six days a week. And three days a week we had classes at 12:00. And then we would go to the library in the afternoon, study at the library. I would try to go to the gym and play basketball at 4:30 or 5:00 so I could keep my sense or maybe touch football or something in the fall; and then I'd go home, I'd cook dinner, study for a few hours and go to bed. I worked hard but I didn't work incredibly hard. I realized that the job was, to understand what was going on, and I figured out that I pretty much understood what was going on. And I did very well on a couple of exams and in those days, all of the honor organizations were determined based on grades and so I was in the top, I don't know I was about 50th or something in the class and that they gave you actual numerical ranks of everybody and that meant I was on the—the first 25 are Law Review, the next 10 or 15 were the board of student advisors who ran the moot court, and then the last group of people was the Legal Aid, so I was on Legal Aid.

MR. MARCUS: So how did you sneak on the Law Review?

MR. MORRISON: They had a half a dozen, at the end of second year they put on, I think eight; four based on second-year grades and four based on your cumulative grades. And I think what happened was that I didn't get any smarter after my first year but that I figured out how to write answers to the exams, and starting in my second year my grades were just really high. I had been on the Legal Aid and I was elected president, but I think the prestige of the Law Review was just too much to turn down and so I walked away from Legal Aid, which I felt a little bad about but not bad enough about it not to do it. So, I went on the Law Review for the last year. When I was in law school, after my first year I worked in New York at the law firm of Stroock & Stroock & Lavan; an old friend of my father's was a senior partner there and he said, "Come down and work for us." And so I worked that summer—I think I made $75.00 a week, and that was okay. I mean, some of the work was interesting but didn't particularly excite me.

MR. MARCUS: Was that after your first year?

MR. MORRISON: Yeah, the first year.

MR. MARCUS: Which is unusually hard I guess.

MR. MORRISON: Very. Well it was only because my father knew one of the senior partners and that this was a personal, not a business relationship. And that was fine, I did fine there and it was okay. My grandfather, who was then still alive, lived in the city and I stayed at his apartment, so I just took the subway down; he was most of the time up in the country, they still had a house up outside of Albany; and I took the subway down and lived in the city and that was kind of fun. I'd never lived in Manhattan before, my parents still lived in, well it was a different house by then but still lived within a mile or two of where they had lived in these other various places. And then after my second year I worked at the U.S. attorney's office in the Southern District because I thought I wanted to be a litigator and I went there; they paid me $3.00 a day, which was not $15.00 a week because I didn't get paid for the Fourth of July. That was enough; as I recall it paid for my subway fare and maybe washing a shirt but it didn't pay for my lunch even at the courthouse.

MR. MARCUS: But were you living with your grandfather at that time?

MR. MORRISON: With my grandfather and so I had a place I didn't have to pay rent, and my parents staked me to not very large sums of money so that I would have something to live on. And that was quite an interesting experience. I worked on some various criminal cases there and it was interesting and exciting and it sort of made me feel as though I probably wanted to go back there at some point; they didn't take people right out of law school. And then I'd gotten on the Law Review and so I went back for my last year at Harvard.

MR. MARCUS: By the way, just to interrupt—

MR. MORRISON: Of course.

MR. MARCUS: — as that when Morgenthau was the U.S. attorney?

MR. MORRISON: Yes, yes, it was the summer of 1965.

MR. MARCUS: Before you talked about the Law Review you talked a little about your experience with the Legal Aid, whatever it's called—

MR. MORRISON: Legal Aid Bureau.

MR. MARCUS: —Legal Aid Bureau, and did you actually serve as president or you were just elected president?

MR. MORRISON: No, I served as president for two or three months; the turnover was, I think, spring break. It was a very interesting experience. At that time Legal Aid was a very tentative organization because the Massachusetts Bar made all these noises about, "We know—we're allowing you to practice to do these cases." And they were divorce cases, adoptions and a few very simple things, nothing aggressive. A landlord/tenant case would have been very aggressive, and welfare, don't even think of doing those things, and they were, see it was sort of the beneficence that they were going to let you do this. And I remember after I became president I met with Erwin Griswold, who was then the dean, and he explained to me how important it was that we retain our relationship with the Massachusetts Bar and how kind they were to let us do this. And afterwards, at some point later and I can't remember when it was, thinking what a bunch of bullshit that was; that here we were doing work that none of their lawyers would ever think of doing, we weren't taking a dime from anybody; they had an obligation to see that these people got legal services and they were treating us as though they were doing us a favor, which was really quite insulting, but that was the milieu and Erwin was not a big boat rocker; and so I never got to the point of really what I would have done the next year, whether I would've tried to do anything more, probably not, but it was a situation in which you did what you could. You saw some people who really needed help. Divorce was very limited in terms of what you could do. I remember walking out of the courtroom one day with a woman and she had – everybody knew what you had to say to get a divorce, the irreconcilable differences and hadn't seen them, and—this woman said something like, "God forgive me." She didn't lie probably but she understood what she needed to do. And there was this other woman who I helped who had these terrible debt problems and you knew that the problem was not her inability to manage her own money; the problem was she didn't have any money and she had all these kids, and so forth and so on, and you just tried to help them out and talk to them. We tried to improve the system internally, get some better training; the lawyers who were in charge of us didn't really train us very well and we sort of muddled through. But I enjoyed working with a woman who was in charge of the—we had an administrative person, Betty—I'll think of her name in a second—anyway, we became very friendly and I would always see

her when I would go back up there. And if you don't mind my getting ahead, it was, oh, in the late 1980s and the Legal Aid was having their 75th anniversary dinner, and I got a call from Betty Allbach her name was, and she said to me, "I need you to do me a big favor." And I said, "What's that?" She said, "Justice Brennan, who had been our speaker at our 50th, was supposed to come and speak but he has shingles." And he, his doctor said to him, "Do not travel—you need to..." this was in 19 what, 87 or 88, something like that, maybe '86 but, he said, they said, "And we've tried to get Thurgood Marshall to come and Blackmun and neither of them is able to make it." So she said, "Would you do it?" I said, "Will I do it? Of course I'll do it." So I got up and what I said there, I told the story about how I'd been asked to do it and I said, "It reminded me of the time that the New York Giants traded for Y. A. Tittle, and there was an offensive tackle named Lou Cordileone, and when Cordileone was told about the trade he said, 'Just me!' and that's how I felt today." So Legal Aid was significant in that it exposed me to what I had kind of known. One of the things I had done in the Navy, when you're out at sea you can go to the movies every night, which I didn't much want to do; you can play bridge, which I played a fair amount of, it's amazing how nobody plays bridge anymore. And you can sleep a lot; and I read books, and I read—probably 50, 60 books a year; I read a lot of law books about lawyers, I remember a book, Louie Nizer's book, I read one of Barrett Prettyman's first books, and that kind of got me going even a little more. And I understood a fair amount about our legal system and why it wasn't very good and Legal Aid certainly pushed me but not really hard because we were so marginalized in terms of that it was a noblesse oblige to allow us to do these cases. And so then I went back and went to Law Review and Law Review was very interesting and I think it was formative in one respect and that was you got plenty of opportunity to write and most important of all, rewrite; you rewrote other people's work and people rewrote yours and what you learned was that it's very hard to write good things yourself and that, therefore, you shouldn't feel defensive when people start to edit your work because if you care about really good quality it takes a lot of effort and we have defense mechanisms and mental blocks that preclude us from seeing what's wrong with our work, and you have to psychologically pull away from that and allow yourself to be edited by other people and not be bothered and humiliated by it and think that you're bad, lazy, stupid or anything else, and that you only get good writing when you learn to rewrite and that was the most important thing that I got out of the Law Review. At this point, I'm in my third year now and I was trying to decide what I was going to do. I applied for some District Court clerkships and I got a couple of offers. I did not apply for any Court of Appeals clerkships; it struck me as it would be kind of another year of Law Review and law school and I didn't want to do that.

MR. MARCUS: You're right.

MR. MORRISON: Even though, of course, they had many fewer clerks then than they have now, but you could apply for Supreme Court clerkships at that time and so I did and I got interviews with both Justice White and Justice Stewart. And I had been a research assistant to Derek Bok before he was the dean and the president, when he was at law school, he taught one of my classes and I became very friendly with him then and we've kept up our friendship ever since; he writes me and, I put his name on a committee when

they had the dinner for me when I left Public Citizen, and we have lunch occasionally when he's around and he's always been extremely nice to me, so I asked him to write a letter and he said to me, and I remember this, that he said, "I'm going to write you a letter and I will do a very strong letter, but there's somebody else who is a year ahead of you who has been out for a year who I'm going to tell you, I'm ranking him higher than you and I just want you to know that when I write it..." I said, "Of course." "...and it's Bert Rein"—whom I didn't know but he told me what his name was.

And so I didn't get the clerkship. It turned out that just right around the time when the clerkship thing was being completed—this would've been in December for the following summer, which is of course way after they do the clerkships now—I was at a wedding of an old friend from Larchmont and it turned out his father was a very close personal friend of Justice White and I knew this man very well and he offered to write a letter of recommendation for me to White. It turns out that by the time the wedding was over and he got back and he wrote the letter, it got to White after he had made his decision. So—maybe I would've gotten the clerkship with White and that would've put me in a different thing. Because you're going to see, we're about to get to the first one of these stories that I always tell students, about how serendipitous life is and how something happens that causes you to do something different than you would have done otherwise.

MR. MARCUS: Before we get there, Alan, say a word or two about whether there were particular professors at the law school, besides Bok, with whom you had worked who had a great influence on you, just as terrific professors or in terms of shaping your approach to being a lawyer.

MR. MORRISON: Well there were several. Paul Bator, with whom I philosophically disagreed later, more later on than then, taught me Civil Procedure. He was a wonderful teacher and I still hear his cadence in the class and I did very well in his class. And the irony is that the first year I ever taught at Harvard he was going to teach at Chicago that year and we rented his house. It was a very fancy and elegant house, much too nice for us. I don't think we properly took care of it though. We had two small kids and—we are not the world's most fastidious people, we're not slobs but we're not fastidious, and renting houses—what is it Shakespeare said, "Neither a landlord nor a tenant be."

So Paul Bator was eventually on the other side of the sentencing guidelines cases, where the big fight was whether these rules were substantive or procedural and I remember him saying to me, "Alan, didn't I tell you, teach you about the difference between substantive and procedural?" I said, "Yes, Paul, you did but you got it backwards!" Okay, and so this was back from our first year in law school, I had Lon Fuller for Contracts and I remember Fuller was such an interesting man and he taught me a bunch of things that I still remember. He would come into class and he'd say, "Now in the case of Smith against Jones the court said such and so and so, what do you think of that?" And I knew as soon as he said it that he thought that they had missed the boat entirely. And here I had thought about it and the court seemed so absolutely right, and as soon as he said you could understand what it was, and then in the end he came back to say, "Well they got it wrong this way but the result was about right for these other reasons." And he

empowered me to challenge authority in cases; he just said that was okay that you could do that. And so when I've taught from time to time I remember that one of my great moments is when the students say, "The Emperor has no clothes, the court is just wrong about this." Second thing Fuller would say, somebody gave this big, long answer and he said, "It's an awfully long windup for a very short pitch." But he had this twinkle in his eye and he used to sit on the corner of his desk and it was just wonderful what he did. He was supposed to be a great philosopher in jurisprudence, but I never took his Jurisprudence course, it didn't interest me, but he seemed to have a great sense about contracts and I really liked him and appreciated him.

I had W. Barton Leach for Property. He had an impact on me because of two things. One was that he practiced law outside and he was very aggressive with his clients in terms of—his job was to represent them and he didn't care what the government said. He also had what was known as ladies' day in those days. We had 25 ladies–women–in our class out of 500 something and they were evenly divided among the four sections so we probably had six. And he never called on the women except on ladies' day when he would sit them down in the front of the room and he would throw high hanging curve balls to them. And we had one woman who was then about 33 years old. We thought she was really ancient, and she had three children, and she didn't take very kindly to this whole thing, but the rest of us just sort of went along. The other thing I remember about him is somebody said something about justice and Leach said, "Justice? You want justice? Go across the street to the Divinity School. This is the Law School." And I remember thinking, "Oh, that's not quite right." It was very cute, but it was wrong.

And then I had David Herwitz. I had him for Accounting and then for Business Planning. And he was a wonderful teacher. He taught in a practical way. Everybody thought Accounting, why do we have to take Accounting? It turns out to be an extraordinarily valuable course no matter what you're doing, and I tell people this who go into nonprofits or whatever they're going to do, the government.

MR. MARCUS: I'll bet it's not still required.

MR. MORRISON: It is not. It's not required anyplace. Required courses are bad. Students don't like required courses and they like to be nice to the students. And somebody said something to Herwitz about, "You can't do this." And he said, "Well why not?" He said, "Am I going to go to jail? Is it going to take my wife and children away?" Somebody said, "Well you have watered stock." He says, "Oh, now you're talking about something." And I always remember that day, the why it matters. And then he taught this Business Planning course in which he would talk about what the objectives are and how these legal things didn't matter except insofar as they told you what you could and couldn't do and they shaped your thinking. And he was a wonderful teacher. Derek Bok was a wonderful teacher too. I would say that they were—almost none of them was pushing to have redeeming social value in what you did. There was nobody that pushed me to my eventual career. They taught me how to be a good lawyer and that was very important, but they didn't teach me how to do what I wanted to do and didn't make me want to do it in particular any more than anything else.

MR. MARCUS: So when you came out of law school, it wasn't with the vision of a public interest career?

MR. MORRISON: No. Well there were really only two public interest organizations: the NAACP and ACLU. That was it.

MR. MARCUS: Charlie Halpern.

MR. MORRISON: Charlie Halpern, oh he was two or three years away. Anyway, I had always been in New York, but I decided to come down and take a look at Washington. I had a friend who was a college roommate for a couple years named Jeff Bauman who now teaches at Georgetown. And I came down and spent time with him and he was, at that time, at the SEC and said how much he liked Washington, how much he was a real New Yorker and always lived in New York, what a great place it was to live. And so I came down and I interviewed. I did talk to Wilmer, Covington, and Arnold & Porter. This was in the fall of 1965. I got an offer from Covington. I think I did not accept a callback to Wilmer. I don't quite know why. I think I wanted to do litigation and as you said before, the firm was not doing much litigation in those days.

MR. MARCUS: It was very small.

MR. MORRISON: It was 35.

MR. MARCUS: Less than that. I started at Wilmer in '66 and there were only 28 lawyers.

MR. MORRISON: Okay, so it was 25. And Arnold & Porter was about 35 or 40 and Covington was a huge firm, it had 100.

MR. MARCUS: 80 or 100, right?

MR. MORRISON: Yeah. Interestingly, it didn't grow anywhere near in relation to where the others have grown. So I was offered a job at Covington and I came to Arnold & Porter and I really liked the place. I liked it because people did a whole variety of different things. I liked it because they had a lot of pro bono stuff they were doing and they were—seemed to be in the middle of a whole bunch of stuff. It was the right size, the people I really liked there.

MR. MARCUS: And they had a nice house.

MR. MORRISON: Yeah, yeah, right on 19th Street. And so I liked them and they said they liked me but then there was this problem. Abe Fortas had just been made a Supreme Court Justice and this was a couple years after *Gideon* and they had all these law clerks, people who they had made offers to before they had gone to clerk on the Supreme Court, who had worked for them in the summer, and they were worried that they wouldn't have

enough business. And so they said to me, "We have to sort of see how we're doing with our business and who's going to come back and who's not." And, of course, nobody pressures Supreme Court law clerks to come back right away. So this was in December. And then every week Bob Herzstein and I would have a conversation and he would say, "I really want to"— And it's going on and on and now we're getting into February. I had, meanwhile, an offer in New York at Cleary Gottlieb, which I also really liked, but I liked Arnold & Porter more, at least I thought I did. And in those days, people would take a pre-bar review practice course on Saturdays in Cambridge. And this guy came up and it was just sort of a way of easing into it, and it wasn't very expensive, as I recall. And it did it—of course it was lousy weather so you couldn't go outside anyway—and we did it for a half a dozen Saturdays so it made it easier. And so I was doing that. And I was about to do that. And I was not about to do that if I was going to go to Washington. And finally I said to Herzstein, "You've got to tell me–this week–besides, I want to know where I'm going to go." And he said, "Give me one more week." And I call them back and they said to me, "We need one more week,"and I said, "No."

And so I went to New York, I went to Cleary. And I really liked the people at Cleary; they were really nice. I started there in the fall of 1966. It was considered a big firm in New York. We had 55 lawyers. People tell me that was a big firm. We had half a dozen people who came in with me. A couple of them had been out two years. Some had been out one year and a couple of them in my class. And they let me do all sorts of different things. I did some litigation and I did some tax work. I really didn't know—I sort of thought I wanted to do litigation but I didn't really know what I wanted to do. And then the single most significant thing at Cleary that happened was one of the associates–actually two of them–said to me that they knew I wasn't married; they said, "We have a woman we want you to meet." And it was one of the associate's first-year roommates at Smith, who was Anne. "And we think you'd like each other." And so we met and we've been married over 40 years now. So I always tell students your first job is really important but not necessarily in ways you're going to expect.

I think I did a whole bunch of things at Cleary, and they were fun. I liked the people. They gave me a lot of responsibility. I remember, I couldn't have been there a month and somebody came in and said to me, "One of our clients, *Scientific American*, wants to do a joint venture with an Italian publisher in Italy for an Italian edition of *Scientific American* and so we've agreed to draw up the papers for them." So I said to them, "You have something like this?" He said, "No." I said, "So what am I supposed to do?" He said, "Try it." So I sat down and literally, what I figured out was if you think hard enough, you can think hard enough, you don't need so many forms, you don't need to do it. And it was really intellectually challenging work. Some of the other business-side work I saw was not so interesting, marking up loan agreements, and so forth and so on. We were not assigned to particular partners or assigned departments. You just did everything, which was perfect. If you had a very strong preference, either positive or negative, they would honor that, but otherwise, they just wanted you to rotate around and see a bunch of different people.

MR. MARCUS: It was the age of the generalist.

MR. MORRISON: Yes, yes, at least at the associate level. And I was there four months and I remember being called in and Fowler Hamilton was one of the senior partners and he said to me, "You're doing very nice work. We are very pleased with your work and I want to tell you something. We have a lot of smart people here. We do good work. But," he said, "we want you to have another life. And when you're done with your work at 5:30, if you don't have some reason to stay, go home. Go do something else. We don't count the hours. We don't work that way. You know and we'll know when you have to stay to do something, but otherwise we expect you to go home. And you know nobody's sitting around counting the number of hours." And that was the way that law was practiced, at least at Cleary Gottlieb.

I'd been there probably a little over a year and a partner called in and asked me if I'd come talk to—the client was coming in, "would you sit in the meeting?" I said yes. And the client was a French company that was, wanted to lease some space, and we were going to do the negotiations for the lease of space in New York. And he didn't even know this when he called me in. He said, "Do you speak French?" And I said, "Yes, I speak passable French." It had gotten better from my time in the Navy. Yes, yes, yes. Although the principal vocabulary I needed there was different from the vocabulary that I needed here. And so we did that and it wasn't a very big transaction, complicated thing. And, meanwhile, Anne and I met and we had gotten married about 6 or 8 months later in the fall of 1967. And Anne had spent her Junior year in Paris and she had taught French for a year after college—she went to Smith—and then stopped, realized that's not what she wanted to do. So they called me in, a partner called me in and said, "We have an opening in our Paris office and we would like you to go." So I came home that night. I didn't tell Anne before I got home. I said to her—she said something about what happened during the day and I said, "Well I have an interesting proposition. How would you like to go to Paris for three or four years?" She said, "What?" and I said, "Yeah." So it sounded like a terrific idea. She was enchanted, of course, by it, and would have loved to do it. And we gave it really serious thought and I said to them—by this time I had sort of decided that I thought that I really wanted to do litigation. I was doing some litigation there, but not all of it. And—but also equally important, I thought that I needed to try to do some litigation to find out whether I really liked it or I thought I was any good at it or whether I was better at something else. And they said, "Well when you come back from Paris, it'll be three years, you can do litigation when you come back."

And I guess I sort of half believed them and half didn't. Not that they were deceiving me, but that I knew what the likelihood was of, "Well, you were doing this already and you want to take a couple steps back and do litigation?" And the more I got to think about it, the more I realized that I didn't want to mark up loan agreements, whether they were in French, Italian, German or English. That's not really what I wanted to do. And that I really needed to see whether I wanted to do litigation. And I had always had in the back of my mind, or not so far in the back of my mind, that I would leave Cleary and go to the U.S. attorney's office for a couple of years at some point and then see what happens. But they were looking principally for people who had been out two years or more and I was happy at Cleary. I liked it and I wasn't thinking this was the time. But I

figured out that if I was not going to go to Paris, I should go to the U.S. attorney's office. Or put the other way, if I wasn't going to go to the U.S. attorney's office, then maybe I'd go to Paris. And I was sort of at a crossroads in the beginning of 1968 and had to make a choice as to what I was going to do. And so I called up somebody there who I knew pretty well in the U.S. attorney's office and he said, "Come down and talk to us." So I came down and I talked to them. As I said before, I'd done all Criminal Division work before and at this point they said to me, "When you get down there, we want you to interview with the Civil Division as well. That's part of the process, you talk to them." So I said, "Okay." I literally had no idea what the Civil Division did. Literally, no idea. It had never come across my plate, my mind, the summer I was there or any other time. So I walk in to see the chief of the Civil Division and the U.S. attorney's office in New York was different from most U.S. attorney's offices in that they retain much more control over their civil cases than all the other U.S. attorneys' offices. And the second thing is, they had a very active Tax Division, unlike most places where the U.S. attorney's office was simply local counsel and the main tax work was done by the Tax Division in Washington. But we had our own tax unit. So I go in and I meet the chief of the Civil Division whose name was Larry Vogel, who had been the chief of the Tax Unit before he was chief of the division. Larry was half a dozen years older than I was, very able, charming litigator who was the chief of the division. And he said to me, "I want to talk to you about coming to the Civil Division. We have this little tax case against U.S. Steel. And I'm in charge and I want you to come and be my second person on the case. It will probably go to trial in a year or so and the amount of controversy's about $250 million," which in those days was a lot of money. It turned out to have been at that time the largest tax case in the history of the United States. It involved excess profits from the Korean War and it ended up being litigated rather like an antitrust case. And I thought about it, and I thought that I liked him and I liked the idea of doing this case and it was something completely different. I don't think I fully appreciated how much more one can do after one leaves the U.S. attorney's office if you go to the civil side than the criminal side, that you've learned to do something besides present things to a grand jury and indict people and try them. And particularly in this office, you were both playing offense and defense, and when you were playing defense you saw how the offense was working.

MR. MARCUS: You were playing defense defending suits against the government?

MR. MORRISON: Yes. But there was a fair amount of offense. And in this tax case, the line between offense and defense was very unclear because you had to prove your case and the same was true in other situations as well. And so I thought about it and I decided to take the job. Now the other thing that was happening at this time was—this was January of 1968—Cravath had then done the outrage of outrages and they had increased starting salaries to $15,000 and Cleary followed close behind. Fifteen was the starting salary but it was also the salary for the first couple of years. So I went from, I think, maybe by that time I was making $9,000, then Cleary bumped me up to $15,000, and then I went to the U.S. attorney's office and I went back to $10,400, starting my downward mobility. So I talked to Anne and I talked to my parents, talked to my friends

and I decided I should do this. And so I did, and started in May of 1968, started working on this case immediately.

MR. MARCUS: Do you think you would have taken—I assume you would have taken the job even if you had foreseen that Nixon was going to win the election and Morgenthau would be out.

MR. MORRISON: Yeah it turned out Morgenthau was not out until—Morgenthau stayed in. He—

MR. MARCUS: Wanted to stay, but he kidded himself into thinking he could stay.

MR. MORRISON: Well the statute says four years and he said that's what it's for, and they ended up starving the office by not giving, not letting him hire any new assistants and not giving him any pencils and paper and things like that and finally Morgenthau thought, quit for the good of the office, but he stayed there for a full year after. And then Seymour came in, and Mike was fine. And I would never—most of the stuff that the office did was apolitical.

MR. MARCUS: Right, of course.

MR. MORRISON: And certainly at my level. So I started and I worked on that case and I worked on some others as well. I got to argue a couple of cases in the Court of Appeals and a bunch of stuff in the District Court and we moved and we took some discovery and we made motions for summary judgment. And then one day we get called into the office meeting. We're getting ready to go to trial and Larry calls everybody into the division meeting and says, "I have an announcement I want to make. I'm leaving the office and going into private practice." Well I said to him, "Well who's going to argue, who's going to try this case?" He said to me, "You." I said, "Wait a second. I am three years out of law school." I said, "I've never tried any case for more than a couple of days. This is going to go on for five or six weeks. You can't be serious." He says, "Yes, you can do it." And we had this guy we'd been working with in the refund section of the Tax Division, Dave Wilson. "Dave will come up and he'll sit with you. I've talked to them about it and they're perfectly comfortable with you handling this." So I almost didn't know what to say. When you think about the serendipity of the combination of the Paris thing, the Civil Division, this case, all coming together at one moment and shaped— So we went and tried this case and I think the case went on five or six weeks.

MR. MARCUS: Bench trial?

MR. MORRISON: Bench trial. They had all their lawyers. They had lots of lawyers there all the time. It was—the case had been narrowed down but it was still a long trial. White & Case was on the other side and they had lots of people in the courtroom and I don't know how many people they had outside. They had all U.S. Steel's resources. I was the only lawyer who examined, cross-examined a single witness, made any statements at all. And they tried to get in some business records and we had this big

motion that I had filed why they were not admissible under the hearsay rule. And it wasn't that they weren't business records but what they were offering them for was conclusions as to the effect of a strike on their business which was the explanation as to why the profits should not be considered common. I'm not sure today I could remember all the details, but the point was we weren't complaining about the numbers, but they wanted to offer these records for all their conclusions about the impact of the strike on their businesses. And the judge was quite inclined to deny them the opportunity.

And then they discovered a whole pile of records in a limestone mine, someplace. And they came in with boxes and boxes of records in the second week of trial and they said these substantiate what was going to happen. And I said, "These are clearly business records." And I said to the judge, "It's not fair, they can't do this." And the judge said, and he was right, "It is unfair, but I'm going to adjourn the trial for a month," or whatever period, "so you can review them and if you wanted to do any discovery," which I turned out not to need to do, I just needed to look at these records. Maybe it was two weeks we adjourned the trial for. So we came back and we tried the rest of the case and then we wrote briefs in sections on different parts of the case. I wrote them for, I don't know, four, five, six weeks, just turning out a hundred pages a week or two, every two weeks. And the thing got in and finally the judge issued his opinion and we won this big case. Meanwhile, this was now in the beginning of 1970.

MR. MARCUS: Let me just interrupt, just a footnote. Who was the judge who tried the case?

MR. MORRISON: Richard Levet. He was, I think, a quite pro-government judge. They allowed him to do most of the tax cases because he liked tax cases, he understood them and a lot of the other judges didn't want to do them. He didn't have all of them, but he had a good hunk of them. And by this time I think he was a senior judge. And he was quite favorable to the government. But he did a very good job, wrote a very good opinion. We got a summary judgment on two parts of the case and this was the third part of the case. And eventually the case went to the Court of Appeals and it was ultimately reversed in part and affirmed in part, and the case ended up being settled for a very substantial amount of money while *cert.* petitions were pending.

MR. MARCUS: Did you get to argue the case in the Court of Appeals?

MR. MORRISON: I did, I did. Yeah, in those days, well nobody else knew anything about the case and even though we had an appellate section and they sometimes did it, nobody wanted to touch this. So the second thing that happened was while Seymour replaced Morgenthau at the end of 1969 and the trial was going on at the beginning of 1970, yeah. That's what it would have been. And Seymour came in and he made Mike Hess— Do you know Mike?

MR. MARCUS: Yes. I met him because he became Giuliani's corporation counsel and when I was at the Justice Department he came down with Giuliani a couple of times to see us.

MR. MORRISON: Mike was in the division at the time. He was the head of Civil Appeals at the time. He and I had worked together on a couple of briefs. He was a year ahead of me at Harvard, but he was a couple of years younger than I was because he hadn't been in the Navy or anyplace else. He was made the chief and he decided that he wanted me to be the assistant chief. There were 20 lawyers in the division and my first reaction was sort of the same thing I said to Larry Vogel: "You've got to be kidding me." Because there were people there that had been there five, ten years and the assistant chief's job is to supervise everybody else's work.

MR. MARCUS: The Chief Operating Officer.

MR. MORRISON: That's right. Everything went through the assistant chief. I looked down and the chief looked up at broader, bigger questions. And that had always been the relationship. I said to Mike, "I don't know that I"— He said, "You can do this job." So I said, "Sure." So I found myself supervising all these lawyers and everything they wrote came through me. And this was fine. Some of them would come to me at the last minute and I had to say to them, "Look, you've got to do this again," or, "It's not right," or, "You've got to get this thing to me early enough." So that was my first real managing job certainly with lawyers. And I was three and a half years out of law school at the time.

And I got involved with a whole bunch of things including a whole bunch of bankruptcies. This was before the '78 amendment to the bankruptcy code. But these were mostly corporate reorganizations. And the government became involved because the government was always involved in bankruptcy because the one thing that every company does is they don't pay their taxes. Not their income taxes, they withhold the money from the employees, and so we had some of those in the Tax Unit there, but the other things, then there were taxes. There were a couple of shipping companies and they had loans from various parts of the government and there were all these circularity of lien problems in these bankruptcies. And there was this one case in which there was an antitrust claim. The company's only asset they had was an antitrust claim and they wanted to settle it and we had to come in. We came in and we said that they had not gotten enough money in this antitrust settlement. We persuaded Judge Lasker to reject the settlement and we got a much bigger settlement.

And so I was doing all of these cases against big firms and doing all this stuff and I was supervising all these people and argued this big trial and argued this big tax case and argued a few other cases in the Courts of Appeals and had this enormous portfolio of things that I was doing and supervising. I'd been there about three years or so at the time and I was thinking about what I was going to do, and there was no immediate pressure to leave. My salary had gone, by this time, oh I was making, by the time I finally left I think I was making $22,000. I think it was $10,400 and then sort of $13,000, maybe $15,000, and when I got promoted it was $19,000. And by this time we had our first child, born in June of 1970. So I was thinking about leaving. People in those days

tended to stay only three or four years, though a lot of people stayed only two years and three or four years was pretty much the norm. Very few people stay longer.

And the first thing I realized was that I could never go back to a big firm. And there were two reasons. One is I knew that they would never give me the kind of responsibility that I'd had. I'd just done too much and I could not carry briefcases for people who had been on the other side of me and I'd generally beaten. Not beaten, given them the fight. That was the first thing. The second thing: I thought about other firms and smaller firms, they were doing mainly commercial kind of work and they were moving money back and forth from one client to another. And I didn't care about that. And what I realized that, working for the government, what I cared about was all these public policy issues that the government was involved in. We haven't talked so much about them, but there were a lot of issues in which the government programs were at stake and where I felt representing the government, I was involved in important issues and doing the right things and not always on the right side. And I saw how lots of people who had the government as their adversaries did not have very good counsel and could have done better.

And about this time I picked up a book by Morton Mintz called *America, Inc.* and I read this book and I said, "You know, this is kind of always what I've thought that I want to do. I want to try to help the people who are doing this." And Ralph Nader was very much a part of the book. And I said, "This is really what I want to do," that at this time I don't think Charlie Halpern had yet left. But a couple of guys in our office in New York had left to form NRDC, John Adams and Dick Hall and then a couple other people who were not at our office. Environmental Defense Fund was just getting started. The Ford Foundation was just starting to make grants. I think Charlie Halpern was just getting started with the Center for Law and Social Policy. This was in the summer of 1971. And I was having lunch one day with my then-summer student from Harvard who was working in the U.S. attorney's office, as I had worked there that comparable summer. We were having lunch one day and he said to me, "What are you going to do when you grow up and leave the U.S. attorney's office?" He may not have said "grow up." I thought of it. And I said, "Well," I explained to him what I was not going to do and then I said, "I've been giving it a lot of thought lately and I really think that I'd want to find some way to do a public interest job. That's what I think I want to do. And I think I want to mostly work on consumer kind of issues. I don't have any particular interest in the environment, no knowledge about it, and I've never been involved in race relations or anything like that. But this seems like something I know enough about to be able to be helpful and I really want to do it."

MR. MARCUS: Let me interrupt only to ask why, what attracted you to consumer issues? Your work in the U.S. attorney's office probably didn't involve consumer issues very much.

MR. MORRISON: Well they're regulatory. For example, we had cases with the Food and Drug Administration, the Agriculture Department, just general programs against the government, against—I think *America, Inc.* sort of pushed me—

It wasn't only the FDA. It was antitrust laws and other kinds of things and, although I was not a mathematician, economic interests were the things that I understood and the tax case was more like an antitrust case than a tax case, the U.S. Steel case. And I just thought that that was where I—there was nobody doing these things and I could do them and I could make a difference on rate regulation and other kinds of things like that. I really didn't have a particularly well-formed idea, but it seemed to me that that was an area that I could do something about. And I guess if somebody had said to me, "You can do something else," I might have done something else. The idea was that I wanted to do something in the public service arena.

MR. MARCUS: I see. And did you—You know, it's interesting. You told us earlier about your flirtation with Arnold & Porter and Washington law firms before you went to New York after law school. But you haven't mentioned Washington law firms as something that I would have thought maybe you would have sort of looked at again in 1971. Why not?

MR. MORRISON: It never crossed my mind.

MR. MARCUS: Isn't that interesting?

MR. MORRISON: That is, I wasn't thinking about moving. We were in New York. My parents were in New York.

MR. MARCUS: Oh, so when you started thinking of public interest, you were thinking of New York?

MR. MORRISON: Thinking of New York; I was going to do something in New York. I didn't know anything else. So Jerry Neugarten, the summer student, says to me, "Oh," as I knew, "I worked for Ralph last summer. I'll call him up and maybe he'll offer you a job." I said, "That's ridiculous." He said, "No, no, I want to call him up." I said, "Of course I couldn't stop you from doing it." I think he wrote him a letter actually. And so I said okay. He said, "I think it's really a good idea." So I said it myself, okay. You know what's going to happen in the best of all possible worlds: Ralph will come to New York sometime, I'll meet with him, and he'll tell me how to raise some money. Because I didn't have any money and I didn't know how to go about starting an organization or raising any money. This was in the middle of July.

MR. MARCUS: When you say, "He'll talk to me about raising money to start an organization," was this already a thought in your mind because of your conversation with this kid that it would be a litigation organization to work with Nader?

MR. MORRISON: No, he would give us some ideas about how to get started because I didn't know how to get in the front door of anything. I had never done anything.

MR. MARCUS: You were thinking of Nader at that point as an advisor.

MR. MORRISON: As an advisor, yeah, yeah. We went on vacation in August and I got back from my vacation and there's a note, a phone message for me: please call Ted Jacobs in Ralph Nader's office. So a couple days later I call and Ted says, "Ralph has just founded Public Citizen." It was literally incorporated in March of 1971. And they had just started advertising, newspaper ads for money, contributions. And he said, "We have a health group and we have some other parts of the organization. We would like to have an internal capability to do litigation. And Ralph would like you to come down to Washington to talk to him about setting up the litigation group." So my first thought is, well, I don't have to raise any money. Second thought was, Washington's probably a good place to do this. Third, I liked—the thought of living in Washington was okay. But I said to Ted, "I've been reading in the paper that Ralph pays people $5,000 a year. I'm making $21,000 or $22,000 at this time." I said, "I have a wife and a daughter who is a little over a year. I cannot live on $5,000." He said, "How about $15,000?" I knew Washington was cheaper than New York. I said, "I can discuss $15,000." And this was early September. I said, "I'm not sure what my schedule is. I'll try to arrange—I know that I have to be in Washington at some point in the next few weeks, month. Can I do that? Can I come down and see you then?" And he said, "Sure." Ralph, subsequently, was very pleased to know that the government was paying for my flight to Washington, legitimately for other business.

MR. MARCUS: A spendthrift he wasn't.

MR. MORRISON: And so fast forward, I took the job. I'll be glad to say something more about it but I took the job. So this is serendipity number two, three. First is clearly meeting Anne, second is the U.S. attorney's office and what that led to, third is the connection with Ralph.

MR. MARCUS: Yeah, which is through this young guy.

MR. MORRISON: Yeah, which if I had any other student working for me that summer, would never have happened.

MR. MARCUS: Yeah. Tell me about your being interviewed by Ralph Nader for this job. This is late 1971.

MR. MORRISON: Late October. I can't believe this is—I show up there and Ted says to me—

MR. MARCUS: Where was there?

MR. MORRISON: There was 19th Street. It was between L and M in a little town house. It had very narrow stairs, I walked up to the second floor. There were papers strewn all around the place. They had had another place which got bought out from under them by the Metro, the entrance to the Dupont, the north entrance to the Dupont Circle Metro. And they ended up following a series of places. Ralph actually figured out that when a

place was planned for destruction you could get lower rents in the year before destruction if you didn't mind moving. So Ralph then had—this was the Center for Study of Responsive Law. Public Citizen did not yet have any physical spaces. So we get there, I get there. Ted says to me, "Do you have a resume?" And literally, I didn't have a resume and had not prepared one. Don't ask me why. I just didn't. This was a job. I mean, they wanted to talk to me. They presumably knew enough about me, they want to talk to me, and why should I have a resume? I don't know what I was thinking, if anything, but I didn't have a resume. So I wrote one out and just gave them the basic information and a few things and that was fine. Ralph was, as usual, running late. And he said, "I have to go give a speech over at George Washington Law School. How about coming over with me and then we'll talk afterwards?" I didn't have any choice, but it seemed like a good idea.

And this was the fall of 1971 and just this last year he was at Stanford when I was there and I gave an introduction for him and I said to the students, "The first time I ever met him was in 1971, this is now, 35, 36 years" — I said, "When you think about Ralph, just ask yourself, who is it that could pack an audience at a university in 1971, could pack one in 2007? Who could do it without having been elected to a single office, without ever taking a penny from the federal government, done it solely by dint of his own perseverance and ideas and personality?" And he was quite electrifying that day. And we walked from GW back up to Dupont Circle and he said to me, "Well what would you want to do when you come here?" And I'd actually thought about it and I said to him, "Well I have this little list of things I've already made up mind that I wanted to do."

MR. MARCUS: When you say things, do you—

MR. MORRISON: Cases, litigation.

MR. MARCUS: Actual cases, lawsuits, actual projects?

MR. MORRISON: So what were they? I said, "The first thing, well, I want to go after minimum fee schedules in the Bar Association. Second, I want to go after the prohibition on advertising for legal profession. Third, I want to challenge the constitutionality of the antilobbying restrictions on 501(c)(3)s." I'm trying to think what else I had on the list. I had a few other things on the list, all of which, most of which we ended up doing and winning. And he subsequently told me that that was one of the things that sold him on me, that I had ideas, that I knew what I wanted to do and that he could understand what we were going to do. And so we talked and then he poked around and talked to some people and a few weeks later he made me an offer and the number was still $15,000 and I didn't fight it because by that time I wanted the job. I remember coming back from that time in Washington, the day I spent with him, not even a day, it was three or four hours— he was telling me what he was going to do and what Public Citizen was going to do and it was that night—I've always been very good at falling asleep at night—and just like the day I went to the U.S. attorney's office, I couldn't get to sleep, thinking about what an exciting job this was going to be. And I've always used that as kind of my

litmus test as to whether I should do this or not. And both of them proved absolutely correct.

But, you know, there were things to think first about moving. It was not the same as when my grandfather moved from outside of Kiev, knowing that they would never see their families again, or when my father and mother almost went to Palestine. Washington was not completely out of sight. We had friends here. I had an aunt and uncle who lived out in Bethesda. My parents were able to come down and visit us. But it was different, picking up and moving and we had most of our friends in New York and I lived around there most of my life.

MR. MARCUS: What did it involve in terms of Anne's—

MR. MORRISON: Well she had an interesting job at that time. She had just taken a job for about a year working part-time as a foundation program assistant at the Carnegie Foundation in New York and she was very happy. The job was three days a week and it was interesting. She was working for a wonderful person whom she'd keep staying in touch with for many years until she passed away recently. And the thing that I remember about that, and I'm glad you raised it, was—and this is a real reflection of the time and not, I think, just me and her—is that there was never a question raised about we shouldn't do it because your job will be—you won't have this job, you won't be able to do it. No person that you or I would know would do that today, that that would not be the way that we would think about the move. We might have done exactly the same thing anyway, but it would have been different. And I think she was a little unhappy.

And for a while it was difficult when she didn't have as many friends and we had a young child. She ended up getting a part-time job at the Office of Child Development and that worked out to be fine. But the fact that it worked out all right was not, doesn't change what the basic proposition is about.

MR. MARCUS: Let me ask you one little question about the process of your being hired. Who was Ted Jacobs? What was his role in the Center or the nascent Public Citizen?

MR. MORRISON: Ted Jacobs was, he was Ralph's top person at the time. They ultimately had a falling out and Ted left very precipitously. I've always been led to understand it had something to do with finances. Ralph would never talk about it, but they had been very close friends at law school and Ralph had known him ever since and he brought Ted in to help him out. Ted was his right-hand man, did all sorts of things for him, did some of the managing and other things, not so much substance, but he was Ralph's confidant and advisor. And then about four or five years after I got there, they had this enormous breakup and Ted was here one day and gone the next and Ralph would not talk about it to anybody. And Ted eventually got very sick and Ralph tried to make amends and go see him, but his wife, who I think was quite unhappy about it all, would not let Ralph go. I don't think Ted was in good enough health to be able to make the decision. And I think Ralph felt very badly about not being able to close with Ted and

Ted eventually died. This is probably six, eight, ten years ago. I don't remember for sure. So Ted was the first person I talked to, but the decision was really Ralph's.

MR. MARCUS: Was Ralph the only person you talked to there besides Ted about this? Were there other people there?

MR. MORRISON: Yes, there were other people there but they were not at Public Citizen. No, Mark Green was there. Harrison Wellford was there. Reuben Robertson was there, but I did not talk to them. I did not talk to them.

MR. MARCUS: And they didn't factor into your decision about whether—

MR. MORRISON: Actually, it was just Ralph.

MR. MARCUS: It was Nader.

MR. MORRISON: And what made—it was Ralph. Oh the other thing was I had—maybe the details are wrong, I've forgotten them—but the day I flew down to see Ralph, the *New York Times* had three stories that mentioned Ralph in the paper. I said, "First is, he's got an organization. I don't have to worry about raising any money." And for many years, I didn't have anything; I was relieved of the burden of management and raising money. The second is, his name opened countless doors. Third, he knew what he was doing and had great ideas and great advice and sources, all sorts of sources. And so I sort of fell into this job.

MR. MARCUS: Nader is himself a lawyer, right?

MR. MORRISON: Yes, yes, Harvard Law School Class of 1958. And he understood a lot of these things. Not a litigator, but a lawyer. And he—I didn't know it at the time because we didn't even discuss it very much—but it turned out that he ended up letting me do virtually whatever I wanted to do.

MR. MARCUS: He didn't set the agenda as you might have thought going in.

MR. MORRISON: Oh no. One of his geniuses, and you see it with Sid Wolfe, who started in November—he had come from NIH and Ralph—he had done some stuff helping Ralph, and then he came to set up the health group. Sid started in November and I came in the beginning of February. And he did the same thing with Sid. He said, "You're in charge of the Health Group," and let him run it. Not that he didn't have ideas and wasn't helpful, but Ralph understood that you pick really good people, or people you think are really good people because you never for sure know until they get there, and you let them run with the ball, you give them advice and help and if they don't do it, then you get rid of them. But you can't run their programs.

MR. MARCUS: Yeah, that's very important.

MR. MORRISON: And we had, there were many things on which we had—I discussed everything with him. I would never do anything without telling him what we were going to do. I had a monthly report that I gave him with all the cases, with everything that was going on. And we'd talk on a regular basis and he would have a lot of ideas and many of them we did and some of them I told him they're not doable, we can't win, we have no standing, we have none of this. We're getting ahead of ourselves, but for example, right after the Saturday Night Massacre, Ralph said, Sunday morning, he said to call around and said, "We're meeting at the office of Public Citizen on Sunday morning and figure out what we're going to do." So he knew we had to do something and that's the way he's always been. I was quite impressed with both what he had done in the past and with him. And it just seemed like it was a great thing to do. And I figured we could make do on the money.

MR. MARCUS: What were you told in the way of your ability to—obviously if you're going to start this litigation operation, you needed to be able to hire some lawyers. You didn't talk about that?

MR. MORRISON: Well he said, "There's this guy named Tommy Jacks, who worked for us one summer who's clerking for a judge in Baltimore. You'll be fine with him." And I said, "Okay." And then we didn't have any idea how many people I was going to be allowed to hire. I said, "Where are we going to work?" He said, "Well, you'll work in our place for a while," and then we moved around. And I was probably irrationally overconfident that things would work out. But everything worked out.

MR. MARCUS: Yeah. And you didn't feel the need to nail down understandings about your role and how many people you could bring in—

MR. MORRISON: And what do I have in terms of secretaries.

MR. MARCUS: Yeah, and it wouldn't have worked anyway.

MR. MORRISON: So I got it, I agreed to take the job in November, and I had been, my right shoulder had been bothering me for some time and I went to see a surgeon who a friend had been to see, and he ultimately decided that they needed, what it looked like was it was impinging my motion and I could barely reach up on a shelf to get a book down, and he said, "I think what it is, is that you have some scar tissue in there." And playing touch football in Central Park…without pads…

MR. MARCUS: Bang!

MR. MORRISON: …bang, and it had gotten worse. And so I decided to have the operation in New York before we moved and it would give us a little more time to get ready. And so I had the operation in late November and I was out of work only a couple of days. And I started going to work a little bit later because I had a sling and hassling it on the subway with a sling was not—this is all becoming relevant in a second—and I showed up for work one morning and I get in there and Mike says, "Come into the office

right away." This is Hess, and I said, "Fine." And he said to me, "We just got a report from the Park Service people out at the Statue of Liberty that protesters have seized the Statue of Liberty and they want us to go out and arrest them." And I said, "That's insane! That's exactly what they want us to do, that we don't want to arrest these people!" And I said, "That would be the worse possible thing." He said, "Of course that's right." He said, "I want you to take charge of this." So I said, "Here's what I want to do. I want to draw up a civil complaint. I've got to get an order to show cause and a temporary restraining order, then go out and serve it on them and get them all out of there." "Fine." So we start to do this and I sit down and I just write up this temporary, the papers, and he looks it over, fine, all fine, and we go up to see the judge. The judge is Judge Lasker and this was, he had just been appointed, maybe it wasn't Lasker. I'm sorry, it wasn't Lasker. I'll tell you who it was, it was Samuel Pierce, not the one, not the Pierce who became the—

MR. MARCUS: Secretary of HUD.

MR. MORRISON: Right, but it was another Pierce, another African-American. He had been appointed about two weeks before, it was his first—I think it was Lawrence Pierce. He had just been on the bench, I mean, literally. So I show up there with this affidavit and for the temporary, an order to show cause why they should not be held in contempt unless you get out and so forth and so on. And the judge says, "I don't want to sign the order to show cause yet." He said, "Serve the copy of the complaint on them out there and come back to me tomorrow morning and we'll see what happens." So I say, "Okay." So I get the complaint, we get a Coast Guard vessel to go out there and we have 50 reporters on the vessel with us. I'm in my sling. I go out there to—because it's cold and rainy, we're going out there, there was a French, I mean, there was a Canadian reporter and I gave an interview in French and I was stuttering and stammering a little bit but, so we get out there. We get off the, we're about to get off and somebody approaches me from the Park Service and they said, "L. Patrick Gray of the Civil Division, Justice Department, has just called and he asked three questions. Do you have enough people to take the statue? Can you get the press off the island before, and can we avoid any damage?" So I said to him, "You tell him we're in charge here." He was probably my boss. I said, "Tell him we're not doing any of those things."

So we go there, I get somebody to come down, we start with, "This is the complaint and we're going to be back with an order to show cause in the morning, you'd better be out of here." I go back and the next morning we go out, and then we go to the judge, he says, "Now I'll sign the order to show cause." I go back, we have somebody deliver it and they all came out of the statue; they stayed overnight there, they got all the publicity they wanted, nobody pressed any charges.

MR. MARCUS: Oh, but you show up with this show cause order and they all leave?

MR. MORRISON: —and they left.

MR. MARCUS: Yes, were these anti-Vietnam protesters?

MR. MORRISON: Yes, of course, of course.

MR. MARCUS: Yeah.

MR. MORRISON: And that was my final thing that I did before I went and after I got my arm fixed so that I was able to help with the move.

MR. MARCUS: And you moved in February of—

MR. MORRISON: We moved, left the end of January and came down here, got here on a Thursday or Friday…

MR. MARCUS: We're, so we are going to close this interview on a February, 1972, day as Alan Morrison moves to Washington.

Oral History of
ALAN MORRISON
Second Interview - January 11, 2008

This is Dan Marcus on Friday, January 11, 2008, the second interview of Alan Morrison.

MR. MARCUS: Okay, Alan, I think we left off last time with your move to Washington after you accepted Ralph Nader's offer to be the first head of the Public Citizen Litigation Group. Why don't you start by telling us a little about how you got going setting the operation up and then we'll turn to the substantive areas that PCLG was involved in over the years. First of all, let's get the date again.

MR. MORRISON: February 5th, I'm pretty sure, 1972. We could confirm it, some piece of paper someplace. Whatever that Monday was, we had come down and we had rented a house, a little house up near Tenleytown and come down, moved down over the week. The movers came, pulled our stuff out of New York, put it in there. We stayed down—and we moved in on Friday, Saturday and I started work on Monday.

Public Citizen didn't have an office as such at the time. The only part of—it was a little fundraising shop that was separate. Ralph had his main office with the Center for Study of Responsive Law which was on 1156 19th Street. He had other people there, Harrison Wellford, Reuben Robertson, Ted Jacobs, Ruth Fort and some others. There was also a Public Interest Research Group office. The Health Research Group had just started with Sid Wolfe. Sid beat me there. He started in November but he didn't have to move down because he was already living here. He had a couple people working for him already at the time. They were in a separate place. There was a related group called the Corporate Accountability Research Group, which was Mark Green and Peter Petkus and I can't remember who else.

There was also the Center for Auto Safety which was not formally affiliated, but Ralph had helped them get set up. And there were some other satellite groups around. And when I had interviewed with Ralph, I think I told you last week, I had some ideas about some cases I wanted to bring, some areas that I wanted to do. They said to me, "Just come over to the Center on Monday morning," and so I got there about 9:30 and I can't remember whether anybody was there or not and I met some people for the first time and the question was where my office was going to be. Hadn't been decided—at least I hadn't been told and guess I probably should have cared about it, but offices were never a big thing for me. And so I—they decided that there was no space there and we had a tax reform group that was just getting started and they had some space and it was over at 733 15th Street, which was where the Lawyers Committee for Civil Rights was at the time,

across the street from the Riggs Bank and I think Covington either was there then or had been there before, before they moved—one of their first moves over to 16th Street.

For the first week or so, what I did was I went around and talked to the people in all these different groups about what ideas they had for bringing cases. There were some that were already to go. There were a bunch of Freedom of Information Act cases, FOIA cases, that people wanted done and there was a challenge to the USDA policy on nitrites and nitrates and they wanted to do that, bring that to court, and I had some other things. And so I started going around and figuring out what I was going to do. I didn't have a secretary; I had a desk and a phone—

MR. MARCUS: You did or did not have a secretary?

MR. MORRISON: Did not have a secretary, no. I didn't really need one, although, of course, it was before the days of computers and I was an okay typist in draft, but couldn't type worth a damn in final. And within the first couple of weeks we had filed a lawsuit on nitrites against the USDA.

MR. MARCUS: Were you just a one-man operation then?

MR. MORRISON: I was the only person then, yeah. We did an *amicus* brief in a FOIA case involving an issue which continued on for a long, long time on availability of pre-market test data from the FDA. My recollection is that Boyden Gray filed the brief on the other side for one of Wilmer's clients at the time and then shortly after I got there, one of my colleagues, actually Mark Silbergeld—I think he was with the Corporate Accountability Group or PIRG, I can't remember which one—knew Lew Goldfarb, who was a lawyer with the Federal Trade Commission who had just filed a case challenging the minimum fee schedules of the Virginia Bar. He was the plaintiff. He bought a home and they had their minimum fee schedules, had price fixing.

He had a very nice little record that he made in advance. Mark put me in touch with Lew and I agreed to go on the case with him. Fairly quickly it became apparent that first, this was a class action—he couldn't be both the class representative and class counsel—and second, he was a full-time lawyer at the Federal Trade Commission. He didn't have the time nor could he get the time off to do this kind of case even though the Federal Trade Commission probably should have been doing these cases to begin with. The Justice Department was making noises about doing these cases. So we had that case, which got up and going quite quickly. This is now in—I probably got involved in February of '72. And at the same time my dear friend Reuben Robertson was at the Center, he started working—he and Ralph had been working on ITT and they had started a proceeding in Connecticut to challenge the ITT merger and its acquisition of Hartford Insurance Company, and they had lost the case in the state courts there but they kept looking around the issue, for something wrong, and two other things came up. One of them was during the course of this investigation, they had gotten a copy of an IRS Ruling Letter that allowed ITT to park some of its stock in The Hartford in a way that enabled them to do the deal for the tax advantages they wanted, the details of which I could probably

recall, but I can't think of it right now. And that letter had surfaced, but nobody ever made much of it. They asked me to look at it because I had done some tax work. And I looked at it and I studied it and I talked to some friends at Caplin & Drysdale, and they couldn't officially help me but they were very helpful to me. And I figured out that the deal had no substance to it and that ITT had pulled a fast one on the IRS, which meant that their tax-free organization was no good. At the same time, Jack Anderson was investigating ITT and Felix Rohatyn's role in getting the Justice Department, which had originally sued ITT, to block the Hartford merger, had lost in the District Court and was going to take an appeal. ITT went around the back door of McLaren, who was then the head of the Antitrust Division and went to Kleindienst initially and then to Mitchell, and they got—and then I think they went to the White House—and they got the decision to appeal to the Supreme Court which was then a direct appeal from antitrust cases, overturned. Nobody knew anything about this. And they went and they had a settlement and in the settlement they gave a whole bunch of reasons, all of which were bogus and somebody leaked to Jack Anderson that they had had a backdoor meeting with the White House, and the reasons they gave to the White House was that the business economy was going to collapse and all these terrible things were going to happen and that's how they persuaded them. That wasn't the White House—it was Kleindienst first. I'll never forget. It was either Jack—it may have been Brit Hume or there was another guy who was working with him, with Jack Anderson, his name I can't remember. They did this fabulous thing which I always will remember. They caught Rohatyn as he was some place, busy running, and they said to him, "Mr. Rohatyn, we know that you had this meeting with Kleindienst about such and such, about the ITT antitrust case and we're trying to find out whether you said A or B." And of course, they had no confirmation of this meeting from anybody that they could go with and Rohatyn says, "Yes, we had that—that's not what happened, this is what happened." They were able to confirm that they had the meeting with him which was completely different from what the Justice Department had said.

I had been aware that there were some recent cases allowing persons who were arguably affected by antitrust consent decrees to challenge them. There was a natural gas case and there was another related case in the labor context, the Supreme Court letting people intervene for the purpose of alleging fraud on the Court, so we alleged fraud on the Court. I prepared the papers and we moved to upset the ITT antitrust decree, to reopen it in Hartford, Connecticut. It made a huge big splash. We lost. I think this was the stage which one of the things I did was I met people doing other public interest things and one of the people I met was Victor Kramer who was a former antitrust legend, a partner at Arnold & Porter and running the Center for Public Representation at Georgetown at the time, from which I'm happy to report, we ended up getting three or four or five really good people over the years because of the relationship that we had with Victor. And when you find somebody who you are compatible with, the old person network really does matter because you could trust their judgment. Anyhow, somebody put me in touch with Victor and I sent him the draft of the brief that we were going to file and he was on vacation in Michigan (this must have been in the summer) and he—I called him and he said to me, "Well, it's a lot better than I thought it was going to be," which from Victor is

the highest form of compliment and, as they said in *Casablanca,* this was the beginning of a beautiful friendship.

We filed the papers, the Justice Department went crazy, we ended up losing, we filed an appeal which we had as of right at the time to the Supreme Court, and they did not hear the case. Then, in the meantime, we ended up sending a letter to the IRS saying that ITT had misrepresented this transaction and eventually one of the things that happened was the ITT revenue ruling was revoked on the grounds of fraud. ITT eventually had to pay lots of money, I don't remember the exact figure, and—

MR. MARCUS: To the IRS?

MR. MORRISON: The IRS, yeah. In theory, they could have gone after all the stockholders, which is what ITT was really worried about because they would have had claims against it, and so the IRS settled it. ITT paid them some very substantial—I think it may have been something like a hundred million dollars. It was a very large amount of money. We then decided we would file under the IRS statute that allows people to seek rewards for tips and we ended up getting I think a million and a half bucks out of it between the Center for Study of Responsive Law and Public Citizen—for us a very large sum of money. But that must have been seven or eight years, ten years by the time we ended up getting the money. We had to keep writing them letters and we couldn't, of course, do anything until the IRS had actually made the assessment which, of course, took a very long time.

MR. MARCUS: But that was one of your earliest—it began as one of your earliest cases?

MR. MORRISON: Yes, yes, and then it continued for quite some time. The other aspect of it was that ITT had a consent decree which was still in effect, but one of the collateral consequences of having a consent decree, a friend tipped us off at the SEC about, was that one of ITT's subsidiaries was an investment company under the Investment Company Act of 1940. And if you had to have a consent decree, you had to get an exception to be allowed to be an investment advisor. So they had to file a formal application and somebody—and I never knew who—Reuben may have known—at the SEC tipped us off to this and we filed an objection on behalf of a shareholder, I think it was. Somebody who at least the administrative law judge thought had standing. I could probably figure it out, but I can't remember right now. We filed an objection to this, and the then-head—the two people, the top two people in the Enforcement Division at the time were Irving Pollack and Stanley Sporkin and they called us in and they decided they wanted to have a meeting about this and Joe Flom came down from New York to represent ITT and he gets in there and he starts ranting and raving, maybe a little hot. He was in high indignancy about us going in there. "These two people don't know what is there or what they are talking about." I remember this—Irving Pollack says, "Mr. Flom, we will have none of that. I know these people. They are honest, reputable people. They have made serious factual allegations and we're going to hold a hearing, so that's the end of that." And so we had this hearing and it went on for months. We had some administrative law judge who probably didn't have anything better to do. It was quite

interesting. We subpoenaed the general coun—it was all about their good faith—we subpoenaed the general counsel of ITT, put him under oath, and all kinds of things. The thing went on for about three years and finally a former colleague of mine in the U.S. attorney's office in New York, Mike Mitchell—was a lawyer for ITT. He was at Skadden at the time and I sent him—I used to send him anniversary cards for every year the hearing was going on and nothing had happened, there wasn't any finality to the hearing. In theory they could keep it, but they couldn't do anything. Finally at some point they just gave up. They got rid of this subsidiary and the hearing wound down. So all that started from this little thing which had been started before we got there. And a couple of lessons that I got out of that was you can't ever predict where things are going to come from—that is, where cases are going to come from or where they're going to or how they are going to think. The second thing was it was really important that I had a broad range of substantive knowledge. I mean, in this very case, tax, securities, antitrust, procedure, all these things were really essential, and we didn't have an antitrust department, we didn't have a tax department, we had me and whoever else was there to do it. So that was really an important eye-opening lesson.

Then—oh yeah, then we had—these things kept happening. We had another—this was at the time when the big flood of the West Virginia mine occurred. What's his name—Gerry Stern — wrote the book about it. The coal mine company—this is what happens when I don't do my homework. Anyway, it happened and it turned out that Donovan Leisure was representing the company and Ralph and I got talking about what was going to happen. We knew exactly what was going to happen—the coal mine company was going to go out there and their insurance companies out there with their checkbooks and they were going to pay people who had nothing, had no house, they were going to write them checks for really small amounts of money. So Ralph said to me, "Why don't you just call...." I said I know this Dan Murdock because he and I were in the U.S. attorney's office together. So we got the idea somehow that I would just call him. So I called him up.

MR. MARCUS: Who were you calling?

MR. MORRISON: Dan Murdock, who was the lawyer at Donovan Leisure who was representing the company. I guess I must have seen the story in the paper that he was doing it. So I just picked up the phone and I called him and I said, "I'm working with Ralph Nader now and we see this happened. It was a terrible tragedy and we're very concerned that you're going to go out there with checkbooks and we think it's a terrible thing. We're prepared to go to the press on this and think about bringing a lawsuit to prevent you from doing this, to take unfair advantage of these people." He said, "Let me check," and a couple of days later we got an okay saying that they would not be going out there, that they understood that this was the wrong thing to do and they were not going to do this. So here was this thing going on and we started—all these things were going on at the same time at the very beginning of all this. Then Ralph said to me, "You know, I think you should hire somebody."

He had already found somebody who had worked with him on a project or he knew—a lawyer who was clerking for Judge Thompson in Baltimore, a lawyer named Tommy Jacks going to Texas Law School. And Ralph said, "I've hired him." And I suppose I could have said, "Ralph, I want to talk to him and object to him." In any event, I met him fairly shortly after that and he seemed like a perfectly able guy, had a good record and so I said, "Fine," and Tommy was going to come in September. And then Ralph said, "There is a fellow by the name of Ron Plesser who went to George Washington Law School and he's in New York—he worked for Bill Dobrovir for a while. He's in New York and he wants to leave. I want you to come talk to him about doing Freedom of Information cases. We need to have somebody full-time on it." And Ralph was so pressured about this because the Act had passed in '66, went effective in July of '67, and there were very few cases being brought. The press had brought a few; a few other people had brought some. The industry had not awakened to the fact that this was an equal opportunity law that would enable them to get lots of stuff. Ralph said, "This law is never going to be in effect meaningfully until people are out there bringing lawsuits, because the agencies will just deny things. This is their *modus operandi*. They have always done this. This is the way they are going to continue to operate and you have to sue them." And, of course, he was absolutely right.

I had seen some of this when I was in the U.S. attorney's office. We had a couple of FOIA cases up there and even as a government lawyer defending them, they didn't have much to defend on in a few cases—the few cases that I saw—and so I was perfectly prepared to go on the attack and see that he was right. So we brought that one case and then we hired somebody.

MR. MARCUS: And you hired Plesser?

MR. MORRISON: We hired Plesser, yeah. I came in. I was feeling really bad but Ron had come down from New York where he then was and I was feeling not good at all and it turned out two days later I went to the doctor and I had pneumonia and was home for a few days after that. So I came in on what was Washington's Birthday and I parked in a parking lot (you'll see the relevance of this in a second) and it said regular rates and holiday rates and then I came out and they are charging me regular rates. I said, "Wait a second, this has got to be a holiday! How could you do this to me?" Anyway, I wrote a letter either to Traffic Enforcement, the police or somebody—I got no response. Meanwhile, I had opened an account at the Riggs Bank which was next to my home down the street so we could go cash checks. Of course, there were no ATM machines in those days. I figured there were enough Riggs Banks downtown I could find one. So we opened the account on the third of February and I remember the brochure said "Funds deposited by the tenth day of the month earn interest from the first of the month." I said, "Well that was nice." And then I filled out the forms and they gave me a whole bunch of other stuff. I had maybe a couple thousand dollars in stocks and I said, "This isn't worth enough, I need to get rid of these few stocks so I can do what I want to do without having to think about those kind of questions." So I had a savings account and a checking account there.

Fast forward to the end of June; I get my statement and there is no interest on it. It turns out that what they didn't tell me right away was that the interest was only on the lowest balance that you had in the quarter. So I ended up getting zero interest and I can't remember the exact machinations of this but it was clearly deceptive. So that became another cause that we started. We ended up—we started with Riggs Bank. Our first—we had problems getting clients. We finally got one and we were just about to do this when Riggs changed its policy so it was only prospective and we just didn't want to be doing it. So we shifted to—and that was then American Security Bank—we actually brought a lawsuit against them. We ended up—the judge refused to certify the case as a class action because he said the amount was too small, it had to go in Small Claims Court and somebody ended up years later taking an appeal. We lost that case, but in the long run all the banks backed off from this highly deceptive practice in teeny, minuscule print that they would give you. There were a couple of other things that we found along the way as we started reading these things.

But these were just lawsuits just sitting around there waiting to happen. The other thing I learned was that if you challenge these institutions, they can't deal with it. That is, they don't—they can't—they know that they aren't supposed to be doing these kind of things, and a lot of them backed off. So that's how we sort of got started.

We hired Ron. He came to work later on. He started bringing a large number of FOIA cases and we won large numbers of them because they didn't have any defense. They were just blatantly violating the law. One of the other great things about these FOIA cases was they were terrific training vehicles for young lawyers. The complaint was really simple. You are an agency, we asked for the records, you didn't give them to us, you violated the law, and we are entitled to them. That's all you had to write in the complaint. One of the first complaints that I wrote for Ralph—it may not have been one of the FOIA cases, but it was another case—and he looked at the complaint and he said to me, "Alan, this is so short!"

So I said to him, "Yes, Ralph, that's true. It is short, but it's all that's necessary." He said, "But what is the—can people understand it? Can the press do anything with it?" I said, "They'll understand. We'll issue a press release if we need to issue a press release." I said, "Besides, Ralph, think of all the money we are saving on copying." And of course Ralph—

MR. MARCUS: That appealed to him.

MR. MORRISON: Oh boy, did that appeal to him. He was a real tightwad on those kinds of things. Ralph refused to have a Xerox machine in the office because one summer he had a Xerox machine and everybody was just copying everything and just running up huge bills. So we didn't get a Xerox machine, we got an IBM machine instead. He felt better because it wasn't a Xerox. It was actually the same thing with the same problem.

Along those lines, one day he came in to me. He was looking at the bills again. And he said to me, "Alan, I got a really good idea." I said, "What's that, Ralph?" He said,

"We're going to save money. We're going to get rid of our copying machine. I found this place that will do overnight copying and we can save a lot of money and do it that way." I said to him, "That's fine, Ralph. I said, but the day the copy machine goes, so do I." I said, "I'm not doing it. We have certain things we've just got to have." So he took a deep breath and said, "Okay." And then in the future when it was something really important, Ralph would say to me, "Alan, this is a copying machine matter." And he—I knew what he meant by that, that he was—he felt that this was something that really mattered to him, and then we would discuss it on the merits of that.

Anyway, we were at 733 15th Street only from early February to sometime in June '72. When we moved to 2000 P Street. We were originally on the fifth floor of 2000 P Street. I remember Ron Plesser had to walk through my office to get to his. We shared—by that time there was Tommy Jacks and then in that summer I hired Ray Bonner who was a Stanford graduate, had been in the Marine Corps in Viet Nam as a lawyer for about two or three years, came back, and I hired him. He stayed with us for two years and then went to do work for Consumers Union in California and subsequently became a freelance writer, wrote books about El Salvador and he wrote books about the Marcoses, became a stringer for *The New York Times* and has written pieces for them and got out of the law and is a journalist. So we had four of us starting in the summer of 1972. Actually Tommy didn't start until September.

MR. MARCUS: Did all of Nader's affiliates move up to 2000 P or just the Public Citizen Litigation Group?

MR. MORRISON: No. The Health Research Group also moved there. The Tax Group stayed where it was. We didn't have an Energy Group at the time. We didn't have the Lobbying Group—it hadn't yet got started. But also at the top floor of 2000 P Street, Ralph had his Congress Project, which did profiles of every member of Congress and lots of people came in there. We got conscripted into reading them and then going out and presenting them to various parts of the country. I did three or four when they were finished —he had hoped to get them done by Election Day—my recollection is maybe we got them done by then. It was an enormous undertaking, completely almost insane in terms of its scope, but it somehow got done. They were occupying the seventh floor and we were on the fifth floor and stayed on the fifth floor for about a year and a half until we moved up to the seventh floor in December of 1973. So there were four of us. By that time we had gotten a secretary. I guess we got one some time probably in April, a lovely woman named Polly Curran.

MR. MARCUS: April of '73?

MR. MORRISON: '72.

MR. MARCUS: Early on.

MR. MORRISON: Yeah, her husband was a State Department lawyer, quite by coincidence she asked a question in 2006 in New Hampshire, or maybe it was 2004, she

was on television and asked a question and I tried unsuccessfully to get in touch with her. She had written me, we had been in communication from time to time. Never able to do it. She was a lovely, lovely person. She stayed with us for a couple years.

We moved over into these spaces. We had a reasonable library, we started getting the Feds. We had bought back edition of the F. 2ds and so forth. This was in the beginning—

MR. MARCUS: Before computerized research.

MR. MORRISON: Of course! Computers! We had Selectric typewriters and not much else. Then we began—so we started—we were doing the FOIA things, we were doing the *Goldfarb* case.

MR. MARCUS: That was the legal fee—

MR. MORRISON: Legal fee schedule challenge under the antitrust laws. We were doing some administrative cases. We had ITT and in the summer of 1972 there was a consumer group that was, again, loosely affiliated with us, next door. They were working on the issue of the price of prescription drugs. The FTC had done a lot about this and there had been a fair amount written about the problem caused by the state laws prohibiting the advertising of the price of prescription drugs. I saw this, and this was right in line with one of my areas that I was interested in, which was the lawyer advertising, which was consistent with the minimum fee schedules. That is, one of the things that I said to Ralph was, "We need to make the legal profession more available and more affordable to middle- and low-income people." Nobody was doing this. The ACLU wasn't doing it, none of the—

MR. MARCUS: The ABA wasn't doing it.

MR. MORRISON: Oh, yeah, the last thing the ABA was doing. They were the problem. And I said, "This prohibition on lawyer advertising, plain violation of free speech and, more importantly, it hurts people." And I had done what I had always done when I was at the U.S. attorney's office. I read *U.S. Law Week* with great care and they had lots of good cases including a case in the Supreme Court called *Kleindienst v. Mandel*. Mr. Mandel was a Communist from Belgium who wanted to come to this country to give a talk, and the attorney general wouldn't let him in. I guess it was an immigration matter, and Kleindienst wouldn't give him a visa or wouldn't give him permission to come. So he sued and the people to whom he was going to make his presentation sued, claiming it was a violation of First Amendment rights. And Mandel lost his part of the case. The Court said you are a foreigner, you don't have standing, you are not here in the United States. But, the Court said, the listeners have standing.

There was another case we were involved with that went all the way to the Supreme Court called *Lamont v. The Postmaster General,* in which Lamont was Corliss Lamont, who was trying to get material from Viet Nam that the Postmaster was interfering with.

He claimed a First Amendment right to get it and the Court said, "Of course you have a First Amendment right to receive, it's not just the speaker." So I put those two cases together and I said, "The consumers, who are being denied access to this information, they are the truly injured people and, besides, psychologically they make much better plaintiffs than the drug people, the advertisers or, later on, even more clearly, the lawyers." So I saw this as the opening step toward getting to lawyers' advertising, and it was clear to me that this was a perfect case because it was lawful to have price competition. You had to get a prescription from a doctor to use the drug, all the pharmacists, at least some of them, wanted to do was to tell the truth. Many of them, of course, were perfectly content with not having to tell—having any advertising—because it meant that they could keep their prices as high as they wanted. And there was no good justification for all of this. And so we brought a First Amendment challenge to this law in Virginia.

MR. MARCUS: That's the big case, right?

MR. MORRISON: *Virginia Board of Pharmacy*. And that gets you with lots of things along the way which I'll talk to you about when we get to it, into the lawyer advertising and on to other things—of course the First Amendment and what has happened to it as a result of it.

MR. MARCUS: But did you find in that case that you were—that while you were clearly pursuing the consumer interest, the public interest, and price competition, and so on, that you were accused of being a foe of small business, of the mom-and-pop pharmacies who were protected by that law and price competition from the Walgreens and…

MR. MORRISON: There weren't so many of those—

MR. MARCUS: There weren't so many in those days, yeah.

MR. MORRISON: And they were—nobody accused us of that, in part, because they were defending this law on the grounds it was needed to protect the consumers. That is how it had been sold, although anybody who thought about it for a minute understood that consumers were being screwed and not being helped.

MR. MARCUS: That's right. The argument was, as I recall, that consumers were helped by this law—

MR. MORRISON: They wouldn't get mixed up, they wouldn't get—

MR. MARCUS: Because they would get—the pharmacists were providing all these valuable services. If there was too much price competition, they wouldn't give the customers supplies, they wouldn't pay attention to their problems and so on.

MR. MORRISON: You got it. And they had other things as well, that they wouldn't check to be sure that you were getting—they were mixing and matching the wrong drugs and so forth. All of those kind of things.

So Ray Bonner started working on that case. We filed a three-judge court case in Virginia. Meanwhile, the *Goldfarb* case was moving along. All of this was within six months. *Goldfarb* was moving along. We took some depositions. They made a motion—the defendants made a motion to dismiss or for summary judgment, raising lack of interstate commerce, the learned profession exception, and *Parker-Brown*. Judge Albert Bryan denied the motion to dismiss. We filed a motion for class certification of a class of twenty-five hundred homeowners in Reston, Virginia. They didn't really seriously oppose it, and Judge Bryan certified the class and set the case down for trial for December. So we took a little discovery and we got ready and we had a half a day trial. We put on a witness who had gone out and—this was largely Tommy Jacks's work, working with somebody—we went out and we surveyed the deeds in Fairfax County where Reston, Virginia, was located and found an enormous number of interstate mortgages, people moving from out-of-state. We had plenty of evidence to show that there was a lot of interstate commerce involved which was either going to be enough or it wasn't going to be enough given the fact that we were also in, of course, an area where there are people commuting and people moving around. So we thought that we were okay on that as well.

We had a one-day trial. In January 1973 he ruled—meanwhile, we filed against three Bar Associations and two of them settled, Alexandria—the City of Alexandria and Arlington settled and we agreed to let them out of the case. They agreed to withdraw their fee schedules and this meant we had two fewer law firms. One of them was represented by Arent Fox and the other was represented by Williams & Connolly, and Hunton & Williams was representing Fairfax, and the State of Virginia had the attorney general's office. So I had two reasons in mind that we let them go. The first thing was I didn't want to litigate against four people and two people is quite enough.

MR. MARCUS: Quite enough.

MR. MORRISON: And I knew that the voluntary Bar Associations had no money in, any event, and they wouldn't be able to—they weren't sources of real revenue if we ever got to that point. And I also thought that if we got two people to voluntarily withdraw their fee schedules we could say to the court, "Look, they voluntarily did this. The world is going to continue to operate. The sun will rise in the morning and set in the evening. It will not come to an end if they don't have minimum fee schedules." And sure enough, we were able to kind of make that point as we went along. So Bryan struck down the Fairfax County fee schedule but upheld the State Bar's role in it and then both sides took—

MR. MARCUS: Was he striking it down on First Amendment grounds?

MR. MORRISON: No, no, no—

MR. MARCUS: Antitrust?

MR. MORRISON: Yes.

MR. MARCUS: Yeah, it wouldn't be First Amendment.

MR. MORRISON: Well because the State Supreme Court had—this came along later in the lawyers' advertising cases. So that's how we kind of got started, and the next thing I knew we were really up and going and in business. Well, some of the things would have been predictable. The lawyers cases were predictable, the regulatory cases, sort of, but we never would have conceived of ITT. The FOIA cases might have been, but not to the extent—I remember Nader or myself at one point, saying why these were such wonderful cases because people could come in and file simple complaints. When we would see a document withheld and the reasons given, we could immediately assess whether we were going to clearly win, clearly lose or whether this was a litigable issue. All these cases involved a modest amount of discovery, not much. A few interrogatories, maybe a deposition and then they would make a motion to dismiss, we would oppose and say, "We need a little discovery; we need to elucidate the facts." And then we'd get cross-motions for summary judgment, decision and appeal, and if we lost we had an immediate appeal. One of our lawyers, Larry Ellsworth, the first year he was in the office, argued four cases in the D.C. Circuit on this. Everybody was able to do it.

MR. MARCUS: Because there weren't a lot of disputed facts. There wasn't a dispute as to what the facts about the fee schedules were, for example.

MR. MORRISON: Well there was not much in those things but I'm talking about the FOIA cases.

MR. MARCUS: The FOIA cases. I thought you were talking about all your cases.

MR. MORRISON: Well that was also true to a greatest extent in most of them, but not all.

MR. MARCUS: Not, for example, in that long SEC hearing you had.

MR. MORRISON: But, by and large, part of this was it was my strategic decision that it was both too costly, too time-consuming and that we were not here in general to pick out or represent individual clients. We were there to make progress in the law and sometimes you had to litigate a case for a client to show that you could not make progress in court. Sometimes we had disputes of fact but they were generally not ultimate disputes because a) it was an administrative law case, or b) it was a statutory case, constitutional case and the facts were ultimately not in dispute. But these FOIA cases went very fast because they were entitled to expedited treatment and the young lawyers didn't have to worry about the complexities of figuring out who the plaintiffs were and who the defendants were and how to structure the case. It was easy in the door and they got to practice being lawyers and they were great tools. We essentially had almost everybody who came in

initially do FOIA cases and then when we started having people who, in addition to those who came in, we would often have them do some FOIA cases, in addition, just to get the experience of doing it and be able to get cases in and out.

MR. MARCUS: Am I right in assuming that you also generally didn't get involved in big agency hearings, agency rule-making proceedings, that it was more judicial review of agency actions or lawsuits challenging private arrangements or government programs?

MR. MORRISON: That's right. We did get involved somewhat initially and somewhat over the years in some rule-making cases. But most of them we got involved in were about issues of law, did they have a good-cause exception for not having notice-and-comment rule making? Did they have adequate justification on the record? Some of those were big record cases. Sometimes—most particularly our Health Group, for example, over at OSHA would do it or at FDA—would be involved in some of these proceedings. They file petitions, participate in some of them, but they were not hearings in the trial sense of the word "hearings."

MR. MARCUS: Yeah, and when Sid Wolfe, for example, at HRG would file one of his petitions with FDA to do something about a drug or something, I assume he and his staff would do that pretty much themselves rather than having—you wouldn't get involved at that stage. You would get involved with people suing FDA.

MR. MORRISON: Initially they started doing—they did them themselves. Subsequently as we got along, we had—our people became more and more expert. Bill Schultz in particular.

And both of us realized the mutual benefits of having our involvement early on so that petitions were properly structured. But our lawyers wouldn't be gathering the information that—I mean, most of Sid's work was gathering other published materials and putting them together and presenting them to the FDA. That is, we didn't have a lab at Public Citizen and the Health Research Group, couldn't conduct our own clinical trials, and so that's the way we proceeded.

MR. MARCUS: And while you had some cases and some of the initial cases you mentioned were in places other than the U.S. District Court for the District of Columbia or the D.C. Circuit, if you look at the whole history, I assume the vast majority of your court litigation was in the federal courts of the District of Columbia.

MR. MORRISON: Certainly in the first five years or so. Although the ITT case was in Connecticut, the Virginia cases were in Virginia, but that's not very far.

But you know, one of the things we had to do in all these cases, we had to get local counsel. We a) were doing controversial things, and b) we had no money to pay them. And so, you know, it wasn't always easy to get local counsel and generally we did almost all the work but we had to get them.

The other thing that we did very early on that had been on my little list of things to do was go after impoundment. Richard Nixon claimed that he had the constitutional, statutory, other authority to refuse to spend money and I reverted to my fourth-grade civics, which I reverted to in other contexts later on as in *Chadha,* and said, "Wait a second, he can't do that!" and so this was getting to—in the beginning of '72 was already an issue.

I saw impoundment as an area in which it seemed to me Nixon was plainly violating the law. Ralph and I had discussed this matter as one of the areas I wanted to do and I found out in the fall of 1972, just after Tommy Jacks arrived, that there was, in fact, a case in the Eighth Circuit involving Nixon's impoundment of highway funds. Both Ralph and I thought that we had plenty of money going into highway funds and this wouldn't have been our first choice of things to attack on impoundment, but the case was going to the Eighth Circuit. The State Highway Commission was the plaintiff and we had seen their briefs and we didn't think very much of them. So what we decided to do was to write an *amicus* brief and with Ralph and working with Mike Pertschuk who was then the Chief Counsel to the Senate Commerce Committee, who Ralph had introduced me to, we decided that we would write an *amicus* brief on behalf of the chair of every single Senate committee, the Majority Leader of the Senate and a couple Members of the House, and Mike got us every single one of them, including Sam Ervin who was holding the hearings on it.

So we decide to file this *amicus* brief. Mike got us all these senators and a few members of the House—I think we had like twenty-five Members of Congress on this brief—

MR. MARCUS: So this was the beginning of your career representing the Congress?

MR. MORRISON: Yes. And this case was in the Eighth Circuit, it was a tight briefing schedule and we had to file a brief—Tommy did a lot of the basic research, although some of it had been done before, there had been some congressional hearings and we both briefed the major constitutional issues; the Justice Department had a position they weren't going to raise a constitutional claim, they were only raising statutory claims. But there was a constitutional background against which we had to deal with all this.

MR. MARCUS: You mean the Justice Department was arguing that he had statutory authority to—

MR. MORRISON: Claiming that he had—that the statutes didn't clearly prohibit him from doing so and that his basic constitutional authority gave him—he wasn't claiming that if the statute had been specific, said, "You may not impound," that he had the constitutional authority to override it. They didn't think he needed to do that and they weren't ready to do this. This was, of course, in 1972 when he was running for president again. He was a strong president at the time but he still didn't want to take on the Congress—Congress was Democratic in both the House and the Senate.

Anyway, we got ready to write the brief and we had to get it out there and, of course, there was no FedEx in those days. And, of course, you couldn't electronically file it; we had to get local counsel. What we ended up having to do, there was something called Next Day Air and one of us, maybe Tommy, went out to the airport here and we took the briefs that we had printed, because they weren't going to print the briefs for us, put them in a box and sent them out to counsel out there, they picked them up and they took them to the courthouse. That's how we had to do it.

Oral argument was scheduled for—my recollection is sometime in January and probably ten days or two weeks before the argument we got a phone call from the clerk of the Eighth Circuit saying that the court has requested that we present oral argument. Now not very many times are *amici* allowed to argue, but to be requested by the court to come to court argument, somebody must have read our brief, and liked it. So I had a very hard choice at this point. Tommy had never argued a case in the court before—in an appeals court. We didn't have much money to send two of us out there and so I made the decision and I thought that the senators who were our clients would have wanted this, too—for me to argue the case which is—I never did this—taking cases away, but it didn't seem like it was the right case to have him do this. In addition, my recollection is that we had only about a week to get prepared for oral argument. So I went and argued the case and I remember to this day sitting there in the courtroom and the court saying, "Will counsel for Senator Ervin and the others please prepare to present oral argument," and I realized that this was a big deal. And we won that case 2-1 in the Eighth Circuit. It was the first impoundment case.

MR. MARCUS: On statutory issues?

MR. MORRISON: Statutory grounds.

MR. MARCUS: He had no statutory authority and they didn't reach the question of whether he had constitutional authority?

MR. MORRISON: Exactly. Meanwhile, while all this was going on, Senator Ervin was holding hearings on it, and Ralph and I testified. Ralph was really good about bringing people up there. My recollection is that I wrote a lot of the testimony but he really went over it and they had a draft bill that we talked about and ultimately became the law. We had a substantial impact both in the creating of the bill and how it shaped out and other things.

MR. MARCUS: Was this something that Nader—you think of Nader being identified with certain kinds of issues, but was he really worried about presidential power, executive power?

MR. MORRISON: Not particularly, no. And one of his great strengths was that he picked people to run the different substantive groups and he, by and large, let us alone, that he understood that there were so many things that needed to be done in the world that as long as you were doing good and useful things and not consuming large amounts

of time and large amounts of money, it was better to have me doing the things that interested me than it was for him to try to set a schedule—

MR. MARCUS: Priorities, yeah.

MR. MORRISON: Agendas—he had areas that if he was interested in something, we tried to do it. A bunch of times I had to tell him, "Ralph, we don't have standing to do this," or, "The law is against us," or whatever it was, but he really let me have incredible free rein. I've said this publicly many times, but the freedom I had was just unthinkable, almost, to me. That I was being allowed to go out and do all this stuff and there was never a case in which he ever said to me, "You know, that's sort of a dumb area to be involved in." Maybe because we agreed that these were important, he didn't necessarily think of it. He was concerned about concentrations of power of any kind and surely this was one that he was concerned about. Once we got into it he was very much—one of the ironies is that in the bill that got enacted, and I do not remember whether it was in the draft version we saw, they divided the world between rescissions, that is, things that stop the spending of money entirely, which were then made illegal, prospectively, under the Impoundment Control Act of 1974 when it finally got enacted, and those things which were deferrals, meaning that they could be done later. There was a legislative veto override in the deferral provision and I have no recollection of either seeing it or, if I saw it, I paid no attention.

MR. MARCUS: It didn't bother you at the time.

MR. MORRISON: It didn't bother me. It didn't bother me at the time and, of course, it was only deferrals—it had to be spent within that year unless there was a rescission that had to be approved. So it was not a big thing, but it turned out to be something significant that we ended up having to litigate later on.

MR. MARCUS: So it seems to me, actually, as I think about it, I asked you the question about whether executive power was a passion of Nader's. Your interest was really a separation of powers interest which played out sometimes anti-Congress, sometimes anti-president and he became a—I don't want to say he became a convert to that, but he agreed.

MR. MORRISON: He agreed. He absolutely agreed.

MR. MARCUS: So it was protecting the constitutional scheme.

MR. MORRISON: Absolutely.

MR. MARCUS: The legislative scheme.

MR. MORRISON: We were non-powers protecting the separation of powers.

MR. MARCUS: Yeah.

MR. MORRISON: So we were able to do this because we didn't have any stake in the fight. We weren't on one of the three teams. We could sit back and look at it. So when we thought the judiciary had too much power in the Sentencing Guidelines cases, we stepped in there. We thought the Congress had too much or the president had too much—we were—we didn't—we stepped in wherever we thought it was the right thing to do.

MR. MARCUS: Did you guys go in on the Independent Counsel case?

MR. MORRISON: Which Independent—?

MR. MARCUS: *Morrison v. Olson*?

MR. MORRISON: Oh, yes.

MR. MARCUS: I'm getting ahead of us.

MR. MORRISON: You're waaay ahead. Because we also had Archie Cox, the firing of Archie Cox. I brought that case, too.

MR. MARCUS: Oh, I didn't remember that there was a case challenging it.

MR. MORRISON: Oh, yeah, I'll tell you all about that and we'll get to it. That was—we're now a year ahead of ourselves.

MR. MARCUS: Yes.

MR. MORRISON: So those were the principal areas that we became involved in.

MR. MARCUS: By the way, Alan, if you are more comfortable going as this is developing today, going chronologically, rather than sort of subject matter area of litigation, we can do it either way.

MR. MORRISON: Well let's—now that we've sort of set the areas, let's go—

MR. MARCUS: Let's go back and go subject matter?

MR. MORRISON: Yeah, because these are the broad areas that we were involved in to begin with. I haven't mentioned sufficiently regulatory cases. We had the nitrites case, we had some truck safety cases, we had some FDA cases, we had some OSHA cases. All these were in the early part and, in addition, we—for many years, administrative agencies were essentially paying no attention to the law unless it was a law that the industry could enforce. They had never been sued before, the agencies, by consumers, and we started suing them.

MR. MARCUS: The agencies themselves? The regulatory agencies.

MR. MORRISON: Right, and—

MR. MARCUS: Or if they were ever sued it was by the industry.

MR. MORRISON: It was by the industry, absolutely right. Nixon imposed wage and price controls and the Order said there shall be open public hearings for any significant price increase that was allowed. He let the automobile industry increase their price what, ten percent, and didn't hold a public hearing, no hearing of any kind. So we sued him. I was getting ready to leave the office to go down to make the argument in the court and we got a call from the clerk saying—from the government saying that they had conceded and they would hold a public hearing.

I represented a guy who had been—he was a poultry inspector and he got disciplined for something or other and we knew why he got disciplined. He got disciplined because the industry got mad at him for not letting enough birds get through and they made up all of this stuff, and we sued them and, sure enough, they backed off.

MR. MARCUS: USDA?

MR. MORRISON: Yeah, yeah. We had some other—we had a bunch of other cases as well in which this was happening. I said to Ralph, "I'm going to write this book. It's going to be called *Morrison on Mootness."* Because they were just giving up as soon as we sued, but it established clearly that they were just disregarding the law because nobody was ever holding their feet to the fire. And so while in initial years we were able to win a lot of cases on those kind of grounds, either because the court said so or because the agency said, "This is ridiculous." There was no attorneys' fees provisions, so we didn't get any fees out of any of this. There were no attorneys' fees provisions in FOIA cases either at this time. We had a lot of early victories and increasingly as you went forward, it became harder and harder because the agencies said, "Well, if it says we're going to hold a hearing, we'll hold a hearing. We're not going to rule in your favor, but we're going to hold a hearing." This was, of course, the heyday of the D.C. Circuit's activism on the court and properly holding the agencies' feet to the fire. And increasingly for industry as well as for consumer groups and, in some cases, they litigated and in many cases they caved in our situation.

MR. MARCUS: Let me ask you one more general question which is during this period, the late sixties, early seventies.

MR. MORRISON: I'm only in the seventies.

MR. MARCUS: Oh, you're only in the seventies. I guess—but the seventies, the big wave of legislation, consumer protection legislation really started in the mid-sixties and ran through, I guess, the early seventies.

MR. MORRISON: Yeah, the first couple years—

MR. MARCUS: So you really came pretty much after that, but I wondered whether—was there much coordination between what you were doing in the Litigation Group and what Nader was doing in terms of legislative stuff?

MR. MORRISON: Well, I remember early on the Consumer Product Safety Act was in the Congress in 1972. It eventually got enacted, I think, in '72. I think—my recollection is that I did look at a draft and it was quite mediocre and Ralph had supported it and in the end he opposed it because it wasn't tough enough. Your former boss, Lloyd Cutler, had managed to get lots of weakening amendments in it that the agency couldn't go after anybody unless they gave them a chance to explain what they were doing and they had these complicated procedures in there. They had procedurally made it almost impossible for the agency to do anything and Ralph (and Sid was involved to some extent) essentially gave up in a large measure because of the statute's weaknesses.

The second legislative piece that we got involved with, and I'm trying to think how early we got involved in it, could have been as early as '72 but it probably was '73 that I became involved, was the Consumer Protection Act. This was a brainchild of Ralph's that he got Ribicoff and others to support it and the idea was that the public should be represented in agency adjudications and rule-making proceedings from the consumer's perspective and the government ought to pay for this and the person would become an independent public advocate in the federal government, not attached to any agency, and could participate and, my recollection is, could take appeals from it as well. The industry was really unhappy about this. I think—I spent a lot of time working on this bill. It eventually got killed by a filibuster. Senator Allen filibustered it. Different versions passed the Senate and House at various times but they never could get through, even when Carter was the president. I always thought it was a wonderful idea, would have been—

MR. MARCUS: When you say, Senator Allen…

MR. MORRISON: From Alabama. Senator—

MR. MARCUS: No, not Allen, it must have been something else. I don't—

MR. MORRISON: Jim Allen, no, Jim Allen. James Allen. He was there for relatively—he was there for two terms, I think, in the late '70s. He was a very formidable opponent. I think that the Consumer Protection Agency bill was one of the things that propelled the advancement and the solidity of the Business Roundtable.

MR. MARCUS: Oh, that's where they got their start? Killing your bill?

MR. MORRISON: They certainly were very much involved in it because they saw this for what it was—it was a big change. We made compromises and what we could do—we spent a lot of time working with Ribicoff's staff, Dick Wegman and others to try to improve it and to get it passed and it got, as I say, got passed at various times. I had a big folder someplace. Maybe I have it still here—I don't think so, I think I left it with

Public Citizen when I left—about this. It finally got killed in '78 and it never got off the ground again after that. So I worked closely with Ralph on that.

I'm trying to think of other—he had fewer legislative things on his agenda at that point as I recall. We did work on the Impoundment Control Act together and subsequently, when the FOIA amendments were made in '74 and '75, Ralph was very much involved in that and I was, to a lesser extent, involved and other people in the organization were involved.

MR. MARCUS: Like Plesser?

MR. MORRISON: Plesser was. Mark Lynch, who was then a lobbyist for Congress Watch which got set up after the Congress Project got completed. Joan Claybrook went to head that before she went off to Highway Traffic Safety Administration.

I don't remember any other specific legislative issues at the time.

MR. MARCUS: Okay. Well maybe we should turn to—

MR. MORRISON: Open Government.

MR. MARCUS: What?

MR. MORRISON: Return to—go back to Open Government, the FOIA.

MR. MARCUS: Yeah, to take the first of the main areas.

MR. MORRISON: Yeah, FOIA.

MR. MARCUS: And why don't you sort of tell us about the history of your FOIA work over the entire Public Citizen period?

MR. MORRISON: Well it began in several respects. One, it was, first, Ralph understood the importance of bringing cases to make the Act workable and to prove to others that it was workable and you could win cases. Second, we had a number of FOIA requests that our substantive groups and the related groups wanted. They had real information needs and so we were their lawyers. And then we started getting press calls, some from this little small guy named Marvin Schacter who ran a publication that looked at HHS and hospitals and Medicare and those kind of things, did some for *Food Chemical News*, and then Carl Stern called us. He was the NBC Justice Department correspondent at the time and he had a bunch of requests, but the most significant one we did for him was involving the FBI's COINTELPRO which was a long-time scheme to infiltrate the civil rights and other groups. They did it for a very long time. Hoover, I think, by this time—Hoover was dead by this time. This was in 1973, and Hoover was not in office when the documents were ultimately made public. He may have been in office when we started. Hoover was not there during *Watergate* but I think he died the prior year and

L. Patrick Gray got appointed the head of the FBI for a year, then he got in trouble and went out.

Ron brought this case against the Justice Department and the FBI. Nobody knew that they had infiltrated all these organizations and that they had people who were spreading bad word about it and doing all kinds of things which may not have been technically illegal but they were certainly improper.

MR. MARCUS: It was anti-Viet Nam organizations, too, as well as civil rights—

MR. MORRISON: Yes, yes, civil rights, yes, yes. Anybody who Hoover considered to be an enemy of the state.

MR. MARCUS: Yeah.

MR. MORRISON: Which was a broad range of people. So we brought this case and sure enough, Judge Barrington Parker, I think, can't remember for sure, issued an opinion saying we could have the documents and they didn't appeal.

MR. MARCUS: Really? Even though these were—

MR. MORRISON: They just—

MR. MARCUS: I would assume they would have had national security claims.

MR. MORRISON: They didn't. No they had no—because these weren't classified at all—

MR. MARCUS: I see.

MR. MORRISON: —and they couldn't very well claim their law enforcement investigative—they could have, but they had no basis for doing so.

MR. MARCUS: Yeah.

MR. MORRISON: And the judge just simply said, "No," and they turned over to us—*enormous* splash! Carl went on NBC News and it was a great event for FOIA because it showed what could be done.

MR. MARCUS: And you had them on national television.

MR. MORRISON: Yeah, yeah. Absolutely. Interestingly, in subsequent years, and they were probably right, the press decided they didn't want to use us as their lawyers because they were also covering us. But they also began to see the value of having their own lawyers do the FOIA cases, which they didn't do. Carl couldn't get anybody to spend a nickel at NBC to do any of this.

So we started bringing cases. Ron brought this case on behalf of Bob Vaughn, your colleague.

MR. MARCUS: Oh, really?

MR. MORRISON: Bob wanted to get the Civil Service Commission's—there were reports and various recommendations by the Civil Service Commission as to—I've forgotten what the subject was. It's important not for actually what the documents were. We went to the District Court and the district judge threw us out and said that all their exemptions were right and they had all these various claims. They claimed five or six exemptions. We couldn't tell what was going on. We went to the D.C. Circuit and said they shouldn't have granted summary judgment. Judge Malcolm Wilkey wrote a really good opinion saying, look, you can't do this. You can't just throw the kitchen sink. You have to have some way to say which parts of which documents are exempt and you got to create an index in court. This became known as the "Vaughn Index" after Bob Vaughn and it became the procedural tool that the courts were able to use to manage these FOIA cases. The Vaughn Index gets cited every day. Every judge knows about it and Malcolm Wilkey, who is a white, conservative judge, but he always understood between right and wrong. If the law says you got to do this, you got to do it. He didn't make any judgments about it, anything like that. He was more conservative in his criminal things than he was in other things, but he was perfectly prepared to tell agencies you're not supposed to do this. So Ron had that opinion. That was a seminal opinion.

Then we had a bunch of other cases. I remember one we had. We had one funny case before Aubrey Robinson. We were representing the Center for Auto Safety and we had a bunch of documents about something that Nixon wouldn't do, wouldn't give us over. Judge Robinson writes his opinion. He says, "There is only one thing harder to fathom than why the plaintiff wants these documents and that is why defendant refuses to turn them over." He says, "But I suppose the very fact that the defendant has not turned them over, that would be what has whetted the plaintiff's appetite."

He says, "So I guess it's understandable why the plaintiff wanted them. I don't see there's anything in them, but they can have them anyway." And of course, he was absolutely right. There was nothing of any—it was just the usual bureaucratic snafus of one kind or another.

Then the government started taking some appeals in these cases and Exemption 7, which is the Law Enforcement Exemption, was written very broadly at the time and exempted materials contained in law enforcement files. The D.C. Circuit started issuing opinions which said that if the document is in a file which is itself a law enforcement file, that's the end of the inquiry. You can't do anything more than that.

MR. MARCUS: You can't argue that it has nothing to do with law enforcement?

MR. MORRISON: You can't argue that it won't interfere or that the release of it now won't have any effect because the case is over or the defendant in the case already has

the documents since it is the defendant's own document it can't hurt anything. We and other people lost those cases and the Supreme Court denied *cert.* in several of them. We saw this as a potentially enormous loophole in the law. Second thing we saw was that government agencies were defending these cases until the end and either giving up or letting the judge do it. There were no attorneys' fees provisions in the statute, so we said that there was going to be no way in the world that people could continue to litigate these cases if there were no attorneys' fees provision. In 1973 the Supreme Court decided the case of *EPA v. Mink*, which was the first challenge of exemption on national security grounds. The Court said, "If it is labeled 'Classified,' that's the end of the inquiry, the courts cannot go any further. You can't begin to look behind it." The Congress, which was very Democratic at the time, and Nixon was on the way out, secrecy definitely was not in vogue, ended up passing a bill with Ron and Mark and Ralph's help. I remember Ralph testified at a hearing when somebody said to him, "Mr. Nader, what do you think is the worst agency for FOIA purposes?" Ralph said, the way only he could put it, he said, "Knock on any door."

He was not going to get into that. He felt everybody was bad and he was probably right. There were some that were worse in terms of timing and processing. They also had some other procedural amendments in there. But these were very significant. These were passed in '75, Gerry Ford vetoed them and Congress overrode his veto. So we continued bringing FOIA cases.

MR. MARCUS: Did the amendments fix up the problems with Exemption 7?

MR. MORRISON: Absolutely and 7 now says "Investigatory file for law enforcement purposes," provided that you can show one of seven different things; interfering with an ongoing investigation, disclose sources and methods, invasion of personal privacy—

MR. MARCUS: And so on.

MR. MORRISON: So it was a perfectly fair balance and it turned out that attorneys' fees were significant and became moderately significant for us although we never got huge attorneys' fees, we did get substantial amounts over the years—in particular, one case that I'll talk about later on. The changes to Exemption 1 on national security information have proved to be very little help. The courts have been extraordinarily reluctant. No case in which a judge has ordered materials produced as improperly classified has ever been upheld on appeal. A couple of judges have done it in the District Court and they've always been reversed and the Supreme Court has never done it.

MR. MARCUS: It's hard to get the Supreme Court to take FOIA cases, right?

MR. MORRISON: Yes. Well, the government's done very well, but very, very few the other way around. We've done a couple and we've won a couple or have helped other people win a couple but at one point the FOIA cases that had gone to the Supreme Court were something like 23-1 government appeals versus private and maybe we won one and we lost most of the government appeals. The Court was not overly sympathetic.

MR. MARCUS: The D.C. Circuit was better.

MR. MORRISON: Much better. And the district judges were good. They understood what was going on—and the D.C. Circuit was, overall, pretty good. Not perfect, but pretty good.

The only thing about Exception 1 that was positive was that because the agencies knew that they had to go to court and justify them, I think they voluntarily gave up more things than they would have and, in a way, that helped them because judges wouldn't get to see things that were plainly improperly classified and therefore be suspicious of other claims along the way. I think the government strategized this way at least in part—or what seemed to us in part—that they tried to present themselves as reasonable. We gave you everything we could (maybe not) but it was a lot easier to defend it that way. I had one case once involving then-ambassador to Iraq, April Glaspie. You may remember Glaspie went to see Saddam before the first Iraq—

MR. MARCUS: Before the Gulf War.

MR. MORRISON: Gulf War, yeah, Gulf War. Exactly. And she told him certain things after which Saddam started the war.

MR. MARCUS: And claimed that he had her implicit permission almost.

MR. MORRISON: Almost. She had sent several cables back to the State Department relaying her conversation. Subsequently she was called before Congress and she relayed the substance of her conversation with Saddam—we asked for the cables and got turned down on national security grounds. We sued, saying Glaspie had already divulged everything when she testified under oath, but the D.C. Circuit didn't accept that claim. This shows how hard it was to win classification cases.

It was a steady diet of—good cases, good training grounds. We had—one of the cases that we brought that looked like it was a—in a way, a precursor to something we ended up doing a little later—Richard Nixon had donated his vice-presidential papers—in 1969 or he said he did them in '69, to the National Archives and he took a tax deduction for them and it was a huge tax deduction. Of course, we knew from the laws of standing we couldn't challenge this, but there had been these rumors that he had backdated the deeds and it was also a question about whether the Archives had the statutory authority to accept them. I got this idea that we could challenge Nixon's tax deduction, the legality of the transaction, by going through the FOIA and asking for the vice-presidential papers. They would come back and say, "This is a private donation." And we're going to say, in response, "No, it can't be a private donation for two sets of reasons. One is they were not—weren't his papers to begin with. He didn't own them. And second, even if he did own them, the transaction was unlawful because he backdated the deeds and at the time he did them there was some reason why the backdating of the deeds wouldn't work and that they had no authority to accept it and it was irregular and, therefore, I think it was that he imposed the conditions in the backdating of the deeds in a way that was improper

under the Archives then-regulations. Details of which, again, unfortunately like a few other things, escape me.

So we brought the case. They defended it and, meanwhile, people were in court challenging Nixon's papers—the donation of Nixon's papers—

MR. MARCUS: As president.

MR. MORRISON: As president, right. Then there was—the statute was passed that made them public papers, right. He then challenged the statute that applied only to presidential papers. After the statute was passed these other cases went back to the District Court and Nixon and the Archivist agreed that even though he had these restrictions which would have prohibited anybody from seeing them until he said so. Oh, I know, one of the conditions was—these are illegal restrictions on the papers—that the Archivist didn't have statutory authority to accept them with these kind of restrictions on them. And when the case finally got back from the D.C. Circuit on remand which was held while all these other things were going on, Nixon voluntarily agreed to not release them all, but make them all releasable if they were not otherwise exempt under FOIA.

MR. MARCUS: But he didn't give up his tax deduction?

MR. MORRISON: No, he did not. Well, I guess he didn't give up his tax deduction. That was one of the Articles of Impeachment against him that they never really pressed. They had so many other things —but it was a major source of embarrassment to Nixon and it was just one more thing that we could do.

MR. MARCUS: Was the backdating ever proven?

MR. MORRISON: No. Well, it depends whose proof you are talking about. It seemed pretty clear that it was. So we had all these creative uses of the FOIA for all kinds of other things that we were doing and eventually we—meanwhile, we had also gotten involved with this statute known as the Federal Advisory Committee Act which—

MR. MARCUS: Also an Open Government kind of thing.

MR. MORRISON: Yes. It was passed by Congress in 1974. It was—no, I'm sorry, '72. It was passed by Congress and it was intended to limit the number of federal advisory committees to assure that those committees which were there to give advice gave only advice and didn't have any authority to make final decisions, that the committees had to operate in the open, and that they had to be balanced.

The Congress did a lousy job of defining what was an advisory committee and what they meant by "open." They said that all of the FOIA exemptions which were written to apply to documents should apply to meetings. Well, the principal problem was that Exemption 5, the Inter-Agency Exemption thing, exempts all kinds of stuff in documents that couldn't possibly be exempt in meetings; if you treated committee meetings the same as

documents that passed around with people, it would be a meaningless thing to have any open meeting at all because they would automatically be exempt. Unfortunately, we had some problems with those things and we had one set of cases under FACA, as it's known. Some similar Exemption 5 cases came up and the D.C. Circuit ruled that Exemption 5 meant what it said and that all internal deliberations could be kept quiet and not open to the public which, of course, destroyed the whole thing. We had to go back to Congress and get it amended to fix that up.

MR. MARCUS: Which you did.

MR. MORRISON: Which we did, yeah, yeah, yeah, and made it the same as the government in the Sunshine Act which was a much closer analogy because that applied to Open Government meetings that had been passed in '72 also—'74. That only applied to multi-membered bodies like the SEC and it has had its own set of problems with it. But at least it didn't claim that they could do something that ultimately ruined the whole statute. So we continued litigating these cases. Then when Nixon went out of office, Reagan issued an Executive Order which purported to allow—

MR. MARCUS: Let me interrupt you because I notice you haven't mentioned the Carter administration. Did you see a real change? I recall that during the Carter administration, the president or the attorney general issued a policy that basically said, "We're not going to claim FOIA exemptions unless it's really important to do so. The fact that an exemption is available doesn't mean you should claim it. You've got to have a really good reason and we're not going to…." And I think the Justice Department was supposed to take a tougher line with agencies as to whether they would defend them. Did you notice any change?

MR. MORRISON: Well you're absolutely right about that. Griffin Bell decided this. It was a Justice Department policy. He issued a letter. My recollection is I remember being at a lunch when he announced this policy was going to take place. I have some recollection that Ralph talked to him about it, tried to persuade him, but he was convinced on his own, I think, that this was the right policy to follow.

MR. MARCUS: I'm sure there was some backsliding by the agencies, but you didn't notice a big change?

MR. MORRISON: It was not a big change, it was *some* change. It was some change and I don't recall cases which they specifically refused to defend them but I think it was a thaw and it was a better policy. Bell said—the first question you ask is not, "Is there some exemption that applies?" but, "Is there an important reason for keeping these documents secret?" not the other way around.

As I've said from time to time, nobody ever got a medal or a promotion for releasing a document under FOIA. All the incentives are in the opposite direction. If they want to release a document, they can release it. By the way, I just read today the new FOIA bill that has passed the Congress and it's got a bunch of procedural stuff in there and they are

trying to get people to do more of this—more releasing and to try to get reports on why they—

MR. MARCUS: Do it faster, yeah.

MR. MORRISON: Yeah, it's faster and it may be of some help. I just think the institutional culture is just so strong the other way and that it's just not what you're going to get out of them.

MR. MARCUS: But still the statutes had an enormous impact—

MR. MORRISON: Oh, oh, overall. It is a truly transformative law. It flipped the world around that you had to have a very good reason for getting it and then you couldn't sue if you couldn't convince an agency you had a good reason, and now the burden is in the opposite direction and the courts understand. It's been tremendously transformative of openness in the government.

MR. MARCUS: I think I interrupted you when you were about to talk about what the Reagan administration did.

MR. MORRISON: Yeah, the Reagan administration didn't like FOIA and they also issued an Executive Order as to which we went to court—David Vladeck challenged it. It was either David or Eric Glitzenstein, I can't remember, in which we challenged the Executive Order that would allow Reagan to continue to keep from the public Nixon papers on the say-so of Nixon.

MR. MARCUS: Oh, this involved the Presidential Records Act.

MR. MORRISON: Presidential Records Act, yeah. And we won that case in the D.C. Circuit and we had a significant number—in the years in which people who were not our natural allies, to say the least, were in charge, FOIA was one of our few defenses—mechanisms—

MR. MARCUS: Few weapons.

MR. MORRISON: Yeah, absolutely. And we couldn't do a lot about regulatory stuff. We did sue them often, sometimes we won. More often than not, we lost. But FOIA was there and it was important and so was the Federal Advisory Committee Act, we got open meetings.

MR. MARCUS: Did you use the Federal Advis—were you involved in the challenges to the Hillary Clinton Health Care Task Force Operation?

MR. MORRISON: No, but we did get involved in the big FACA case involving the question about whether the ABA's Judicial Evaluation Committee was subject to FACA, and the case was started by the Washington Legal Foundation, our ideological opposite.

MR. MARCUS: They didn't like the ABA Judicial Committee Recommendations.

MR. MORRISON: They didn't like the substance.

MR. MARCUS: Because they [the ABA] had opposed Bork—or they hadn't opposed Bork, but they had given him a hard time.

MR. MORRISON: Yes, and we actually had some serious doubts about them as well, about their balance, and so forth and so on. We also thought that they ought to be more public about how they proceeded, what their charter was—what would be the equivalent of their charter, and how they went about participating and why they couldn't have—they have all these internal reports which were made available to the Justice Department. Why couldn't we see most of them most of the time? We didn't want to go sit in on their meetings which are all on the telephone anyway, but we wanted to—we were interested. We probably would not have brought this lawsuit but the Washington Legal Foundation brought its lawsuit and we decided for protective reasons we had to bring our own because we thought that they were not going to make the kind of arguments we were making. They were asking for much too much. All we wanted to do was establish that they were subject to FACA and then they would have to figure out how they were going to proceed from there. They wanted to abolish them and they wanted to interrupt all their meetings. We brought this case and at the time—and we lost in the District Court—Judge Joyce Green.

MR. MARCUS: Did you bring it just against the ABA or also against the Justice Department?

MR. MORRISON: No. They brought it originally against the ABA, we brought it against the Justice Department because under the statute only the Justice Department is an agency which has to control—

MR. MARCUS: Comply with—

MR. MORRISON: Comply with—and we said that they have to recognize it as an advisory committee—

MR. MARCUS: And therefore require them to comply.

MR. MORRISON: And then what they do from that point on is up to them and how they are going to go about structuring it. We didn't want the court to do anything with it. Sure enough, the judge said, "It's unconstitutional as applied to the ABA."

The statute was unconstitutional because it interfered with the president's ability to—

MR. MARCUS: It's in violation of the separation of powers because of the president's ability to get advice about nominations.

MR. MORRISON: Interestingly—

MR. MARCUS: Do you remember what judge this was that this was before?

MR. MORRISON: I think it was Joyce Green.

MR. MARCUS: Joyce Green?

MR. MORRISON: Yeah. Interestingly, when FACA was passed, unlike FOIA, which does not apply to the president, and there is no FOIA for the president—even now the presidential records are available only after the president gets out of office; you can ask for the records, but there is no way to sue him when he's in office—the FACA applied specifically to presidential advisory committees because, among other things, the presidents were using advisory committees regularly and, in fact, I was on one that Carter set up and we had open meetings and it was no big deal. It would have been an enormous loophole, like the definition of "agency" in the FOIA, to exempt the presidential advisory committees. The president could have convened every one of these advisory committees and they would have been exempt.

We thought that we had to defend the statute by bringing them in and the case went to the Supreme Court and the Court—Eric Glitzenstein argued the case for us. We unfortunately had to get divided argument with the Washington Legal Foundation. Eric did a terrific job and we lost five to four. Actually we lost nine to nothing. Four of the Justices said the statute didn't apply. No, *five* of the Justices said the statute didn't apply and four of them said, "Come on, the statute applies, but it's unconstitutional."

And then subsequently the D.C. Circuit applied it not only to these committees which we brought under the prong that they were utilized rather than established, because the ABA had established the committee but the Justice Department was directly relying on it and they were utilized, and that was the word we hung on. The court, the D.C. Circuit, said, well they meant to undermine the word "established" as well when it had to be formally established by the agency and if you got an outside contractor to establish it, then that was not an established committee and there was a huge potential for an end run which turned out not to be as bad as we thought it was going to be because the agencies ended up not wanting to have contractors doing it. But it was a very bad potential loophole. The Supreme Court denied *cert.* in the case. D.C. Circuit opinion by Judge Ruth Ginsberg said, "We are compelled by this other case," and we said, "No, you are not compelled," and the Court said, "We're not getting into this and that's all."

So that's what took us through the Reagan administration. Meanwhile, the Presidential Records Act had passed and in the closing days of the Reagan administration, the National Security Archive, which was an independent group that does a lot of important work in the national security area, got wind of the fact that all of the e-mails at the National Security Council and other places in the White House were being deleted and they claimed that they were not subject to either the Federal Records Act or the Federal

Advisory—or the Presidential Records Act. A suit was brought at the last minute and Judge Parker issued a temporary—

MR. MARCUS: By the National Security Archive or by you?

MR. MORRISON: National Security Archive. They got Kate Martin from the ACLU to be their lawyer. She filed the case, got a temporary restraining order and as she was doing this she said that they couldn't handle the case. It was too big for them and so they got us to do it. Kathy Meyer started working on the case, got a preliminary injunction, went to the Court of Appeals. By this time, Kathy and Eric had left to set up their own law firm. I argued the case in the Court of Appeals. We won part—we won enough to stay alive. They knocked out Bush as a defendant, they knocked out some of the Presidential Records Act stuff. They said we didn't have standing under the Presidential Records Act.

MR. MARCUS: You mean they knocked out Reagan as a defendant or Bush?

MR. MORRISON: Bush because Bush had taken office by this time.

MR. MARCUS: Oh I see, I see.

MR. MORRISON: It was originally Reagan, but two days later Bush was substituted for him. When the case was remanded from the D.C. Circuit, at this point it was clear to me that this was one of the few cases in which there was going to be a lot of discovery, even for a federal agency case like this. Michael Tankersley had come over from Covington. I got him to start work on the case and Michael was the attack dog of all attack dogs, would not let go. He just grabbed hold of this case, he took great discovery, he built an unbelievable record. He was also pretty computer literate, which I was not, so he was able to manage all of this stuff. Their basic claim at the beginning was two-fold. First, we print out everything and second, there is nothing on these e-mails except, "Are you going for lunch and can we meet at three o'clock?" Turns out to be an enormous stuff on the e-mails. They were not printing out anything and ultimately the D.C. Circuit, on the second trip back up, said, "It's not enough to print them out because e-mails are much more useful because they are in electronic form, you could search them, you could tell who sent them, you've got all this data and other stuff in there and you have to preserve electronic records and this applied to the Federal Records Act and to the Presidential—

MR. MARCUS: And we all know that despite memos that come around saying print out your e-mails and save them, nobody does it.

MR. MORRISON: No, no. Anyway, this case went on for a whole bunch of years and we ended up getting a terrific settlement. The one part of the case we couldn't settle was whether the National Security Council was an agency subject to FOIA. They had conceded for years that it was subject to FOIA and they shifted their position in litigation and said it's a presidential entity and we went to the D.C. Circuit and we lost two to one in the D.C. Circuit and the Supreme Court refused to hear the case. So while those

records all have to be preserved because they are presidential records, the NSC is now no longer FOIA-able. You can ask for them and they will give you some things but you can't take them to court during the real time that's involved. Not that you ever got very much with them anyway.

MR. MARCUS: Because most of them are classified, yes.

MR. MORRISON: Yes, yes, yes and the internal exemptions and other things as well. But it was a tremendous victory and it revolutionized the electronic record-keeping in the government. They have not fully done everything they were supposed to do, still huge problems with managing, but this was a sea change and recognition and this was a revolution from where we started with all paper records.

The last big case we had was the Nixon tapes case. As part of the statutes creating the Presidential Records Act and the Nixon Act, the Archivist was required to review them all and release them, separating out the personal material for Nixon from the other material. The Archives was sitting on this and sitting on this and not doing anything and this went on for years and years. Some of it was due to litigation, some of it was due to the massive amount of records. They started releasing some paper records but they did not release any tapes at all.

An historian, Stanley Kutler, from Wisconsin came to us and said, "We have to sue them," and we said, "Okay, we'll sue them." So we did. Patti Goldman brought the lawsuit and we sued the Archives. Nixon came in and intervened, as he plainly had the right to do. He then brought a motion against the Archives to preliminarily enjoin them from releasing anything because they had not adequately done what they were supposed to do and he was at least partially right on that. We had some discovery and we were in a terrible, terrible situation—couldn't figure out exactly what happened. Patti then left to go to Seattle, Washington, where she set up the office for the Earthjustice—well Sierra Club Legal Defense Fund, now Earthjustice—as their Northwest office head. I took over the case and shortly after I took over the case, Nixon passed away and so they made a routine motion to substitute the new executors for Nixon.

MR. MARCUS: "They" is Miller, Cassidy?

MR. MORRISON: Miller, Cassidy, yeah. So I got the motion and they claimed that the executors have the right to these papers. I said, "Well, could I see the will?"

MR. MARCUS: Ah ha!

MR. MORRISON: How could they possibly not give me the will? So they give me the will and I discover two things. I discover, number one, that the two executors are a lawyer in New Jersey and John Taylor. John Taylor is a Nixon protégé and aide for a long time and he is head of the Nixon Library. The second thing I discover is that the will provided that all of the money in Nixon's estate would go to the Nixon Library and not to his family because he'd already otherwise provided for his family, after the

payment of all legal fees in all litigations over his papers, including this very litigation. So I said to Miller, Cassidy, "I want to depose John Taylor," and they let me depose John Taylor.

I bring him in and I say, "Have you read the will?"

He said, "Yeah, I read the will."

I said, "Would you look at this provision on residue and tell me what you think it means as to what the proceeds are going to be?"

And for the first time the light went off in his head that every dollar they spent litigating this case was a dollar that was not going to go to the Library of which he was the head. As soon as he—I had to get him there to do it because there was no other way I could get him to do this, to say, "You know, maybe there is a little conflict—not a conflict of interest, but certainly…"

We then proposed mediation and they agreed to mediate the case.

MR. MARCUS: What did Taylor say in his deposition?

MR. MORRISON: He said, "*Oh*," sort of, "*Oh,"* the light went on and he—

MR. MARCUS: I see.

MR. MORRISON: Yes, "I see," that was enough. You didn't have to beat him up. He was not a dumb fellow, you didn't have to beat him over the head with it. So we began a mediation which lasted well over a year and I suppose at this point—well it wouldn't be wrong to say—and maybe it would be, but I'm going to say it anyway—the Justice Department was much more of an impediment as the thing went on than were Nixon's lawyers and their clients. We had a perfectly—there was one point and I'm not really at liberty to discuss it—that we suggested a perfectly reasonable way to resolve this and the Justice Department would not go along with it. They said that the law didn't let them and there were all kinds of other reasons. They were really being pigheaded about it.

We went up to the head of the Civil Division and—

MR. MARCUS: When was this?

MR. MORRISON: Clinton, the Clinton-era. It was in '95.

MR. MARCUS: It was during the Clinton administration?

MR. MORRISON: Yes, it was '95—'94 or 5.

MR. MARCUS: Frank Hunger was head of the Civil Division.

MR. MORRISON: That is correct. We ended up getting release of the documents. There were two potential stumbling blocks. One was my client wanted a fixed schedule. He said, "If this has been going on, it will go on forever." I said to him two things, "Stanley, you've waited seventeen years, right? If we don't have fixed schedules but we have targets, if they slip a little bit is that better than litigating this case and we're never going to get to it?" I said, "They will never agree to fixed schedules. They just won't and be subject to contempt and I don't know if I would do it with them either and so if you want this we have to do it." And so he said, "Okay." We set up targets and time frames and by and large, they followed them. Perfectly? Of course not, and there were unforeseen problems because nobody knew how long it was going to take. We had to build in time for Nixon's people to review them and then get back to them and so forth and so on.

MR. MARCUS: The process took a while but it worked, basically.

MR. MORRISON: It worked. It's almost all out—one last part is still pending. They have also re-reviewed some parts and there will be more from that.

MR. MARCUS: It's all out now.

MR. MORRISON: The second stumbling block, and this was a Nixon stumbling block: he wanted people to only be able to go to the National Archives and listen to them there. They were really adamant about this because they didn't want people putting it in their car radios and listening—buying tapes and putting them in car radios and listening to them. They didn't want to broadcast over the airwaves right away. I thought it was unlawful, that is to say that they had no statutory authority to do that.

MR. MARCUS: I see.

MR. MORRISON: But I also believed it was non-negotiable. So what we proposed, and Stanley agreed and they compromised, was that they could not be publicly copyable and made available for a period of some number of years after they were released, on the theory that they were hot items mainly when they were initially made public—we had six segments that they were rolled out. But in the end, they could not have kept them that way. They didn't mind having them made public eventually. Everybody agreed with that condition and both of those were really significant in the mediation and we ended up having—there was one issue which we didn't care about was how the Archives were supposed to handle a certain aspect about Nixon's tapes, whether they could cut them up or give them back and whether they could do certain things. It ended up getting litigated in the D.C. Circuit. We did not participate at all because we thought the two of them should fight it out and we didn't mind.

It was an enormously successful mediation. It was clear that we never would have gotten—the litigation result would have been a court's ruling and all kinds of things, schedules, it would have been a disaster. It was the perfect case to be mediated because there was right on both sides. The statute couldn't possible take into account all the

myriad things that were there and everybody had to sort of give up a little bit on it. Nixon's death and the finding of the will were key, key ingredients in this.

MR. MARCUS: Who was the mediator.

MR. MORRISON: He's in—I'll have to get you his name. He was at Crowell & Moring…Cliff Hendler, he did an incredibly fabulous job of shuttle diplomacy with three parties. Sometimes two of them are one side and sometimes a different two and it just took a huge amount of time and it was an enormously successful litigation. It established to me why the D.C. Circuit was smart to say there is no case that is not subject to mediation. That you can mediate anything.

Oral History of
ALAN MORRISON
Third Interview - January 19, 2008

MR. MARCUS: All right. Here we go. Let's start again. This is Dan Marcus interviewing Alan Morrison on Saturday, January 19.

Alan, let's talk about the separation of powers cases that you worked on over the years at Public Citizen. Why don't you tell us how you got into that area and we'll go from there.

MR. MORRISON: Well the first set of cases we did were the impoundment cases that I think we talked about last time. They were really about a battle as to who controls the power to spend. As we discussed, I took the view that the Congress really had the power. The president didn't really have the authority to unilaterally decide not to spend money unless Congress had made it very clear that he had the authority. Of course, he had the authority not to spend money wastefully—if they gave him money to fight the war and the war was over, he didn't have to spend money fighting a war.

But generally that's not the way it worked and so there was this big battle and, as we talked about, we did some litigation cases in that. We brought a bunch of our own cases here in the District in addition to the *amicus* brief for the senators and the others in the Eighth Circuit.

We brought a case in Virginia involving the water—I think it was the money being spent for water treatment. Campaign Clean Water was the name of the client, I remember. We brought that case and we won that and then it went all the way up to the Supreme Court. One of my colleagues, Tommy Jacks, argued the case in the Supreme Court and won that.

MR. MARCUS: And these cases were all toward the end of the Nixon administration, '73 period?

MR. MORRISON: Yes, yes. He started impounding a lot more after his election in '72 because he wasn't offending as many people that were going to vote for him or hopefully vote for him. We had a bunch of them here in the District. We won a few of them.

The City of New York had another case involving the same water issue we did and both of those cases went up to the Supreme Court. The Supreme Court heard them together and decided against Nixon. Meanwhile, Congress had passed the Impoundment Control Act, which we discussed, that had the legislative veto provision in it with respect to the deferral part but not the rescission. We did a bunch of those cases and when the Impoundment Control Act passed, Congress essentially made clear what it thought it had done before and said "no rescissions." Rescissions meaning stopping spending the

money and deferrals where Congress could step in and say "no." Eventually when the legislative veto was declared unconstitutional, which we'll talk about a little bit later, there was still that provision in with respect to deferrals in the Impoundment Control Act. We brought a case involving that issue—it got into the D.C. Circuit and the D.C. Circuit ruled that—

MR. MARCUS: This was after *Chadha*?

MR. MORRISON: After *Chadha*, yeah. It ruled that Congress would not have given the power to the president to even defer, meaning delay in spending, if it thought that it couldn't exercise the legislative veto. So it was unseverable and the president's power to defer was eliminated. Even though it wasn't much of a power, it did make a difference during the year and had timing issues. David Vladeck argued the case in the D.C. Circuit. My recollection is that Judge Bork was on that panel and ruled in our favor.

MR. MARCUS: Ironically, of course, did it occur to you back in '73 or whenever you had the litigation on the Impoundment Control Act or whatever it was called, there you were attacking the president's authority to impound or defer—to rescind or defer—I assume you were not attacking the legislative veto provision at that point and did you think about that at all at all at that time?

MR. MORRISON: The first cases we brought were pre-Impoundment Control Act. That is, all the litigation was pre-Impoundment Control. Once the Impoundment Control Act was in effect there was no problem with our position.

MR. MARCUS: I see.

MR. MORRISON: But the answer to your question is I remember testifying—Ralph and I went up and testified about the Impoundment Control Act and we had a lot to say about it. The one thing that neither of us paid any attention to was the legislative veto provision. Now it was because I had never really thought about it before then. The second thing that happened was, of course, it was attached only to deferrals, which were much less significant than rescissions because the deferral provision only allowed you to defer it within the fiscal year so that if the money was supposed to be spent on a monthly basis you had to spend it all by the end of the year. That was less of an issue and people were less concerned about it from both sides—that is, the people who weren't getting the money were less concerned and the president was less concerned because it wasn't going to do him any good, he was going to have to spend the money anyway.

Anyway, so that was one whole issue and on that one we sided with the Congress. The next case that happened is—I've always thought of as a separation of powers case but many other people didn't view it exactly that way. That was the case involving the Saturday Night Massacre. Archibald Cox had been appointed to be the Special Counsel as it was then called—Special Prosecutor, excuse me—Special Prosecutor and he was investigating Nixon and they—he had—they had obtained an order for the grand jury, and it was affirmed by the D.C. Circuit, to the president to turn over certain tapes which

had been revealed by Alex Butterfield in the *Watergate* hearings that summer of 1973 and Nixon had been ordered to turn them over. He proposed various compromises and he then said finally when the court ruled he said he was not going to turn them over and he ordered Elliot Richardson to fire Archibald Cox and to put somebody else in his place who would follow the president's orders. Richardson resigned in protest.

MR. MARCUS: He refused.

MR. MORRISON: He refused because he had made a commitment to the Senate when he was confirmed in May of 1973 that he would appoint an independent prosecutor and he had named Archibald Cox and he had entered an agreement with the Senate as part of his confirmation. They had issued regulations that said that the independent prosecutor could be fired only for "extraordinary improprieties." Richardson refused to fire Cox and resigned instead. William Ruckelshaus, who was the second-in-command, did the same thing and it fell to Robert Bork, who was then the solicitor general to do it or not. Bork decided that it was more important for the government that he carry out the president's order and so he fired Cox Saturday night, I think October 17th, 18th, 19th, something in that range. Of course the story hit the presses, the FBI came down and cleared out the offices and everything like that. I was at home that evening and Ralph called me and he said, "Do you know what's going on?" I said, "Yes." He said "We can't let this go on." He said "Let's get people together tomorrow morning in our offices, 2000 P Street. We've got to figure out what to do. We can't let this happen." So I said, "Sure." So a bunch of us came together and I can't remember how many of us there were, but not a lot.

MR. MARCUS: Since it was the Saturday Night Massacre, it must have been Sunday morning.

MR. MORRISON: Oh, it was absolutely Sunday morning. It was absolutely Sunday morning. We started poking around and we found the *Federal Register* and the C.F.R. cites in which the regulations had been issued protecting the Independent Prosecutor from firing except for extraordinary circumstance.

MR. MARCUS: Yeah. When you say Independent Counsel or Independent Prosecutor it was a Special Prosecutor who was in the executive branch, so it wasn't as clear a separation of powers issue obviously. I'm getting ahead of you a little, but I just wanted to correct "Independent."

MR. MORRISON: They called him the *Independent* Prosecutor—

MR. MARCUS: Okay. But he was appointed by the attorney general and …

MR. MORRISON: But he was appointed…no statutory basis at all.

MR. MARCUS: That's right. You're right, you're right.

MR. MORRISON: But it was a rule and I knew that rules had to be enforced, and you could try to rescind the rules but they had not tried to rescind the rules. They had not alleged anything remotely dealing with extraordinary—"extraordinary improprieties" was the term. That was the term.

MR. MARCUS: It wasn't just "good cause."

MR. MORRISON: No, no, no, no, no. Nothing—and it was carefully chosen to be much stronger than good cause because we had the old cases. The "good cause" cases, *Humphrey's Executor* and so forth and so on. The first question—we saw this and we immediately saw the protection and we tried—I can't remember the precise order, but we tried to get in touch with Archie Cox, who had been at Harvard when I was there but only for the last year and I didn't really know him. I knew some other people in the office who were working there and we eventually got through to Cox and told him about this and said, "You can resist. It was an unlawful firing." Cox declined—he did not want to be involved. He said, "I've been fired, I understand—I'm not going to fight this." I sort of understood but would probably not have done the same thing, but who knows? Archie was at a different place in his life at the time and he was a different person and so forth and so on. So we said, well why don't we bring an independent case? At this time there had been a couple of opinions in the D.C. Circuit involving citizens' standing and there had been a bunch of cases involving congressional standing also. We had been involved—

MR. MARCUS: The law wasn't as bad as it is now.

MR. MORRISON: No, no, no, no. Quite the opposite.

MR. MARCUS: Right. You had all these Bazelon court decisions on standing.

MR. MORRISON: Yeah and there were other people as well. In fact, the cases, particularly in the '70s and '80s, there were cases from the right as well as from the left. Don't forget Goldwater challenged the rescission of the Taiwan Treaty and he was certainly not a liberal. So everybody was using them. Ralph was the first plaintiff because he was a citizen and we had Frank Moss from Utah who was a Democrat, something not heard of very much anymore in the Congress—Democrats from Utah. I think we got a couple of House members. I think Bella Abzug and I can't remember who else. We got somebody else and maybe there was one more senator but I'm not sure. We had had some other separation of powers cases around this time, just before this. I had brought an action on behalf of a bunch of senators who challenged the failure of the president to send up Howard Phillips's name for confirmation to be head of the OEO. They put him in as an Acting and then they didn't send his name in. There was a statute called the Vacancies Act and so we brought some cases on behalf of the senators saying, "Look, they had a right to have this guy come up for confirmation…"

MR. MARCUS: So they could turn him down.

MR. MORRISON: Turn him down, exactly. And we had another one with Proxmire, with somebody else. Anyway, we had done some of those cases and we had—the standing had been upheld.

MR. MARCUS: And here the standing theory was the confirmation promise?

MR. MORRISON: Yes, that they had made a deal.

MR. MARCUS: A deal. It was a contract, oral contract.

MR. MORRISON: Yes, but evidenced by the regulations which Richardson immediately put into effect as soon as he became the attorney general. So we had the case and we filed it and we drew Judge Gerhard Gesell. Judge Gesell was a wonderful, no-nonsense man who was a former Covington lawyer, highly regarded in the bar and at the court. We knew we were going to get fast action.

MR. MARCUS: A footnote, he had issued a courageous opinion in the *Pentagon Papers* case by then, I believe.

MR. MORRISON: Yes, yes, yes because that was in '71.

MR. MARCUS: So he had taken on the president.

MR. MORRISON: He was prepared to take on whoever needed to be taken on. So we filed the case and we filed a motion for summary judgment with the complaint because under the rules it allows complaints—you can file a motion—twenty days, it was—

I guess we filed at that time or we may have filed a motion to file it early. We filed the motion. The government responded and said we didn't have standing and all the usual things. It came on for hearing and Gesell entered an opinion in which he said, first, that Nader didn't have standing but that Frank Moss did, and so he threw Nader out and then he issued the opinion saying that they had violated their regulations and Cox was illegally fired.

By this time the president had appointed Jaworski. In theory, Bork appointed him, but the president negotiated the deal, Leon Jaworski from Texas. He came up and he kept most of the people. Some of the people went back because they felt loyal to Archie and didn't want to stay, but most of the people stayed and they proceeded to continue the investigations and went forward. Even though Archie had been let go and was not coming back, we felt that the victory, the decision that the firing was unlawful gave the office the kind of backbone it needed to fight. Eventually when Nixon went a year later to the Supreme Court —this was actually eight or nine months later—to challenge the orders and testing the legality of the Independent Prosecutor, the same kind of arguments in terms of the need for independence and the validity of the regulations and separateness enabled the Court to say that it was not simply a fight between the president and one of his lawyers, that they had this separate office and the separate office was significant in

assuring that there was a proper case or controversy. This was not an intramural squabble; this was really something that the courts could adjudicate. It gave both the moral and intellectual backbone to that case.

MR. MARCUS: But what happened? What happened to the Gesell decision? Did the government appeal?

MR. MORRISON: Yes, but they took forever to appeal.

MR. MARCUS: I see.

MR. MORRISON: And we said that it was moot. They said, "Well it was never ripe to begin with." We said, "Yeah it was," and so forth and so on, and finally—my recollection is that the case got fully briefed in the D.C. Circuit—fully briefed in the sense that we said it didn't matter, it was all over, it was done with and everything like that. Eventually the case got dismissed, I think after Nixon resigned, on the theory that it was no longer capable of repetition or evading review because the subject of this had gone.

MR. MARCUS: But is Gesell's decision still in F. Supp?

MR. MORRISON: Oh, yeah.

MR. MARCUS: It didn't get vacated or anything.

MR. MORRISON: It's in F. Supp. It's in F. Supp. *Nader v. Bork*.

Bork was simply the nominal defendant. I remember interestingly years later when Bork was being considered, I think first for the D.C. Circuit and then for the Supreme Court, I was called by the ABA committees asking me about this and I said I didn't agree with what Judge Bork did—what then-law professor Bork did, but I would never suggest that what he did was so improper that it would be a basis for disqualification of him. That is, he made a choice that it was better for the stability of the Justice Department to carry out this order and if there was something unlawful about it, somebody would go forward with it. I probably wouldn't have done the same thing, but it was certainly not disqualifying in any respect.

That was sort of the next little separation of powers case and then we had a couple of these things with the OEO and a bunch of these Vacancy Act cases when Nixon was not sending anybody up for confirmation because he knew he couldn't get these people confirmed because we had a very Democratic Senate and they were not about to put in these ideologues who were trying to dismantle the agencies which they had set up.

MR. MARCUS: Did you ever get a decision from the District Court on the Vacancy Act claims?

MR. MORRISON: Oh yes. Judge William Jones ordered Howard Phillips to get out. We won the case.

MR. MARCUS: And he got out and they didn't nominate—

MR. MORRISON: They eventually nominated other people in there and they got some people through. The Vacancy Act has since been changed and clarified a little bit. It's still not entirely satisfactory, but now the period runs—in essence it says you've got to send somebody up right away, but once it gets up to Congress the period tolls. That is before the Senate it tolls on the theory that you can't blame the president if the Senate sits on somebody forever.

MR. MARCUS: That's right. And there are limits now under the Vacancy Act amendments as to who you can make the acting head of the agency. You can't bring someone in from the outside.

MR. MORRISON: And, actually, I think it now is you have to bring somebody who was either confirmed—who was confirmed for another position so that you have at least—

MR. MARCUS: Or someone who has been in the agency for at least ninety days or something like that.

MR. MORRISON: Right, right. So they cleared up—it took a while but they finally cleared up the worst parts of it. There are still some problems and so forth, but they are not as bad as they were.

Oh, my—we had four plaintiffs in the Howard Phillips case. The lead plaintiff was one Harrison Williams who subsequently went to jail.

MR. MARCUS: But at the time he was very distinguished.

MR. MORRISON: He was. He was the chairman of the Appropriations Committee.

MR. MARCUS: We were all surprised when he turned out to be a crook.

MR. MORRISON: Yes, yes, yes. So those were our early separation of powers cases. This took us into 1975. The next separation of powers case involved the legislative veto. If I had ever heard of it before the spring of 1976, I surely do not remember it. Indeed, although there had been a part of *Buckley v. Valeo*, the major campaign finance case that dealt with the legislative veto over the regs of the Federal Election Commission. I had only the faintest recollection of that and never saw it as a particular problem—indeed the Court never reached that question in that case.

MR. MARCUS: They decided another separation of powers case on the appointment of the commissioners.

MR. MORRISON: Yes. The Appointments Clause said that the FEC was not constitutionally constituted because they had various people—in fact, virtually all of them were appointed by the Senate and the House and they said that violated the Appointments Clause. We were not involved in that particular dispute. Anyway, in the spring of 1976, Public Citizen's lobbying arm, Congress Watch, sent to me a bill that had passed the House Judiciary Committee, I'm pretty sure. It was a series of amendments to the Administrative Procedure Act. It was a really interesting, good bill that would have imposed a few additional requirements on rule-making such as having a definitive record, that is, they had to have a file and they eliminated some of the exceptions, as I recall, to the exclusions from rule making in the APA. It was a good bill.

All of a sudden comes the last provision in the bill and I remember reading it. I was in a taxi coming back from the Hill from some—maybe from the Court. I had it in my pile and I was reading it. I remember reading this provision which said that either house of Congress has the authority to veto by one house any regulation issued by any federal agency. I broke out laughing. I said to myself, "They must be kidding me! The Congress can't pass real laws, they can't get their budget in shape, they can't do anything. How could they possibly do this?" And then I also realized that this was a tremendous augmentation of the power of Congress. It gave those people who had access to the Congress a third bite at the apple. They would have the administrative proceeding, they would go to court, and they would have the Congress. All they had to do was to get one house which, in effect, meant only one committee or maybe even one subcommittee because these matters would be viewed as highly technical, —within the jurisdiction of the committee and the committee could just say all we're doing is maintaining the *status quo*. We're not doing anything and therefore there is no reason for the rest of the Congress to come in.

This seemed to me to be complete insanity from a political science perspective—and also unconstitutional. Because I remember from fourth grade civics or fifth grade that the Congress passes a law, you have to have two houses and the president. This was one house. So this began the legislative veto battle. I remembered—I asked Larry Ellsworth, who was then working with us, to start looking into this. We poked around and we then discovered the *Buckley* case and they had not decided it. We also discovered that the Justice Department had been ranting about this for years, that the president was very unhappy. We found out that these vetoes had been in effect since the early 1930s. Franklin Roosevelt had agreed to some of them as part of Lend-Lease because it was the only way he could get some of these done. There were some that were in reorganizations but that they had become increasingly popular in recent years. There were some two-house vetoes, some committee vetoes. Most of them were the one-house variety.

MR. MARCUS: And the Justice Department rantings that you describe took the form of OLC opinions or signing statements? Did they have signing statements in those days?

MR. MORRISON: They had some signing statements. I don't recall them coming in that way. There were OLC opinions and there may have been some signing statements as well. The problem from the Justice Department's perspective was how were they going

to get these things into court. They weren't prepared to sue the Congress over them. Among other things, this gave us a feeling if we got into court they would support us on this. And so what happened was that we also knew that the Federal Election Commission statutory revisions had not eliminated the legislative vetoes and we also knew that they had a very broad standing provision in them—in the statutes. And of course, there were people who were running for Congress—this was in 1976—and there were voters.

The statute also provided for expedited judicial review before the *en banc* D.C. Circuit Court. So we went out and recruited some plaintiffs, including Ramsey Clark, who was running for Senate, and the problem we had, although we didn't think it was going to be a problem at the time, was that the FEC rules that had been subject to the veto, some of which had actually been vetoed before when the Supreme Court did not pass on that, it said that everything that the FEC had done before the striking its appointments down as unconstitutional would be judicially approved and could continue in effect unless changed. There had been no new rules that had been subject to a veto after that fact.

We thought that we had a reasonable shot at doing this and so we brought a lawsuit the beginning of—the end of August.

MR. MARCUS: What year?

MR. MORRISON: 1976, just before the New York primary. Ramsey Clark was our plaintiff, and I can't remember who else. We had some individual plaintiffs as well, I think—under a very broad view any voter—but he was a candidate and he said he needs to know whether the rules are valid or not.

MR. MARCUS: The FEC rules?

MR. MORRISON: The rules of the new FEC and are they valid and so forth. We were only seeking a declaratory judgment and we filed our lawsuit and they set an *incredible* briefing schedule, like over the weekend we had the briefing.

MR. MARCUS: Under the statute the lawsuit got filed directly in the D.C. Circuit?

MR. MORRISON: We filed in the District Court and they certified it to the D.C. Circuit *en banc*. It was a completely insane procedure and in subsequent cases we got it into a three-judge court. There were no facts at issue here and we served the Secretary of the Senate and the Clerk of the House and they came in and essentially said there's no standing, there's no ripeness, there's no case or controversy and they barely tried to defend it at all. The Justice Department came in on our side and said there is a controversy, it's perfectly legitimate and we think it's unconstitutional as well. And we said it was unconstitutional. That weekend—we had never briefed this before—we put together the model, the argument in our brief which ultimately carried through. We had a three-part argument. We said if it's Legislative, it violates the Presentment Clause because it didn't go through two houses and the president. If it's executive, it violates separation of powers because Congress can't do this. And if it's Judicial that they're

vetoing it, as in overruling it, it violates Article III because only judges can do it. So whatever way you looked at it, it was unconstitutional and that was our basic argument. We kept that basic approach the entire way.

MR. MARCUS: Let me ask you a question. I know you had developed this intellectual interest in separation of powers and the importance of preserving the integrity of the legislative/executive relationship. But was there a motivation for the Public Citizen's interest in this and Nader's interest in this that overall the legislative veto threatened to knock out regulatory actions by regulatory agencies like the Federal Trade Commission or the SEC or whatever that would—so was there kind of a pro-consumer, pro-regulation aspect to your interest in this?

MR. MORRISON: Absolutely. As I said earlier, most of the original legislative vetoes were in the international arms area or reorganization area. But increasingly, they were coming into other areas. We thought that the FEC was particularly good because, essentially, you had Congress vetoing the rules under which they and, by the way, their opponents are going to run for office. That seemed a particularly egregious case for us. But we were very concerned about the ability of lobbyists and people who make campaign contributions to members of Congress to be able to derail these regulations.

I forgot to mention one of the things that we did along the way. Before we filed our FEC legislative veto case, the provisions of the APA amendments were subject to some hearings in the Government Affairs Committee of the Senate. We asked to testify about the legislative veto and we were there. There was a whole bunch of people ahead of us including OLC in the person of one Antonin Scalia and that was the first time he and I had met. He testified saying that they were unconstitutional. We decided that they were going to testify—scholars were going to testify as to that, so Rueben Robertson and I got this idea. I think it was probably my idea—to do a little skit.

MR. MARCUS: In your testimony?

MR. MORRISON: In the testimony. The testimony was a skit. We had a dialogue and Reuben was the head of the CAB. He'd done a lot of work with the CAB and I was his general counsel and the dialogue went something like this. The chairman says, "Well it's a great day. We have in our new rule." I think it was on lost baggage or maybe it was overbooking, both were issues that we had worked on. "When is it going to go into effect?" And I say to him, "Not so fast!" And then I proceed to explain to him all of the things that were going to happen with the legislative veto and he'd ask me questions, "You mean they can do it for any reason or no reason or because of a political contribution or anything like that?" And the senators sat there really paying attention because we had figured out a way to explain what was happening that made it so different. The testimony actually showed up in some Administrative Law casebooks as a new form of advocacy for a period of time. The *Washington Post* ran our picture that day. I think they had the story about it as well, but they had a picture of Reuben and me sitting there waiting with our hands on our chins and then our knees because we were there for four or five hours, but it was worth every minute of it to get that in there.

We had different means of advocacy and eventually that bill didn't go anyplace.

MR. MARCUS: What happened in the D.C. Circuit in the Ramsey Clark case?

MR. MORRISON: D.C. Circuit wrote an opinion in which it said, "No standing, not ripe despite the statute. We're not going to adjudicate it." We got a dissenting opinion from Judge George MacKinnon. George MacKinnon, very conservative Republican from Montana—

MR. MARCUS: Minnesota.

MR. MORRISON: Minnesota? Okay, excuse me. Someplace out there.

MR. MARCUS: And Catherine MacKinnon's father.

MR. MORRISON: Yes, I know that. Anyway, MacKinnon had been a member of Congress and he knew exactly what was going on here. He said it and really had a dynamite dissenting opinion. He said of course this is ripe, we've got to stop this thing in the bud and so forth and so on. It was *en banc*; we lost on eight to one or eight to two. I can't remember what the vote was but it was quite lopsided.

MR. MARCUS: But not on the merits.

MR. MORRISON: Not on the merits—nobody else said a word about anything but standing and ripeness. I think the rationale was that there had been no new rules issued under this new FEC and therefore we don't know that they are going to continue to follow, and since they were appointed before it, the Congress may leave them alone. It's a major constitutional question we ought to stay out of. But the Justice Department, who normally thinks that nobody has standing and everything is not ripe, had come in on our side.

We decided we didn't have anything to lose. Larry Ellsworth had argued the case but I worked very closely with him and we filed a *cert.* petition. The Justice Department flipped and decided it would not support us on *cert.*

And it would say that it was not ripe. It would agree and said it shouldn't take it. And then it said the fatal words. It said don't take this case. There is another case called *Chadha* against INS that has just been filed in the Ninth Circuit. That's clear that there is no ripeness problems. The court should wait to hear that case. Our first reaction was *Chadha*? *Chadha*? Where do we find *Chadha*? So Larry calls John Pohlman, who was the lawyer for Mr. Chadha in the Ninth Circuit —goes through the court, finds who he is, gets a number and calls him. He says to him, "Mr. Pohlman, we see that you have this case with the Justice Department challenging the legislative veto in the case of Mr. Chadha." Chadha is an immigration case. Chadha has been ordered to—was allowed to stay in the country and the House of Representatives vetoed the order of the Immigration Service as the statute authorized them to do. "We know a fair amount about this," Larry

said, "and we would like to come in and help you with the case, briefing the constitutional issue." Pohlman said, "Thank God. I knew there was an issue because I had read enough about this. I don't know anything about this. I'm an immigration lawyer." He said, "You can do whatever you need to do with the case." So that's how we got into *Chadha*.

MR. MARCUS: And became counsel for Chadha.

MR. MORRISON: Counsel for Chadha.

MR. MARCUS: Solved your standing problem.

MR. MORRISON: That certainly did.

MR. MARCUS: The best standing you ever had.

MR. MORRISON: Although the House and Senate, who came in, continued to insist that this was an intramural dispute between the branches and it was not subject to private rights of action and that nobody had standing. He didn't have standing to do it because it was not a justiciable controversy, more a political-question argument.

I remember in the Supreme Court when they made that argument I said to them, "They say this is an intramural squabble. They can say that, but if we lose the case, he's going to be on the next boat out of here the next day."

Anyway, about this time Larry decided he was going to leave the office because his mentor at the Center for Public Representation, Victor Kramer, had been appointed the Special Counsel to the Senate to investigate the *Koreagate* scandal. I can't even remember what it's about. Anyway, he asked Larry to come with him and Larry thought he would do that, that it would be an interesting thing to do. So he did. I, who had been very much involved in these cases, took over the *Chadha* case. The first thing that happened was we persuaded the Justice Department—it didn't take much persuading even though they were the respondent through the Immigration Service—to come in on our side. Once that happened, there was a serious case-or-controversy problem. What we did was we urged the Court to invite the House and Senate in as *amici* and they did that. They came in and filed briefs saying all the usual, no standing, political questions, not severable, meaning that if the veto was unconstitutional, so was the power to allow Mr. Chadha to stay in the United States, and they also defended on the merits as well.

MR. MARCUS: Was this still in the Ninth Circuit?

MR. MORRISON: Yes. This was all in the Ninth Circuit. The case was argued in the Ninth Circuit in April of 1978. My recollection is that it was some time in '77 that we got involved and it took about a year to get briefed which was, by Ninth Circuit standards, especially today, not bad. But even then it wasn't too bad, particularly

because we had this complication because we had to bring in the Senate and the House and they came in after the government filed its brief and so the thing was elongated.

I argued the case in the Ninth Circuit and the case sat there. One of the first problems we had was that one of the judges on the panel was Shirley Hufstedler, who in 1979 got appointed Secretary of Education, so she had to step off. Then they appointed somebody else and he either died or got sick or something and eventually they appointed a third judge who was somebody I'd never heard of—a lawyer in the Ninth Circuit from Sacramento named Anthony Kennedy. Kennedy turned out to write the opinion but not for quite some time. Meanwhile, these vetoes keep coming up in other legislation and they started to be exercised.

MR. MARCUS: Was this during the Carter administration?

MR. MORRISON: It was early Reagan.

MR. MARCUS: Early Reagan.

MR. MORRISON: Early Reagan. These other two cases that we had, the first one was a FERC case, Federal Energy Regulatory Commission case, which I'll say something about in a few moments because it had all sorts of problems with it. Then there was an FTC funeral—it was either funeral or used car—rule that finally got vetoed, and other people brought that case as well.

Meanwhile, we're waiting for this going on and there is more and more impetus for legislation. Elliot Levitas wants to put it in everything. They're putting it in all the bills. I occasionally testified. I went up there, testified one day and said, "It's unconstitutional." And the members of Congress said, "We'll leave that to the Court." I understood exactly why this was. This was a wonderful toy. They get to pass big, broad statutes—

MR. MARCUS: But keeping the agency on the string.

MR. MORRISON: On the string and then they can do all the favors they want and yank back all the authority and no one will notice. They get to curry favor with their supporters and with the people who are opposing regulation. So it was getting to be a really serious problem.

About this time, Ronald Reagan got elected, and during his election campaign he said that he supported the legislative veto, reflecting the views of the people who supported him. So when he got sworn in I became quite worried that maybe the Justice Department would shift its position, and I was also wondering what was going on in the Ninth Circuit because we argued in April of '78 and we were now in January of '91.

MR. MARCUS: '81.

MR. MORRISON: I'm sorry, you are quite correct, '81. So I talked to the folks at the Justice Department. They said they hadn't heard anything yet—this is people in OLC and the SG's office because somebody in the SG's office was actually doing it, I think. And we talked some and I decided that maybe we would try to find some way to push the Ninth Circuit. So I said let me try this. Let me talk to my client. I haven't talked to him in a long time. He had been at the oral argument and I'd met him there, but I hadn't talked to him in some time. Maybe we can find some excuse for saying to the Ninth Circuit, you know, we need to do this for some reason.

So I called Mr. Chadha and I tell him that I need to talk to him and there is a long silence on the phone. He says, "I have something I think I need to tell you." I said, "What's that?" He said, "I got married to an American citizen."

I have two reactions, congratulations and, oh shit! Is the case now moot? Because I knew from when I was in the U.S. attorney's office that even though I never practiced immigration law we had enough cases there that I knew that if a foreigner marries a U.S. citizen, they then become eligible for citizenship. Given the propensity of the courts to duck this issue already, I was concerned that they were going to be ducking it. And by the way, the Supreme Court denied *cert.* in the Ramsey Clark case, as the Justice Department asked them to do, and so we had only *Chadha* at this point. He said, "I actually got married some time ago. We've had a child now and I wasn't sure but I thought I probably shouldn't tell you about this…" I said, "Look, I understand completely. If these are the facts, then these are the facts." My first question to myself and to others at the office was, "Do I have an immediate obligation to tell anybody about this?" So the first person I could tell was, I knew, I could tell my friends at the Justice Department about it. I told them about it and I said look, I need to do some poking around, you need to do some poking around to see whether, in fact, it's moot. So I started doing some research and I concluded that it was not moot because—this was the theory and this was the theory that won in the Supreme Court on the same argument—that if Chadha wins his case in court, he becomes eligible to be a citizen immediately.

MR. MARCUS: I see.

MR. MORRISON: And that, on the other hand, if he has to do the marriage route, it is five years—a perfectly sensible time. They don't want people getting married and then getting divorced, getting citizenship, and so he would save a whole bunch of years by doing it this way. Therefore, he did have standing and it was not moot. I told the Justice Department that, they thought about it. The agreed with it and I do not recall whether we sent a letter to the clerk of the court on this. I think we did not. We did not because we didn't think anything had changed. We did think, however, that we did disclose this to the Supreme Court.

MR. MARCUS: In your brief.

MR. MORRISON: At some point along the way. I cannot remember in which context. We decided that they should decide whether it is, in fact, moot or not and we didn't think we had that obligation with the Ninth Circuit but given the fact that it was in the Supreme Court, we did that. So in the summer—shortly after that, I think it was probably about May, we finally got a decision from the Ninth Circuit striking down the veto.

MR. MARCUS: That was the first court decision ever striking down a legislative veto provision?

MR. MORRISON: Right, right. It was a very solid decision by Justice—then-Judge Kennedy. It was unanimous, I think. Funny how you forget those things, but I think it was unanimous. The Justice Department filed a *cert.* petition. Although it said it agreed with it, it said that it had an obligation to file the *cert.* petition. I think the Senate and House filed their own petitions. We said that we agreed the decision was correct but that it was an important issue and we thought that, in view of the two branches supporting it, we were not opposed to grant of *cert.* It would have been silly to have opposed it in those circumstances.

MR. MARCUS: And, in fact, you probably were hoping, given your long-term interest in this issue, to get a Supreme Court decision.

MR. MORRISON: Yes, but I also of course had a client.

MR. MARCUS: Of course, yes.

MR. MORRISON: Who was quite interested in not having it further reviewed although no he's—it's a great thing in his life that he's—

MR. MARCUS: Right, he's a hero.

MR. MORRISON: He's a hero.

MR. MARCUS: He's immortal.

MR. MORRISON: The case was granted. We had oral argument in February of 1982. I argued for Chadha. Rex Lee, who was the solicitor general, argued for the government. Gene Gressman argued for the House and I think Mike Davidson argued for the Senate—no, no it was not Mike Davidson, it was somebody else. I've forgotten his name.

MR. MARCUS: Was Gressman an outside lawyer for the House?

MR. MORRISON: Yes, he was retained.

MR. MARCUS: Whereas Davidson was in the Senate Counsel's office.

MR. MORRISON: Yes, but Mike didn't argue it. It was somebody else who argued it whose name I've now forgotten because he didn't appear in any of the other cases. Gressman did appear in some of the other cases.

MR. MARCUS: And was there ever—before we get to the argument and the decision, was there ever any concern during this period that because of the president's position on the legislative veto the Justice Department would change its position on the merits?

MR. MORRISON: We were—I was concerned. I do not know whether there were internal battles that I was not aware of. Ted Olson was the head of the OLC at the time. One of his deputies was Larry Simms with whom I dealt most of the time. I don't recall them ever saying that it was in jeopardy. I think that we were okay. I think that when Reagan got in office he realized that—

MR. MARCUS: He was the president.

MR. MORRISON: He was the president, and looked at all the other places in which this thing was impinging upon his powers and potentially so. A couple of other interesting things happened along the way. One is that the ABA filed a brief on our side saying it was unconstitutional but the principal part of the brief was talking about the ramifications of what the legislative veto would do and all the areas in which it was destructive of the American government. Then-law professor Antonin Scalia wrote that brief in conjunction with a lawyer from Davis Polk, and it was an extremely helpful brief in my view. There were a few other briefs in the case, but not many. There were a lot of people who didn't understand what was going on.

As I said before, there were other cases going on and one of them was this Federal Energy Regulatory Commission case involving natural gas pricing of some kind or other. When this veto took place—I think it was in 1980—there were some consumer groups that had been supportive of the FERC rule that got vetoed, and I approached them about bringing the case because we had not gotten a decision from the Ninth Circuit and this was a one-house veto also. But the *Chadha* case involved what was a form of adjudication that was being overturned. The decision to allow Chadha to stay in the country, that was by an executive branch agency. The FERC was a rule making by an independent agency and so although on my theory of separation of powers, focusing on what Congress was doing, it made no difference, there were people who argued that there was a difference.

MR. MARCUS: That it wasn't as much of a separation of powers problem—

MR. MORRISON: Because the independent agencies—and there was rule making and it was less of—it was kind of a visceral reaction kind of thing. One couldn't dismiss it out of hand as being a potential dividing line. Second, we wanted a second case because we didn't know a) whether we were going to win that one or what was going to happen to it and so we brought this FERC case. The FERC case had *enormous* procedural problems with it, the first one being that the FERC statute said that you had to have asked for

rehearing before you could go to court. Since our clients had been perfectly satisfied with the rule as issued, they hadn't asked for rehearing. It was only the veto. I decided what we would do is we would ask the FERC to reinstate the rule that had been vetoed on the grounds that the veto was unlawful.

MR. MARCUS: Which of course they would have to refuse to do.

MR. MORRISON: And then we could take the case up. We would satisfy the procedural thing, arguably. There were two or three other things about the statute that made it extremely complicated, but we managed to write briefs surmounting all of those obstacles, we thought. We got to the D.C. Circuit and we drew Judge Malcolm Wilkey. Judge Wilkey had spent most of his time with the executive branch and was a strong supporter of the president. A Republican, he had always been a very straight judge in our cases, we felt. He was always a gettable vote and he saw immediately what was going on and he wrote a fabulous opinion with us on every single point—he had leapt over all these procedural hurdles to get to the veto issue and then held it unconstitutional.

MR. MARCUS: Before the Ninth Circuit decision.

MR. MORRISON: No, after the Ninth Circuit.

MR. MARCUS: Oh, after the Ninth Circuit.

MR. MORRISON: Three weeks before oral argument in *Chadha*. So we of course submitted the opinion as support for us. *Chadha* was then argued. All of the energy companies who wanted the veto to be kept in had been intervenors and they had filed for *cert.* as well. So the case was argued—*Chadha* was argued in February and no decision. Finally, the last day of the year there was an order entered: *Chadha* is set for reargument.

MR. MARCUS: The last day of the term?

MR. MORRISON: In June. Everybody was mystified. In the meantime, we and the Justice Department had made a motion to the Court asking to defer filing a response to the *cert.* petitions in the FERC case until the Court decided *Chadha*. We filed this in May, I think, and the Court agreed to allow us to do it. Then, of course, once they set it down for re-argument we were told that we had to file our oppositions. We filed our oppositions and the oppositions said, yes, it's important; yes, it presents the case, but you should, nonetheless, await the decision in *Chadha.* In addition, we also pointed out that there were, I think, eight different *cert.* petitions involving between sixteen and twenty-four separate issues, depending on how you counted them, many of which would be—could be—barriers, all of which would have to be decided before you could get to the legislative veto issue and therefore, *cert.* should be denied.

MR. MARCUS: And this reflected your view that *Chadha* was the stronger case?

MR. MORRISON: Well, at least it ought to be decided and sorted out and see what was going to happen. We filed that in the summer, probably August. Unlike every case which I have seen in which cases were set for re-argument, the October calendar came out and *Chadha* was not in October. It wasn't in November either. The FERC case was on the first court conference in September and when the order list came out there was no grant or denial of the FERC case. Almost immediately after that, *Chadha* was set for re-argument in December.

Justice Blackmun's papers claim that the chief had screwed up somehow and not assigned *Chadha* or had kept it for himself and didn't get it done. That was the reason it was set for re-argument. I, of course, was not there at the time but I do not believe that to be the case and I think that the history that I've just recited to you about the not rescheduling for argument and scheduling only once the FERC case had gone to conference supports the theory that the Court was originally inclined to set the FERC case for argument with *Chadha*, hear them both at once and get the full spectrum of legislative vetoes and deal with it all in one opinion.

MR. MARCUS: But you said—because—you say the FERC case came down shortly before the original argument in *Chadha* so the Court was thinking, "Let's wait for the *cert.* petitions in the FERC case and maybe we'll have everything to decide. We'll have the benefit of both cases." That makes sense.

MR. MORRISON: Yes.

MR. MARCUS: Or it could be that someone like the Chief Justice started work on an opinion and thought well, gee, this would benefit from—

MR. MORRISON: Unlikely, because they knew a case came down—the opinion was there, they could see that and if that was what they were going to do, they would have said to us early on do this or have done something else and it didn't make any—it's the only thing that makes any sense given the issues of timing, especially on the not setting it down for re-argument and then only setting it down for re-argument immediately after they saw what a mess the FERC case was.

MR. MARCUS: Of course, they couldn't put off—they couldn't hold the *Chadha* case initially because—postpone the argument because they didn't know whether *cert.* petitions would be filed in the—

MR. MORRISON: Or what they would say.

MR. MARCUS: Or what they would say, yes.

MR. MORRISON: Yes, yes, yes. So that's my belief as to what actually happened. The initial argument—

MR. MARCUS: So you argued it twice?

MR. MORRISON: Yes. When the case got scheduled for re-argument my mother said to my father, "Why are they re-arguing it?" My father said to her, "Did you ever go to a movie twice?"

They must have liked the argument so much. In fact, the first argument was a really good argument. It was contentious; everybody was on top of the issue. It was a really good argument, well argued on all sides. The second argument was boring. They had seen this movie before and they were literally going through the motions and, as I recall, nothing was said of any substance in the second argument that changed anybody's view. Lo and behold, down comes the *Chadha* case in late-June striking down the legislative veto.

MR. MARCUS: We're now in 1983.

MR. MORRISON: '83, yes. Striking down the legislative veto and striking it down completely across the board as applied to all vetoes. Burger wrote the opinion saying Congress can't do this, it is legislation. Powell says, not so fast I think it is an adjudication here but as an adjudication it doesn't work either. White dissented and said it was okay. Rehnquist dissented on the grounds that the veto was non-severable from the power granted and that therefore Chadha had no right to stay in the country in any event. The Court admitted that it was striking down two hundred statutes with this. Most of the time Congress didn't go through and take the provisions out of the statutes and maybe they still were able to exercise some influence. It was a big case and I said at the time that I thought the case was less significant for what it struck down that happened in the past than for what it prevented from happening in the future. That we would have had a completely different administrative state if the legislative veto had gone into effect.

MR. MARCUS: Oh, I agree with you and the other thing I would say, even though I'm not being interviewed here, is that White's dissent, as I recall, was this apocalyptic thing. It was a fairly powerful opinion, actually, in which he said gee, the modern administrative state has required this big shift of rule making and everything to the executive branch. The legislative veto is the only thing that really enables the Congress to really retain real power over legislation, in fact, and you are approving a massive shift the other way.

MR. MORRISON: And he also said it will be the end of compromise, that people can't work these things out and this was an accommodation and so forth and so on.

MR. MARCUS: Of course what he didn't realize is Congress had lots of other arrows in its quiver.

MR. MORRISON: It certainly did, it certainly did.

MR. MARCUS: Okay, so that was probably the case for which you as a lawyer will be most remembered. Don't you think?

MR. MORRISON: Well…

MR. MARCUS: I don't know.

MR. MORRISON: Maybe, maybe.

MR. MARCUS: Yeah.

MR. MORRISON: We can decide this later on. Someone else will have to decide that question. But certainly among them, certainly among law students.

MR. MARCUS: Among Con Law professors.

MR. MORRISON: One of the things that people always ask me about this was how did this particular veto take place? What was the theory? Why did the Congress veto?

MR. MARCUS: Yes, I see.

MR. MORRISON: There is no definitive answer. The statute was a statute that allows Congress to create exceptions for people who would otherwise be deportable if they have shown that they've been in the country for more than five years and that there are—I think again, extraordinary circumstances that prevent them from going back to the country from which they were sent.

MR. MARCUS: Let me just correct—I think that you meant allowed the attorney general…

MR. MORRISON: Attorney general, yes. Did I say the Congress?

MR. MARCUS: You said "Congress," yes.

MR. MORRISON: I meant attorney general through the Immigration and Naturalization Service. They were allowed stays of deportation and they were allowed to stay in the country and eventually become U.S. citizens. Needless to say, lots and lots of people applied for these—extraordinary hardship, I think, or undue—extreme hardship or something along those lines. It had to do with the fact that you couldn't go back to the country from which you came because political conditions had changed there. That was principally the aim of this statute. The Congress had a period of up to almost a-year-and-a-half or two years—if the INS, once they approved Mr. Chadha and the others, had to send the list over to Congress and Congress had until the end of that congressional session which, in the case of Mr. Chadha, I think was about eighteen months, to veto it. There were three hundred and thirty-nine people like Mr. Chadha whose names were on this list. The Immigration Committee apparently looked through these and they came out with a list of five people who got vetoed. When the resolution was brought to the floor of the House, the subcommittee chair said that we felt that these people didn't qualify. That's all that was said about them. That was the entire discussion on the floor. Nobody

said anything more; they unanimously approved the five and meant that the other three hundred and thirty-four got to stay. Why Chadha? Number one, why Chadha? No particular reason.

MR. MARCUS: Where was he supposed to be deported to?

MR. MORRISON: Well that was one of the problems because he had come from—he's of East-Indian extraction, had lived in Kenya at a time when there were a fair number of Indians. When in the 1960s and '70s the situation in Kenya changed, Indians became *persona non grata* and it would have been very difficult for him to have gone back. I don't think there was any quasi-asylum claim, but something sort of like that. He had a British passport but they wouldn't let him in to Great Britain either so he really had no place to go. He never lived in India although his family was originally from there.

One of the thoughts was that there was a scheme of bribery in effect at this time in Congress and that you had to pay to keep your name—

MR. MARCUS: To stay.

MR. MORRISON: Now there were two things—one thing that supports that theory. The subcommittee chair was Joshua Eilberg, who was subsequently indicted for bribery and convicted. I think bribery, but some bribery-like scheme. It was not unthinkable. The other problem was that to have a scheme of bribery you have to have people pay the bribes and—

MR. MARCUS: Three hundred and thirty-four?

MR. MORRISON: Yes—and nobody every told Chadha that he was supposed to have paid a bribe or that his lawyer was supposed to pay the bribe and they didn't. So while it is theoretically possible, I didn't believe that. My own view about this was that it was sort of an "off with your heads" approach, that the committee was just showing who was the boss, that they had the power and they wanted to be sure that the Immigration Service understood it and that the overseers were overlooking what was going on. Whether it was random or not, they picked enough of them that the INS wouldn't know that was going to happen. I have no specific evidence of that but it is the only thing that makes any sense about it. So that's the situation.

MR. MARCUS: Okay, Alan. Let's move on to the next case which is the Gramm-Rudman-Hollings legislation.

MR. MORRISON: I was sitting home on a Saturday morning and the phone rings and it is Ralph calling me. He said, "I got a call from Senator Weicker who was telling me about this effort to balance the budget and he described this process under which the president is going to send his budget over to the Congressional Budget Office but the Congressional Budget Office was going to decide whether the president had the authority to spend the money or not and if they didn't, the president would have to stop spending

the money." I said, "They can't do that. The Congressional Budget Office works directly for the Congress; we just won the *Chadha* case!" This was in 1985. I said, "They can't possibly do that."

Ralph put me in touch with some people and then we found out that various people in the House of Representatives were worried about this issue also. I went over to meet Mike Synar, who eventually became our plaintiff along with eleven or twelve others. I had never met Mike before—from Oklahoma. He's a lawyer, but not practicing much law, not much constitutional law, and the first thing I remember about him, aside from the fact that he had cowboy boots on and he put his feet up on the desk was, unlike other congressional plaintiffs whom I represented, he really wanted to know what this case was all about. He really cared about it. He wanted to know what we were going to do and how we were getting standing and all the rest of the stuff. He's a wonderful guy, just understood what was absolutely wrong with all this and that they were trying to use gimmicks to balance the budget and they were not making hard choices and the Congress was just trying to put this thing on autopilot under some formula that they were going to put in the statute where there turns out to be an enormous amount of discretion under the statute that was supposed to be kind of automatic. Anyway, he and I had discussed this and, meanwhile, the Justice Department was making—

MR. MARCUS: If I can interrupt—what year are we in now?

MR. MORRISON: Fall of '85.

MR. MARCUS: '85, okay. And the bill had not been passed yet?

MR. MORRISON: Had not been passed, it was still proceeding. The Justice Department, meanwhile, had weighed in, said it was unconstitutional to give it to the Congressional Budget Office.

MR. MARCUS: Let me interrupt again just to ask you was the GAO issue—was the GAO question in the bill at this time?

MR. MORRISON: No.

MR. MARCUS: I see, okay.

MR. MORRISON: The Congressional Budget Office was in the bill and everybody realized that the Congressional Budget Office was not going to work, but they thought they had a chance with the GAO and so they substituted the GAO for it. In my mind, the GAO was only a little better than the Congressional—

MR. MARCUS: Was a little better because the president nominates the head of the GAO, the Controller General.

MR. MORRISON: Yes. But the Controller General can be removed by the Congress and works for the Congress and everything and so we knew that was a big separation of powers issue. We also knew that the Justice Department was vigorously fighting the GAO in a variety of other cases then, some involving review of government contracts in which the GAO was claiming it had various executive branch-like authority. I knew that we could get the government to come in on our side. I also thought that Gramm-Rudman was bad public policy because it purported to put the government on autopilot, it left to the GAO lots of important choices to be made in the statute and this was, I thought, an excessive delegation. Mike thought so, too. This is what—he didn't care about the GAO. He thought this was a bad—this was government by gimmickery, just like the legislative veto and this was just not the right way to run the government. That was my view also.

MR. MARCUS: It was irresponsible.

MR. MORRISON: Yes, yes. And it was camouflaged and you really can't solve the problems that way. So I was working with Mike and I said to him what we need to do is we need to put a special judicial review provision in the bill. It has to do two things. One, it has to confer congressional standing so that at least the statute says it. It also gives an immediate right to go to court and requires it go to a three-judge district court in the District of Columbia and then automatic appeal to the Supreme Court. This approach actually appealed to everybody because people who said it was constitutional or unconstitutional, everybody agreed that we needed to know this right away. That got put in without objection. We had stuck an attorneys' fees provision in there, but that didn't last. I was trying to get Public Citizen paid on this thing because we never got a nickel in the *Chadha* case. We drafted the complaint as the bill was going through. Meanwhile, at this time the president had come out in support of the bill without realizing that the GAO thing was in there. He was supporting the concept of getting control of spending.

MR. MARCUS: It was very popular.

MR. MORRISON: Very popular.

MR. MARCUS: The political system can't do this, we have to set up a system—the automatic pilot was a virtue, that this was the way that the political branches could agree to get spending under control. It was very clever.

MR. MORRISON: Don't let me forget to talk to you about the balanced budget constitutional amendment because it's not—it's not a litigation but it was a very important thing and I'll tell you about my role in that.

So we were getting ready to file a lawsuit and I realized that I wanted to see my—

MR. MARCUS: Meanwhile, the bill has passed?

MR. MORRISON: It's about to be passed.

MR. MARCUS: About to be passed.

MR. MORRISON: Fred Fielding—

MR. MARCUS: And you begin to realize President Reagan's going to sign it.

MR. MORRISON: He can't not sign it. He can't not sign it.

I called Fred Fielding who was an old, old friend. I don't know whether I've mentioned this to you. I had met Fred when the *Pentagon Papers* case was in the U.S. attorney's office in New York. I was not working on it, but Fred was Deputy Counsel in the White House at the time and Fred was sent up to New York to watch us to see what we were doing in the case, to be sure we didn't give away the country. He didn't have much to do and I had some time so I got to meet him and became friends with him. We became friends over the years including when he was in the Reagan White House—well first when he was in the Nixon White House the last couple of years and then when he was in the Reagan White House. I called him and I said, "Fred, they're going to sign this—the president is going to sign this bill. I understand that, but the Justice Department has been fighting about the GAO provisions and lots of other things. I don't expect him not to sign it, but can he issue a signing statement saying he supports it but that this is unconstitutional and that the government's not going to support it?" And, sure enough, Fred got the president to put that in the signing statement so I knew I had the government on my side on one issue in the case. They did not come in on my side on the delegation issue which I was never expecting them to come in because any delegation is fine as far as the executive branch is concerned.

So we filed the lawsuit—immediate three-judge court—the GAO then hired its own lawyers, Lloyd Cutler, and then I was on the other side on behalf of Mike Synar and eleven other members of Congress. The three-judge court was appointed: Oliver Gasch, either June Green or Joyce Green (I can't remember) and the third judge was Antonin Scalia, as the requirement was one circuit judge and two district judges. We were put on a very expedited briefing schedule as the statute required, but this was really expedited.

MR. MARCUS: Brutal.

MR. MORRISON: Brutal. We argued the case in the ceremonial courtroom in early February of 1986. I argued, saying it was undue delegation and argued also that the GAO was unconstitutional but I left most of that argument to the government because the government had that. They said that the delegation was okay but it was unconstitutional. The GAO said the delegation was okay and the GAO was constitutional. So we had three different positions.

MR. MARCUS: Was Congress—House and Senate—represented in the three-judge court, do you remember?

MR. MORRISON: My recollection is that they were not—that the GAO was carrying their water for them and making all of their arguments.

About this time the GAO had then issued its first order cutting back on a pay raise or some benefits for government employees and so NTEU, National Treasury Employees Union, filed their own case which was consolidated with ours and eventually went to the Supreme Court with ours, although they made almost no arguments that were different from ours, and their lawyer did get to argue. But fortunately the Court said they had standing so they didn't have to reach whether Mike Synar had standing or not because as we know subsequently, they would have found that he didn't have standing.

MR. MARCUS: He was your only client.

MR. MORRISON: Well I had eleven others similarly situated—

MR. MARCUS: Oh, right, yeah, but it was just Congressmen.

MR. MORRISON: Just members of Congress, right.

MR. MARCUS: When you say the Court held the NTEU's standing, are you talking about the three-judge court?

MR. MORRISON: The Supreme—both of them.

MR. MARCUS: Both of them, okay.

MR. MORRISON: The three-judge court said because it was D.C. Circuit law at the time—

MR. MARCUS: Congressmen had standing.

MR. MORRISON: Had standing. Right. And certainly in a case in which there was a statute conferring standing all the prudential limitations which had arisen in some other cases were nonexistent and so they didn't have any particular problem with that. We argued in the Supreme Court—there was an opinion written in the three-judge district court *per curiam* but everybody believes that Justice Scalia, then-Judge Scalia, wrote it.

MR. MARCUS: You won in the three-judge court?

MR. MORRISON: We won in the three-judge court unanimously. The case went to the Supreme Court and we won on the GAO grounds. The Court didn't reach the delegation ground although the lower court had reached the delegation ground, said it was a proper delegation—the Supreme Court didn't reach the delegation ground.

MR. MARCUS: In the oral argument did you divide the argument with the government?

MR. MORRISON: Actually, it was divided four ways.

MR. MARCUS: Oh, yeah. What did you argue?

MR. MORRISON: I argued mostly the delegation point because that was the argument we were making alone. I think Lois Williams got to argue some as well. Lloyd Cutler argued for the GAO and I don't know whether Rex was still there or not—Rex Lee was still there at the time…if he wasn't, maybe Charles Fried—I think maybe Charles did argue it.

Anyway, we won the case, but not on the delegation grounds. I have always believed that although we didn't win the delegation argument that the delegation argument was vital because it made the Court understand that this was not simply a matter of adding up numbers, that the GAO had an important function with lots of discretion in it and that, therefore, it was particularly inappropriate, not a technical thing, but really went to the fundamental question of executing the laws.

MR. MARCUS: So the delegation argument colored the Court's view of the case in your view.

MR. MORRISON: Yes. If all they had been doing was adding up numbers in a column, no one would have cared. This was why they cared, and why you shouldn't let the Congress people, the congressional agency with powers to be removed by Congress, doing it. And then of course, after that they went back and they gave it to OMB and they did some other things. They tinkered around with it. Ultimately, it was somewhat helpful in moving the budget along, but ultimately it was getting lots of tax revenues in there.

Actually, this is as good a time as any to talk about the balanced budget constitutional amendment. This idea came in because Congress felt it couldn't get control of the spending.

MR. MARCUS: Right. So it was motivated by the same kind of political motivation that underlay the Gramm-Rudman.

MR. MORRISON: And subsequently the line-item veto. All the same thing.

MR. MARCUS: Stop us from spending, we can't control ourselves.

MR. MORRISON: Exactly the words. Government by gimmickery I refer to as the whole series of things. It's not reform. It's fooling yourself.

I first heard about this—Mike Synar told me about this and I got called to testify before the House Budget Committee on the constitutional amendment, the balanced budget.

MR. MARCUS: And of course, the Balanced Budget Amendment was the greatest threat in a way because that really would have put a straitjacket—

MR. MORRISON: It wouldn't be unconstitutional—

MR. MARCUS: It wouldn't be unconstitutional, and similar things have created enormous problems in states.

MR. MORRISON: The states, of course, have a problem but they have provisions that the balanced budget is only with respect to current expenditures. They have the power to issue bonds that are outside of all of this. The Balanced Budget Amendment would not have provided any safety valves at all. I did not think that anybody cared what I thought about the Balance Budget Amendment as a political matter. I thought the only thing I could usefully talk about was the question which nobody had asked: Are disputes under the Balanced Budget Amendment justiciable? If somebody claims that the budget will go out of balance, can somebody go to court and, if so, who and on what basis? If they are claiming the war powers exception, can they go to court on that?

And I had, I think, probably the most intellectually interesting day that I ever had in the House Budget Committee where I went on for well over an hour, maybe longer than that, discussing this back and forth and saying to them, "I don't know what the right answer is, but this is something that is completely irresponsible for you not to answer the question, 'Is it justiciable?' and if so, who and under what circumstances and what kind of cases, and that you can't pass an amendment to the Constitution and say, 'Leave it to the courts as to whether the courts are going to decide it.'" Many people said, "Of course, its justiciable," and many people said, "Horror of horrors! We can't let the courts decide the budget." There are no necessary right answers to that, but you have to decide it. Of course, they punted. Got over to the Senate and I testified again in the Senate—

MR. MARCUS: You say they punted—

MR. MORRISON: Meaning they didn't say a word about it, passed the Balanced Budget Amendment.

MR. MARCUS: The House passed it.

MR. MORRISON: House passed it. And the Senate came within one vote of passing it. Then it would have had to go to the states and maybe it could have been defeated or held up or something like that, but it was a complete disaster. I remember testifying before the Senate Judiciary Committee and Orrin Hatch was there and I said to him, "Senator, I have only one thing to say and that is it is the height of irresponsibility for this committee to pass this out without saying whether it is or isn't, and what is intended is justiciable. You cannot throw this matter onto the courts. You are amending the Constitution and the people have an absolute right to know the answer." Didn't stand in their way, nobody was interested in this at all. People would say, "The courts will sort it out." I said,

"That's not their job! When you are amending the Constitution, when you see an obvious problem, you've got to deal with it."

MR. MARCUS: But you got nowhere with this.

MR. MORRISON: Nobody was interested. A few people mentioned it from time to time as opponents, but that was sort of, oh well you don't like it and therefore you are using this as an excuse. I felt that that was, as I said, the height of irresponsibility not to deal with this issue. Imagine if that had passed?

MR. MARCUS: And it had a lot of steam behind it.

MR. MORRISON: It easily passed the House and it came within a single vote of passing the Senate.

MR. MARCUS: And if it had passed it might well have been ratified by the states, who knows?

MR. MORRISON: They would have said, "We have to live by balanced budget, so do you."

MR. MARCUS: Yeah.

MR. MORRISON: You don't have to wage war, you don't have to take care of the national debt and so forth and so on. It was really worrisome.

MR. MARCUS: It's amazing how these issues like that peak politically at a particular time and while there are still tremendous problems with balancing the budget and deficit spending, you don't hear about that anymore.

MR. MORRISON: Well, it's becoming possible to do the things they want to do.

MR. MARCUS: Okay. The next—what's the next big separation of power issue? Is it *Mistretta*?

MR. MORRISON: Well, actually, let's talk about the War Powers Resolution.

MR. MARCUS: Yes.

MR. MORRISON: At the bottom of Nixon's popularity, in the fall of 1973, Congress passed a War Powers Resolution designed to control the president's ability to wage war. It had a number of provisions in it. I think it had—it did have a legislative veto provision in it but—

MR. MARCUS: Still does.

MR. MORRISON: Yes, yes.

MR. MARCUS: And everyone assumes it is unconstitutional.

MR. MORRISON: Yes, yes.

MR. MARCUS: That's the one thing that everyone agrees is unconstitutional in the War Powers Resolution. It was passed, by the way, over President Nixon's veto, as you mentioned.

MR. MORRISON: That is correct and no small surprise that he would veto it.

MR. MARCUS: Probably any president would.

MR. MORRISON: I think that is probably right, yeah. They had lots of controversial parts. The part that always seemed to be the least controversial, least dubious in terms on constitutionality, was the provision that required that within forty-eight hours after combat of any kind begins (the words are not precise) that the president had to send a report to the Congress explaining the circumstances and telling the Congress how long he envisioned this was going to last and what was going to be done about it—an information report—and send it over specifically under the War Powers Resolution and Congress could then do what it wanted to do based upon that.

Reagan at various times had sent over information which arguably satisfied the War Powers Resolution but without invoking it—without saying that he was doing it. In—I think it's the fall of '87 now, Reagan is still in office, there began a series of sea battles in the Persian Gulf and we were fired on and they fired on us and ships were being sent there, among other things. Troops were being given combat pay and the president has not sent over any report as to what he was doing.

MR. MARCUS: And when you say "they," was it Iraq?

MR. MORRISON: Yes.

MR. MARCUS: So it was Saddam Hussein?

MR. MORRISON: No, no—yes, it was Iraq.

MR. MARCUS: It wasn't Iran at this point.

MR. MORRISON: I'm sorry.

MR. MARCUS: I don't remember actually either. It doesn't really matter.

MR. MORRISON: Iran is to the north so they couldn't—it was Iraq and others.

MR. MARCUS: Yeah.

MR. MORRISON: There were battles going on and we were firing back and forth and it was clear that everybody thought this was some kind of a war. Mike Lowry, who was a congressman from the state of Washington, and ninety-three other members of Congress filed a lawsuit after having written the president to ask him to please send the report over. The lawsuit simply wanted him to acknowledge the war and give us the information as to who was responsible, what our plans were, how long we were going to stay, so that Congress could act responsibly. The president refused, so we brought a lawsuit making absolutely clear that the only thing we wanted was this report to establish that Congress had the right to receive this information. Filed the lawsuit, reasonably expedited basis, the case was heard by then-Judge George Revercomb here in the District. He issued a decision in late-December (I'm pretty sure this would have been '87) saying that it was a political question and that there was no specific authorization for the lawsuit. He didn't say we didn't have standing and he said this was a political matter that Congress should deal with.

We took an appeal to the D.C. Circuit on a very expedited basis and within six weeks we got briefing and oral argument. Our first response was how can this be a political question? Congress has already passed one law. How many laws do they have to pass to get him to do this? Second, we're not telling the president he can't do anything, we need this information for our legislative responsibilities. The statute is perfectly clear; there is no doubt that there is this war going on. They are paying people combat pay. How can there not be a cause of action under the statute?

The case was argued in the D.C. Circuit. The panel was, I think then-Chief Judge Patricia Wald, Judge Harry Edwards and Judge Stephen Williams. These are very capable, smart and for these purposes, very fast judges. The case was argued in February, the first week in February my recollection is. February goes by, March, April, May, June—in July sometime there is a cessation of hostilities and we get an order from the court saying, "Does the recent announcement about the cessation of hostilities have any impact upon the litigation?" We wrote a letter back saying, "No, we still are owed this report. It's not moot, it doesn't change anything around. We might do things differently but we are still owed this report. There is an obligation, it is certainly not moot." And to the Justice Department's credit, they said, "It is no more nonjusticiable now then it ever was." It should the thrown out. The decision should be affirmed." Those things came in in the beginning or middle of August. Finally, we get an order in late October which I find out about only because a reporter calls me because we didn't have online anything then and because they sent it out but it didn't get picked up until after the reporter picked it up. The court enters the following order, "The hostilities having ceased, the case now is moot. The appeal is hereby dismissed." I always considered that the worst example of ducking a hard question that I ever saw. Some day I'm going to ask one or all the judges, each of whom I know, what happened.

MR. MARCUS: Well the judges must have assumed that since the statute had—well maybe—I don't know—did the government take the position that this wasn't really hostilities or…?

MR. MORRISON: No, they never said anything on the merits.

MR. MARCUS: They never said anything on the merits, but I guess the court, of course, if they held that the statute had been violated, would then have to decide whether the report requirement was constitutional.

MR. MORRISON: The government didn't really argue that it was unconstitutional.

MR. MARCUS: Really? They didn't argue the report—it's very hard to argue that a reporting requirement is unconstitutional.

MR. MORRISON: Yes, yes.

MR. MARCUS: There is another—I mean, from the executive standpoint, there are other provisions of the War Powers Resolution that are much more questionable.

MR. MORRISON: Absolutely, and when I took this case on, I said to them, "We are arguing only this."

MR. MARCUS: Only the report.

MR. MORRISON: Because you've got to get your foot in the door and the question about cessation of hostilities and withdrawal of troops and other things like that, those were surely more difficult and I don't think the government cared about the first step. I think they didn't want to have the second one. If this is justiciable, what else is justiciable?

I didn't quite make that argument. I assume what happened was I had one or two votes and somebody had threatened to take it *en banc*.

MR. MARCUS: Well, it's possible.

MR. MORRISON: And nobody wanted it to proceed so that's what—

MR. MARCUS: It's interesting because, of course, the big issues, separation of powers issues with respect to the War Powers Resolution, have never gotten decided as far as I know.

MR. MORRISON: No.

MR. MARCUS: And was that your only brush with the War Powers Resolution?

MR. MORRISON: I think so. The rest of these cases were brought by people who were trying to stop fighting in Nicaragua and arms to the Sandinista and I said to myself, gee, let's walk before we run because those are really tough cases. If this case couldn't get decided, all those other cases…. And this case, if there was any case that was congressional standing was ever appropriate—

MR. MARCUS: Yes, it was this one.

MR. MORRISON: Because it was a report so we could carry out our constitutional responsibilities.

MR. MARCUS: Yeah.

MR. MORRISON: To say this was a political question, pretty harsh to say that.

MR. MARCUS: But in that case the government argued it was nonjusticiable but they didn't argue no standing, right?

MR. MORRISON: Oh, yes, they said that members of Congress don't have standing, that their only remedy is to pass another law and to keep passing laws and laws and laws after that.

MR. MARCUS: Let's go on to the next case.

MR. MORRISON: In the wake of *Watergate* and Archie Cox's firing, Congress responded by passing a new Independent Counsel statute which created a statutory basis so that no president could ever remove in the same way that Nixon removed Cox. The statute provided that a special three-judge court would appoint Independent Counsels upon the advice and recommendation of the Justice Department and they had to forward recommendations if certain conditions arose.

There had been several of these appointed without too much controversy and when Ted Olson was the subject of the investigation for his role at the Office of Legal Counsel, he brought a challenge to the statute, to the Independent Counsel who at that time, in that investigation, was Alexia Morrison, no relation. Years later one of my students whom I ran into at a reunion said to me, "Gee that Independent Counsel case was great, but how did they get your name wrong?" I said, "No, no, no, this is not me." We had supported the legislation creating the Independent Counsel. We thought it was necessary, we thought it was modest and was properly—was constitutional.

MR. MARCUS: You didn't worry as much about judicial power as—I'm just teasing.

MR. MORRISON: Well we did worry about judicial power, as you'll see when we came to *Mistretta*, the Sentencing Guidelines case. The only power they had was—they had two powers—one was to appoint somebody, which the Constitution specifically gives them.

MR. MARCUS: Right. It's quite a shocking thing from a separation of powers standpoint, but it is right there in the Constitution, right.

MR. MORRISON: Although there is at least an argument which did not prevail, that it was meant to apply only to people who worked for the judicial branch rather than for other branches. That argument did fail because it wasn't—it's one thing to appoint the Marshals and the clerks, it's quite another thing to appoint—

MR. MARCUS: Appoint a prosecutor.

MR. MORRISON: Or the Secretary of State. Now fortunately the argument is that Congress would not allow that to happen and this was only in special circumstances.

The second thing, which became the real problem in Ken Starr's investigation, was the power of the court to expand the scope of the investigation without any check from the executive branch. That became ultimately a real problem. Olson filed this challenge and he won in the D.C. Circuit, Larry Silberman writing the opinion striking down on separation of powers grounds. We filed an *amicus* brief in the Supreme Court saying that it was perfectly legitimate, necessary and other things supporting it. But they had—we thought it was good government and it was not interfering with separation of powers. It was limited and carefully controlled.

I think my most useful contribution in the case was that I participated in the moot court. I think I may have looked at the merits briefs but I don't recall how much I was involved. I had lots of people. I was very much involved in the time leading up to the oral argument and in the moot court. One of the questions was who should argue this case? Should Alexia Morrison argue the case? She was a highly respected former assistant U.S. attorney and had been at the SEC and was recognized as a very able government lawyer, but she had never argued a case in the Supreme Court before in her life. This was a big case and you had not only Olson, but you had the Justice Department, Charles Fried, arguing against the constitutionality, saying it was unconstitutional, interfering with the president's power. She was on the other side. I think Congress filed some briefs but she was the only one that was going to argue it.

Lots of people thought that we should get somebody else outside to argue the case. My law school classmate Larry Tribe was mentioned and I said, "No, we must not do this. This is a case about separation of powers and extra-governmental activity. This is the last case we want somebody outside. We want Alexia to argue this case. She's got to argue this case. Our job is to get her ready to argue the case." So we did. I don't know who made the final call—but she argued the case. I remember during the moot court one of the issues came up as to whether she was following Justice Department guidelines and instructions. She said, "Well, yes." She said, "I have a copy of the U.S. attorney's Manual," and she goes like this and she reaches behind her and sweeps her arm back and she says, "I look at this every day." I said to her, "You absolutely have to say that at the oral argument. That's exactly the vision we want, that you are just like any other prosecutor except that you have a little bit of an insulation. What we want you to talk

about is how regular you are and how you follow everything and you do everything just like you did when you were an assistant U.S. attorney."

When she made the argument we wanted the Court to feel this was nothing out of the ordinary and unusual and it was not threatening to anybody. I had not known Alexia before and she is a woman—she was at the time—this was in 1987, '88—in her early to mid-forties, I guess. She has a large amount of hair with a bun on top. She dresses very conservatively and she looks like nothing but a schoolmarm. Your old vision of a schoolmarm and she has a completely unthreatening manner unless you happen to be a defense counsel. In the court she was calm and we got her ready and all she did for the first twenty-five minutes of her argument was to talk about what she did and how she went about doing it and how regular it all was. She didn't talk about separation of powers, she didn't talk about any of those kind of things. The message we got out was she was a prosecutor and she would do fair and right by it. And people afterwards said, "But she didn't talk about any of the issues," and I said, "No, no. This is exactly what she should be talking about." If you read the opinion, the opinion says yeah, it's a little unusual but nothing very threatening. She was completely unthreatening. She was unthreatening and she won the case eight to one.

MR. MARCUS: Well that's interesting because I remember being somewhat surprised by the decision at the time and I think this issue of supervision was very important in the case. Scalia makes a big deal in his dissent, as I recall, about how these guys are rogues, they can do whatever they want and so I think you were on to something there—

MR. MORRISON: And Rehnquist wrote the opinion—

MR. MARCUS: Who had been a former head of OLC and who was a big executive power man.

MR. MORRISON: Yeah, yeah, yeah. I felt that was a major contribution in that case.

MR. MARCUS: I think it was.

MR. MORRISON: Everybody—when I finally made my points about not going outside and what she ought to be talking about, everybody was comfortable with it and you could feel the Court being comfortable with that argument that day.

And a last thing I want to say about the Independent Counsel statute is after the Ken Starr thing which he once referred to as "the recent unpleasantness," which I thought was a nice way of putting his fights with the Clintons, there was a lot of talk about what to do. David Vladeck and I put together a paper in which we said "Mend it, don't end it," that there were things wrong with the Independent Counsel statute that could and should be fixed, but it still had an essential truth to it and, unfortunately, nobody was interested in it at the time and they may come back to it. I don't know if they got—the Scooter Libby-Valerie Plame prosecution was clearly the kind of thing where Patrick Kennedy had—

MR. MARCUS: Patrick Fitzgerald.

MR. MORRISON: Fitzgerald—had enormous power, had as much power as anybody else had in it and nobody thought that that prosecution ever would have gone forward but for an independent—and I don't care whether it is statutorily independent as long as its got the kind of independence it wanted there. That was a pretty good test case and maybe you proved that you didn't need a statute and that maybe the big problem was, some people would say, that the Valerie Plame investigation had a life of its own and went on far too long. I don't think, so but it continues to be somewhat of a problem.

MR. MARCUS: Well it does and it's interesting right now with the CIA destruction of the videotapes there is a kind of dance going on where the attorney general moved very quickly to appoint a Special Prosecutor but not with the kind of independence that Fitzgerald had because—

MR. MORRISON: Has he—has he got less?

MR. MARCUS: Yes. He reports to the deputy attorney general, whereas Fitzgerald had the powers of the attorney general. There are still calls in Congress for the appointment of an outside Special Counsel.

MR. MORRISON: The CIA tapes, of course, raises the additional national security issue which was not really at stake in any of the other ones.

MR. MARCUS: I think that's right. Okay. Should we end now?

MR. MORRISON: Yeah.

MR. MARCUS: Okay. This is the end of the January 19 session.

END TRANSCRIPT

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

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

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

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

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

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

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

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

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

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

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

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

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

And sure enough, it was right.

MR. MARCUS: In the statute?

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

He said, "Well, okay, all right…."

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

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

MR. MARCUS: In the statute.

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

MR. MARCUS: Appointed by the Chief Justice?

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

MR. MARCUS: Ah.

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Even Stanley Sporkin?

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

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

MR. MORRISON: Had no control.

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

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

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

MR. MORRISON: On the Supreme Court.

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

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

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

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

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

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

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

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

MR. MARCUS: I see.

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

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

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

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

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

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

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

MR. MARCUS: I see, yes.

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

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

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

MR. MARCUS: But that's okay.

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

MR. MARCUS: It's legislation.

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

MR. MARCUS: You were the challenger, yes.

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

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

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

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

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

MR. MARCUS: That's right.

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

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

MR. MARCUS: They are our people.

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

MR. MARCUS: We know these guys, yes.

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

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

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

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

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

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

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

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

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

MR. MARCUS: Judges' pay?

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

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

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

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

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

MR. MORRISON: Absolutely.

MR. MARCUS: So—

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

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

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

MR. MARCUS: It was a good government thing.

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

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

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

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

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

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

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

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

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

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

MR. MORRISON: Yes, yes, of course.

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

MR. MORRISON: No, they had standards.

MR. MARCUS: Well, very vague.

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

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

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

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

MR. MORRISON: By the federal government.

MR. MARCUS: All three airports?

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

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

MR. MORRISON: No, Baltimore.

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

MR. MORRISON: Well, no, I may not—

MR. MARCUS: I don't think so.

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

MR. MARCUS: Yeah.

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

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

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

MR. MARCUS: Parking spaces.

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

MR. MARCUS: Ah, yes, yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MORRISON: No. Probably Justice White.

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

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

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

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

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

MR. MORRISON: Bush.

MR. MARCUS: Bush administration.

MR. MORRISON: Bush II.

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

MR. MORRISON: Perfectly constitutional.

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: And their guy wanted it.

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

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

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

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

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

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

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

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

MR. MORRISON: Yes.

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

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

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

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

MR. MARCUS: Could have standing?

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

MR. MARCUS: Yeah.

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

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

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

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

MR. MARCUS: That's right.

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

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

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

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

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

MR. MORRISON: They argued the merits as well.

MR. MARCUS: They defended the statute.

MR. MORRISON: They absolutely defended it.

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

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

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

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

MR. MARCUS: On standing.

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

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

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

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

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

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

MR. MORRISON: Oh, absolutely. Oh yes.

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

MR. MORRISON: I don't think so.

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

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

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

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

MR. MORRISON: Yes.

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

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

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

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

MR. MARCUS: Like defense spending.

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

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

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

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

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

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

MR. MARCUS: So you teach the Delegation Doctrine?

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

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

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

MR. MARCUS: For foreign lawyers?

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

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

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

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

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

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

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

MR. MARCUS: They all said $750?

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

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

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

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

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

MR. MARCUS: With that quotation.

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

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

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

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

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

MR. MARCUS: You got your class certification?

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

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

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

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

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

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

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

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

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

MR. MARCUS: What did you appeal?

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

MR. MARCUS: Oh, of course.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MORRISON: We did not.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Oral History of
ALAN MORRISON
Fifth Interview - February 2, 2008

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison on Saturday, February 2nd, the eve of the Super Bowl 2008.

So Alan, I think last time we finished with the *Goldfarb* case and we should resume our discussion of the other professional cases.

MR. MORRISON: Well, let's go back a little bit. I think I mentioned to you, the first time we talked about the lawyer advertising, the *Virginia Board of Pharmacy* case.

I had decided that minimum fee schedules were certainly one, and the blanket prohibition on lawyer advertising and solicitation, was another very anticompetitive rule. The minimum fee schedules were done by the Bar itself. The lawyer advertising rules were rules of the court. From my work in *Goldfarb* and from other things, it was pretty clear to me that antitrust theory we pursued in the minimum fee schedules would not work because the state court had officially issued the rules and, therefore, under *Parker-Brown* they were—it was state action, they were actually supervising it and we had little or no chance, as it turned out rightly, to be the case when the case ultimately got to the Supreme Court from another place.

So we decided that there was a First Amendment challenge to be brought to the lawyer advertising rules. The challenge was essentially that it was denying the consumers access to information and we brought this first in the context of the *Virginia Board of Pharmacy* case. Virginia, like about thirty-something other states, had statutes that prohibited advertising of the price of prescription drugs. The statutes did not prohibit price competition in prescription drugs, but they prohibited advertising, which was well before the Internet and, as a practical matter, meant there was no competition. You couldn't find out what the price was. You could perhaps call around to every drug store in the county and figure it out, but there was no practical way to do it.

These were all laws that were enacted by legislators principally for the benefit of the local pharmacies. They were anticompetitive in exactly the way we saw the legal profession's rules being anticompetitive. I saw the lawyer advertising rules as being anticompetitive in several respects. One is it was almost impossible to find out anything about what lawyers were doing, what they specialized in, what they charged, anything about them because there was no advertising permitted at all.

I remember when I was in New York—which is where I actually got the ideas to do these First Amendment cases when I was in the U.S. attorney's office—because I had read this case called *Kleindienst v. Mandel* in which, I think I said before, the Supreme Court held that a Belgian Communist, who wanted to come to this country to speak before groups,

had no standing as an outsider, but that the people who wanted to hear him had standing. That seemed to me to be, first place, completely in line with what I wanted to do which was, I wasn't so much concerned about lawyers getting their information out so they could make more money, although I thought that that would happen as well. They would generate more interest, but that consumers could have access to the information. So it seemed to me to be the perfect combination because consumers are much more sympathetic as clients than lawyers are in the lawyer advertising context—especially with then-Chief Justice Warren Burger, who didn't think much of lawyer advertising in the end anyway. But that was further down the road.

So a group, affiliated group with ours, Citizen Action, was next door to us on P Street where our office then was. They had done some surveys and the FTC had done a big study about the price of prescription drugs in places where they are advertised as opposed to where they weren't advertised. We didn't think we needed a whole lot of evidence as to the competitive impact but we thought we had some anyway which was useful. We brought a case in Virginia before a three-judge district court. Those were the days when you challenged the constitutionality of a state statute before a three-judge district court and we filed in Richmond. Judge Merhige, who was a very activist judge, was involved. Judge Albert Bryan, Sr. was involved. His son, Albert Bryan, Jr., had been the judge in *Goldfarb* and Albert Bryan, Sr. got assigned to the panel. We brought this case—

MR. MARCUS: He was on the Fourth Circuit?

MR. MORRISON: He was the circuit judge assigned. He was the senior judge at the time and I don't remember who the third judge was. It was a district judge.

We brought this case and sure enough, we won!

MR. MARCUS: But was it on price advertising or substantive advertising? Services advertising?

MR. MORRISON: The only prohibition was on price.

MR. MARCUS: Oh, it was just on price.

MR. MORRISON: Just on price advertising.

MR. MARCUS: So it was really like *Virginia Pharmacy*.

MR. MORRISON: It was the *Virginia Board of Pharmacy* case. And we recognized—we brought the *Pharmacy* case and we brought it for first for several reasons. One is there are no pharmacists sitting on the Supreme Court. There are nine lawyers. The second thing was there was no possibility of any confusion because they were advertising a price which they were actually going to charge. So there was no possibility of, for example, in the lawyers' area saying we are charging a third. A third of what? Or routine divorce, what's a routine divorce? All of those kind of things. This was absolutely clear,

objective, verifiable information. Precisely the kind and the way the Federal Trade Commission routinely polices advertising in the rest of the marketplace. This was the marketplace.

The third reason was that price competition was perfectly legal, you just couldn't do it. So they couldn't claim that price competition would do anything.

MR. MARCUS: Can I interrupt just to ask, Alan, whether—maybe I'm a little slow this morning, but I take it the bringing of the case challenging the ban on pharmacy advertising of prescription drug prices was a conscious part of the broader strategy to go after lawyer advertising?

MR. MORRISON: Yes. We independently wanted to do the pharmacy case.

MR. MARCUS: You would have done it anyway.

MR. MORRISON: Anyway. But it was clearly done as a First Amendment case and there had been other challenges to rules about advertising, but they had all been on Fourteenth Amendment Due Process grounds. In fact, just as we were bringing this case, the Supreme Court had decided a case called *Snyder's Drugs v. North Dakota*—said that there were no substantive due process rights at all. I think we had that in the Complaint, but we tossed it. It was strictly a First Amendment case.

Then we had a very interesting procedural wrinkle in this case. One of my colleagues had been the principal lawyer. I worked, of course, with him on every case, Ray Bonner, and we won this case and after we won the case in the District Court, the state attorney general made a motion for reconsideration but did it way after the ten days were over. Under Rule 59(e), the ten days are absolutely jurisdictional. We pointed this out, the motion was denied and then they filed an appeal. So we were faced with kind of a hard choice. We had a really good opinion that we wanted to get up. They had not made much of a defense. The defense was that the statute was okay because they didn't want you to shop around because you might be taking different drugs, and the pharmacists were supposed to help you to be sure that you didn't take inconsistent drugs and that was plainly both over-inclusive and under-inclusive, and there was no evidence that that was really a reason and there were lots of better ways of doing that. And the pharmacist was supposed to ask you and so was your doctor. These were all prescription drugs, after all.

So by this time, actually, Ray had left to go out to the West Coast and work for Consumers Union out there. I was writing the opposition to the jurisdictional statement and I felt that I had an obligation to the Court to tell the Court that there was what I thought was a jurisdictional defect and still think was a jurisdictional defect. The Court paid no attention to it whatsoever. It noted probable jurisdiction.

I've got to continue with the story because you need to have some other parts of the story as we are working in with this. Our Health Group, headed by Dr. Sidney Wolfe, was very interested in the delivery of medical services. It decided that it wanted to produce a

directory of doctors that would have in it objective information about the doctor; where they went to medical school, are they board-certified, how long they've been practicing, do they speak languages other than English, do they take Medicare/Medicaid, what are their basic rates, what kind of assistance do they have, what kind of backup do they have, all kinds of objective things that we wanted to do—wanted to find out. So Sid and his group put together a survey, and they sent it out to Prince George's County Medical Society and the State Medical Society. I guess it was just Prince George's County, and they got back a letter from the State Medical Society saying that it would be unethical for doctors to cooperate with this because it would be advertising. We said, "Wait a second. They're not advertising, they're not paying us to do anything. We're doing it. We're controlling it. We have an interest in doing it." Nope, they said you couldn't do it.

While the *Virginia Pharmacy Board* case was proceeding, we brought in Maryland this doctors case. It got hung up in all kinds of procedural mishmash and, meanwhile, the *Pharmacy* case was going forward. *Goldfarb* is now in the Supreme Court. Meanwhile, there is an obscure abortion case that is up in the Court. It's a case called *Bigelow v. Virginia*. This is the example I always cite about why I read *U.S. Law Week.*

Bigelow was a case in which the defendant, Mr. Bigelow, ran a small newspaper, I think, in Charlottesville, Virginia. The newspaper, in 1972 or before, was advertising abortions that were legal in New York, but illegal in Virginia. The case went to the Supreme Court about the same time that *Roe v. Wade* went to the Court. It was held and after *Roe*, the petition was granted, vacated and remanded for further consideration in light of *Roe*. Defendant said well, *Roe*, this is all legal now, you can advertise. The State said, no, it was illegal at the time and you couldn't advertise.

The case goes back up to the Court. The Court grants *cert*. I see this immediately as an opportunity for us to file an *amicus* brief in the Supreme Court supporting Mr. Bigelow. His principal argument—he was represented by the ACLU in New York—was that he was exercising his right of free press and, although it was advertising, *New York Times v. Sullivan* said it was okay to advertise. This was all part of the free press. We wrote a brief which said all that's true, but the real interest is the interest in dissemination of information to consumers because we had *Virginia Board of Pharmacy* waiting to come up. In fact, it was going on at the time. That's the real interest here, and information about a lawful service cannot be suppressed consistent with the First Amendment.

MR. MARCUS: Because of the interest of consumers' access to information?

MR. MORRISON: Yes, in this case consumers could not be denied access to truthful information.

We filed the *amicus* brief in the case and the same day that *Goldfarb* was decided, *Bigelow* came down and Justice Blackmun wrote the opinion. I think it may have been eight to one. I think Rehnquist dissented, but I'm not positive. Anyway, it was a very strong—at least seven to two—saying our position exactly. This is a First Amendment case.

Meanwhile, *Virginia Board of Pharmacy* had been granted. The Court noted probable jurisdiction. The government filed its brief. We then filed our brief after *Bigelow* came down saying *Bigelow, Bigelow, Bigelow, Bigelow*. They filed a reply brief in which they say nothing about *Bigelow* at all.

MR. MARCUS: When you say the government, you mean…

MR. MORRISON: I mean, the State of Virginia.

MR. MARCUS: All right.

MR. MORRISON: The federal government was not involved.

MR. MARCUS: Although they might have been on your side.

MR. MORRISON: They weren't. Not yet. They came in on the lawyer advertising case, but not yet.

So the same day as *Goldfarb* came down, *Bigelow* came down. *Goldfarb* was a big story because it was lawyers, antitrust and it was the Washington, D.C., area. It was a big story all over. I said, "The *Bigelow* case, which was decided the same day, was a much more important case than *Goldfarb*."

Nobody paid any attention, you know? And it was. The ACLU didn't make the commercial speech kind of argument—that there was commercial speech. It didn't really come up in that context because it was litigated in a different way. Blackmun just assumed that commercial speech applied. *Virginia Board of Pharmacy* was the first case in which they actually directly confronted the commercial speech doctrine. Although it was plainly implicated in *Bigelow* it was not discussed because of the way the case came up procedurally.

I remember two things about the oral argument. The first was that Justice Blackmun said to Tony Troy who was, I think, then the deputy attorney general, later became the attorney general of Virginia, "What about the *Bigelow* case?" And he said, "Doesn't have anything to do with it. Nothing to do with it. That's an abortion case." Blackmun just sat there and nodded his head at him.

That was one thing I remember. The second thing I remember was about my argument, in the middle of the argument—there were two things that I was worried—two questions that I thought I was going to get and worried about. One was about cigarette advertising. At this time, the Congress had banned the advertising of cigarettes on television and radio.

And in the *Red Lion* series of cases, that had been upheld—in *Red Lion*, saying that the Congress had special authority over interstate commerce and the airwaves. Then another case came up afterwards, they had specifically upheld the cigarette ban.

MR. MARCUS: Well I think there was never a Supreme Court opinion. They affirmed—

MR. MORRISON: Affirmed a three-judge court, that's correct. So the first I was worried about was cigarettes and the question was, "If we uphold this, what is this going to do to the ban on cigarettes?" I was prepared to say you would have to make the same kind of analysis we would have here and that there was at least an argument that it would be unconstitutional. You would certainly have to consider the First Amendment implications and I wasn't prepared to say what the answer was, but I was certainly ready for that. I didn't get that question. That came up years later in other contexts.

The second question was, was this going to apply to lawyer advertising? And I was absolutely prepared for the answer to that question which was, "The same analysis would apply. The First Amendment would apply. The Court would have to look at the justifications given for the particular rules being challenged and, to the extent that the rules were the same as these rules here, the answer would be the same." I was prepared to say that.

I didn't get that question. I got a different question from Justice White. He said to me, "Well, Mr. Morrison, I suppose your next case is going to involve lawyer advertising." The courtroom broke out into laughter. And completely uncharacteristically for Justice White, he said, "That's okay. You don't have to answer that question." Because he thought he knew what the answer was. When he asked me the question that way, I was prepared to answer the question, "No, Justice White, our next case involves doctors," which was true and we had actually disclosed that at one point in our papers.

MR. MARCUS: Your Prince George's County case.

MR. MORRISON: Yes. Our next case involves doctors. But he made his point and everybody understood the point that the lawyers case was going to come up next.

MR. MARCUS: And that's why there was a footnote in the Supreme Court's decision in *Virginia Board of Pharmacy*. I shouldn't get ahead of your story.

MR. MORRISON: Yes, well anyway, we won the case. Justice Blackmun writes his opinion, says *Bigelow, Bigelow, Bigelow* and lots of other things—this is a silly rule and everything like that, and I think maybe Rehnquist dissented in that one, too. I don't remember for sure.

MR. MARCUS: Yes, I think so.

MR. MORRISON: I'm pretty sure he did. He dissented a lot—much more when he was an Associate Justice and many more concurring opinions than when he was the Chief. So it was a great day and we knew this—a lawyer advertising case—was going to happen.

We were perfectly prepared to have the doctors cases and there was another doctors directory case that was being brought. There was a lawyers directory case brought by

Consumers Union in Virginia. We thought those were better vehicles. Meanwhile, out in Arizona, Bates and O'Steen started advertising. They got slammed and they took their case to the Supreme Court. The Supreme Court agreed to hear that case. Actually, I think the State Bar lost that case—I think it was the State Bar against Bates and O'Steen. In any event, right on the heels of this, that case went to the Supreme Court and we had hoped for a little more time and reprieve, but it didn't happen that way.

We filed an *amicus* brief in the case as well as others. This time the solicitor general came in because Bates had claimed both an antitrust violation and a First Amendment violation and so the government came in and Dan Friedman came in and argued for the federal government and a lawyer in Arizona named Bill Canby, who later became a judge on the Ninth Circuit, argued and we did a moot court for him, much to his appreciation, I think. The case was argued and I learned a really interesting lesson from that case. The government came in and said no antitrust violation because of *Parker- Brown.* The state was regulating the advertising, the State Supreme Court had issued these rules and after *Goldfarb*, that was clearly right and it was clearly right before *Goldfarb*. The antitrust laws are not designed to get at state court ethical rules. But they came in and they said the First Amendment applied. They said *Virginia Board of Pharmacy* and it was anticompetitive. Dan Friedman, whom I'd seen argue many times and then saw in the Federal Circuit, was a wonderful advocate. But I must say he was quite uncomfortable arguing the pro-First Amendment side.

Because he's always—representing the federal government, he's almost always against the First Amendment. Not against it, but for a narrow interpretation.

It reminded me that sometimes having the best possible advocate, if he or she doesn't have their heart in it—

It was awkward. I remember seeing a similar thing—the football players hired Ken Starr after he left the solicitor general's office to argue on behalf of the players against the league and Ken did an okay job, but I didn't feel he had his heart in it the way he would have had if he'd been arguing the other side.

Somebody thought, "We ought to get the solicitor general, he knows all this stuff." There is something to be said for having the person with the passion on it.

Anyway, five to four, the opinion, again written by Blackmun, saying the state can't bar all lawyer advertising and that these were not narrowly-tailored, objective restrictions—the ones that they wanted to have—legal clinic, fixed fees and hours. Chief Justice Burger wrote in a passionate dissent saying, "It was the beginning of the end of the Universe," and, "The Bar will never be the same again." Of course, it wasn't the same again. It was actually better. Some things worse, but overall, better. I've often been asked, "What do you think about all this now?" And I say, "Look—I have two reactions. Do I like some of these ads I see on television? No. Do I think they are harmful? No. Do I think many people are offended? Sure. But there are people who pay attention to them

we know because people are spending real money for these ads and they wouldn't do it without it."

MR. MARCUS: People are getting legal services.

MR. MORRISON: And most importantly, they are able to get legal services that they need—

MR. MARCUS: At a reasonable price, maybe.

MR. MORRISON: And this is one of those cases where if the Bar had gone and done a lawyers directory with the kind of information that we wanted to do with the doctors directory and the Bar had done a service and controlled for all of this, the result might have been different. In the first place, people probably wouldn't have brought these lawsuits. In *Bates* and *O'Steen*, the lawyers were on the defensive there. That is, they got sued and they were subject to potential disciplinary proceedings. So they stuck their necks out. In the *Virginia Board of Pharmacy* case, we were a consumer group; they couldn't do anything to us. We had low risk. There was no risk at all. It's easy to be a plaintiff in that kind of a case. It is quite difficult to stick your neck out, with the lawyers. So that became the beginning of the changes in the lawyer advertising rules.

Two other things had been going on during this time as well. One, the ABA and the State Bars were getting concerned about prepaid legal services—in particular, group legal services, that is the ones that were referred to as "closed panel plans," which were the legal equivalent of HMOs. The reason that these were initially popular was because they did what HMOs did, except that they were consumer-driven as opposed to insurance-company-driven. They were often set up by labor unions and they effectively drove down the price of legal services by making it affordable, and it was a form of insurance. When I first heard about this, because it was part of our work on the legal profession, I went to work with a group whose principal purpose was to get these plans out and get more known about them and to remove barriers. There were two significant barriers that we worked to remove, and I worked with a group on it. And, under the Taft-Hartley Act, jointly negotiated labor management plans have only limited subjects of collective bargaining and medical plans were included but legal services plans were not, so we got Congress to change that.

Second, there were two problems with these plans from a tax perspective. One was that the people who wanted these plans wanted to make the contributions to them excluded from income, like medical insurance plans, which made them more attractive and cheaper in terms of benefits both for the employee and for the employer. The second and bigger problem was that in all likelihood the payments for legal services would be treated as income to the plan beneficiary so that you would have to pay tax on the payment with no money to pay for it. That was also true with the medical plans and they had fixed that for the medical plans. Those were very important things and we got a cooperative Congress to fix those in the early 1970s as a prelude to doing this.

Meanwhile, the ABA—was dominated in this regard by the General Practice section, and they were very much against it because they saw it, just as doctors saw prepaid medical, and HMOs, the lawyers saw this as potentially cutting into their business which it probably would have if they'd really gotten off the ground. To some extent they did get off the ground. The ABA had some rules, the effect of which was to—they did it this way: lawyers were forbidden from cooperating with plans that advertised the availability of group legal services and so while the Bar couldn't regulate the plans because they were not lawyers, they could say that it would be unethical for lawyers to cooperate with them. At that time, the ABA Rules were adopted either automatically or virtually automatically by most states in the Union.

Well these ethics rules that the ABA promulgated were seriously anticompetitive because they essentially said that lawyers couldn't cooperate with these plans and the plans couldn't get off the ground without lawyers.

MR. MARCUS: What was the ethical violation?

MR. MORRISON: Advertising.

MR. MARCUS: Advertising?

MR. MORRISON: Because they were—the plan was, theoretically, advertising. Not on behalf of the lawyers, but on behalf of the plan.

MR. MARCUS: Was there also an element of control of lawyers by non-lawyers, I vaguely remember, with some of this stuff?

MR. MORRISON: Yes, but those sort of things were taken care of. Everybody agreed that they couldn't control the lawyers' handling of individual cases. The question is could they do this?

We brought an antitrust case against the ABA about this time—this was in the mid-70s—it was the *Pre-Law Society of Middle Tennessee State University v. American Bar Association.* They ended up backing off and they ended up changing their rules. We never did get it litigated. They said, well we're only advisory, so we had to make it clear that they couldn't do it. About this time, the second thing that happened was State Bars started taking a look at the ethics rules more seriously and so the ABA's model rules were not automatically adopted, so that helped as well.

In any event, I think it was the FTC or maybe the Antitrust Division were also making noises about these things being anticompetitive. We were reasonably successful both on the legislative side and also on the litigation side. For a while these prepaid legal services plans got going and they have become more common but they have never become like medical plans and the principal reason was that starting in the late 1970s, labor unions, who were the principal proponents, went into a decline and they lost their bargaining position and members became more concerned about not losing wages and getting wage

increases in times of inflation. It just became less of a priority. As labor unions, particularly in the industrial sector, became less powerful, the movement never really moved ahead. I don't have the latest data on it, but it's not anywhere near what anybody thought it would be, probably for market reasons as much as anything else. There are some private plans. I think at one time some of the credit card companies had them. They were not, strictly speaking, the prepaid and closed panel plans, they were advice plans and discounted services and you could get lawyers if you were driving and got in a traffic matter in some other part of the country. They were useful but the movement never took off. In any event, we saw our job as eliminating the barriers, and we had eliminated the barriers. There is currently in the code nothing that in any way stands in the way of prepaid legal services.

The other related antitrust prong that we had going was during the time that I was litigating *Goldfarb*, I came to understand the process of buying and selling houses in Virginia. The reason that A. Burke Hertz and the rest were able to charge so much money for it was that there was an ethics opinion of the Virginia Bar which said that the examination of the title to real estate was a matter that only lawyers could do because they were stating a legal opinion as to the state of title and that, therefore, title examiners and title insurance companies could not do that on their own. They had to have a lawyer examine the title, and it would be unethical for lawyers to assist in any way in a house closing in which the title examination was done by a non-lawyer.

MR. MARCUS: And the theory was that the non-lawyer was engaged in the unauthorized practice of law.

MR. MORRISON: Unauthorized practice of law, yes. There was a company in Virginia called Surety Title that was trying to do title examinations without lawyers and the Bar started making noises and they came to me and so we brought an antitrust action against them.

During the course of this we discovered that there had been several impassioned meetings at which the Bar debated and issued these ethics opinions and it was a hundred percent clear from these that the sole motive was economics. Some guy got up and said, "If we let them do this, they'll be taking bread out of our mouths." Somebody else said, "What do you expect to do? We'll turn into a bunch of Legal Aid lawyers."

We brought this case—it was not the world's most sympathetic client. They were doing some stuff that didn't look so great. We ended up not winning—we lost the case, *cert.* was denied, Justice White dissented. But in the meantime, the Virginia Bar got wise—it may have been while the case was pending, I can't remember for sure; they proposed a new rule—actually it probably came from the Supreme Court. It had to come from the Supreme Court.

MR. MARCUS: The Virginia Supreme Court.

MR. MORRISON: The Virginia Supreme Court changed the rules on opinions on what constitutes the unauthorized practice of law. In the past, the State Bar could issue them without any approval by the Supreme Court of Virginia. They changed it so that the Bar could issue opinions saying that something was *not* the unauthorized practice of law and hence could be done, i.e., pro-competitive without the Supreme Court of Virginia, but if they had to do it the other way around and said it was a violation, they had to go to the Virginia Supreme Court, which was perfectly fine. A perfectly sensible rule. That is, there was no anticompetitive problem in saying that you could have more competition.

MR. MARCUS: That was your quasi-victory.

MR. MORRISON: Yeah. Well, it was clear that the case would never have been victorious without that. The FTC, as I recall, did some further things about that, but I don't recall seeing any other instances of State Bars issuing unauthorized practice of law opinions.

I have two or three other areas I want to talk about. One is unauthorized practice of law, and I want to talk about residence and other requirements for Bar admissions, and then policing attorneys' fees, principally in the plaintiffs' bar.

MR. MARCUS: Let's—why don't we do unauthorized practice of law.

MR. MORRISON: Yes, I just want to give you a preview. I was sitting in my office one day in about 1977 and I get a letter from Rosemary Furman of Jacksonville, Florida, and it says, "Re: Help." I always read my mail because there were all sorts of good things showing up in it. Rosemary Furman was a paralegal. She had been a legal secretary in Jacksonville, Florida, and she ran an independent service in which she was helping people who could not do the work themselves to prepare simple legal papers: divorce, adoption, name change, and other things. The State Bar of Florida was very unhappy. The State Bar of Florida, fast forward, has, even today, the most extensive effort to police the unauthorized practice of law of any state in the Union. They have a budget in excess of $1 million that they spend, by their own admission. No other state has virtually any enforcement mechanism. Many other states are principally concerned with people who are misrepresenting themselves as lawyers, people who are unlicensed in the state but licensed someplace else or have been disbarred and are practicing. We never had any problem with those. The problem we had was this. And the State Bar of Florida came after Rosemary Furman and they brought a proceeding against her. She had heard about my work and she wanted me to come down and represent her. The first thing she wanted me to do was to bring an action in the federal court on antitrust grounds to enjoin the enforcement. She was smart. She really knew what she was doing.

MR. MARCUS: Their enforcement action was before a state agency or in an injunction action in state court or what? Do you remember?

MR. MORRISON: Yes. The Bar has to seek an Order to Show Cause from the State Supreme Court.

MR. MARCUS: I see.

MR. MORRISON: The State Supreme Court issues an Order to Show Cause and they set the matter down for hearing before a circuit court judge in the county in which the unauthorized practice was alleged to have taken place. The State Bar has lawyers—they actually hire lawyers—or hire, they probably don't pay them. They don't pay them. They get lawyers in a firm there to prosecute the case on behalf of the State Bar. The remedies they were seeking were injunction and contempt of court.

There were lots of reasons why Rosemary was singled out, although they were going after other people at the same time as well. The first reason was that she was charging $50 for things that lawyers were charging $450 for. The second thing was that she hated lawyers generally and the organized Bar, in particular. She would denounce them as "scum" and "thieves" and everything else. She was very strong and very good on television and the Bar was going crazy. They just couldn't abide this. So she got me to come down. I wrote her back and I said to her, the case has already started, under Supreme Court precedent, you can't get an injunction against them. It's not a violation of the antitrust laws to begin with and, therefore, I declined to do it. I think actually they were threatening to do this. They hadn't done it yet. Well, maybe they had done it. Anyway, the point was I said I was not going to do that case because it would have been futile. I said if you want me to represent you in the state court proceeding, I'll do it, but I have to get local counsel. So I got local counsel, a guy who she had helped out with some things. He was basically a criminal defense lawyer. A lovely guy whom we've kept up with for many years, named Bill Sheppard. He helped out in this case. I went down there and I defended her.

The judge was extremely unfriendly; he issued an order saying, no, you can't do this. This is the practice of law. She kept saying, "Well what is the definition of the practice of law?" Of course, nobody was going to give her a definition. She was typing up papers, so therefore she was doing legal pleadings and she was telling people what to do, therefore she was giving advice. She was not going to court, but she was doing everything short of it. Although a lot of the stuff focused on the divorce papers, she was doing other things as well. It turned out that the Bar had trouble getting her clients—people who would be witnesses for her because all the people she served loved her. She was doing things—she knew what to do.

MR. MARCUS: She did good work.

MR. MORRISON: It was very good work. In fact, she did better work than a lot of lawyers who didn't know all the details, because she really did know everything about what she was doing. If she made a mistake, she didn't charge anybody anymore. She was also very active in the local women's center and she did a lot of work for battered women who were tossed out of their houses and left with children. I think that the judges could figure out which papers she typed because her typewriter had a distinct style and the people would come in pro se and they would ask—the judges would sometimes ask them, "Did you type these papers?" and they said, "No, Furman." They said, "No, I got it

done at the Northside Secretarial Service." At one point she had a couple women who were helping her out, but she was very good.

So we lost the case in the court and we took an appeal. Meanwhile, another case had come along in which we had nothing to do with, didn't even know it was going on—*Marilyn Brumbaugh*. Florida Supreme Court, same kind of situation—divorce preparation—and they said, "Well we realize that typing the papers is okay. That's okay. But, that's all the person can do. Anything else is the unauthorized practice of law." We said, "That can't be right. These people are all people who can't read and write. They don't know any legal proceedings. They can't fill out the forms. If they could fill out the forms, they could do them themselves; there is no requirement that these papers have to be typed. This is, in effect, virtually nothing." It was illegal for the clerks of the court to tell people how to fill out the forms because that would be giving legal advice also. We said it was a completely unworkable situation. We threw in for good measure, this also violates substantive due process and equal protection because, for many people who want a divorce, they cannot afford a divorce and if they cannot afford a divorce, the State maintains a monopoly over the divorce. Therefore, they cannot be divorced and under *Boddie v. Connecticut*—the Supreme Court had held that a $50 filing fee for a divorce is a violation of due process and equal protection for those who can't afford the filing fee.

But this was divorce and we said this is the same kind of barrier. These people have no ability to pay it. Unfortunately, the way the case was structured, we didn't really have the evidence as to particular plaintiffs who were adversely affected and for whom there was no other remedy, no Legal Aid, no pro bono lawyers, no nothing. We didn't have any of those plaintiffs, in part because we were on the defensive and the charges were with respect to people who, while middle class, they were not completely poor. So the issue was presented. The Florida Supreme Court didn't pay any attention to it, nor did they pay attention to our plea to narrow *Brumbaugh* (or broaden it, depending on which way you look at it) to make it more workable. They said *Brumbaugh* is the law and that's it. We filed a *cert.* petition and *cert.* was denied—not very surprisingly because we didn't have much in the way of a record. So she had this injunction against her. They hadn't held her in contempt and she purported to follow *Brumbaugh*, but she couldn't do it. She couldn't do it because it didn't work and because in her heart she knew it was wrong. She couldn't help these people. Sure enough, the Bar caught up with her. This time they brought a criminal contempt against her.

The criminal contempt could have put her in jail for an indefinite period of time, so we made a motion for a jury trial. That was denied. We tried this case before another unfriendly judge. This one was on television. It was my first experience with television. None of the witnesses for the other side had any complaints about her at all. The only problem they had was that the judges were hostile to the papers because Rosemary had done them. Well, big surprise. So if we had gotten a jury trial, we might have been able to do something. We didn't get a jury trial and the judge recommended the sentence of five months in prison.

She got scared. We went to the Florida Supreme Court, raised the jury trial issue, the argument about *Brumbaugh*, constitutional rights. They didn't pay any attention. We went to the Supreme Court and we got a stay from Justice Powell, but then *cert.* was denied. The only issue we took up was the jury trial issue. So Rosemary at this point was about to go to jail. Meanwhile, we had decided that about the time they went after Rosemary for the criminal contempt that we had to go on the offensive. So we took the *Boddie* case and put it in an offensive posture. We found, through Rosemary, a woman, poor, black, on welfare, with three children. Her husband had left her. She just wanted to get a divorce and get rid of him. Legal Aid at the time was taking only cases in which there was current abuse because they simply didn't have enough people to take more. Their budget had been seriously cut. We brought a class action on behalf of Serena Dunn against the Florida Bar and the Florida Supreme Court saying that, as applied to divorces, adoptions and name changes, over which the state maintained a monopoly, this was a violation of their due process and equal protection rights to prohibit the Rosemary Furmans of the world from providing advice and assistance and, at the same time, not have any pro bono services or anything else to do it. You could change—there are lots of things you could do. The one thing you can't do is to keep denying these people access to legal services.

MR. MARCUS: You brought this in federal court?

MR. MORRISON: Federal court. They made motions to dismiss and that was denied. We made a motion for class certification, a (b)(2) injunctive class. I had our client in court that day. I was getting—I had made my part of the argument and the lawyer for the other side was arguing about why we shouldn't get class certification. The judge said, "Would counsel please approach the bench?" So I go up to the bench and the judge says to me, "Mr. Morrison, please don't look around, but would you tell me is your client in the courtroom today?" I said, "Yes she is, your Honor." He said, "Well, you know, she has been sleeping through the entire proceeding." I said, "Yes, Your Honor, on the way over she told me that she had been up the night before with her small children and she's very tired and it was very difficult to get her to come today." He said, "All right. I appreciate that," and he said, "I wonder," he said, "Do you think it's possible you could get an additional class representative?" He said, "Being class representative is not a particularly onerous requirement, but there are some sort of minimal standards." I said to him, "I think we could do that, Judge." And, sure enough, we did so. Judge Howell Melton was perfectly prepared to do this.

We took a bunch of discovery and they made a motion for summary judgment. It was denied. All set to go to trial and we were literally on the eve of trial and the State Bar with the State Supreme Court issued a bunch of new rules which promulgated a series of forms that were useful. They loosened up on what the clerks could do. While it wasn't anywhere near what we wanted and while Rosemary still would have had trouble complying, it was impossible to go to trial on this basis. So we declared victory. We then sought attorneys' fees. The judge who was assigned to the case, who had been very sympathetic to us and, I'm sure would have given us attorneys' fees, but, for reasons that I never understood, except he had a backlog, stepped aside and a visiting judge who

knew nothing about the case, from Missouri, came down and he handled the fee application. He said we weren't entitled to fees because we did not state a claim to begin with even though the trial judge had said twice we were upheld. We went to the Fifth Circuit and they declined to overrule. We got no fees for having done a really lot of work. It was very, very, frustrating. Meanwhile, the State Bar rules on unauthorized practice got a little better and they've gotten better in the meantime and there has been a little less enforcement.

I know this is still going on because there is another paralegal who has written to me from time to time asking me to help her out, and I've just said there is not much I can do. It is a terrible, terrible area, the unauthorized practice of law. It is the area which I felt that I had the least success in litigation. These were all state court claims, state court. We were never able to get the *Boddie* case back into court again in any other situation because Florida was really the only place that was really tough on this.

MR. MARCUS: I think in other places there have been some more reforms, like California.

MR. MORRISON: Or if they are not formal reforms, they just sort of leave them alone, let them be. Nobody says that it is legal, but nobody comes after them and the lawyers are not complaining.

MR. MARCUS: I think the Internet has made some *de facto* changes, too, with people putting out these forms.

MR. MORRISON: Yes, well, the form books. You can't stop that and not only that, but computer programs, too.

MR. MARCUS: What happened to Rosemary? Did she have to go to jail?

MR. MORRISON: No. She didn't go to jail. We—in Florida the governor has a right to clemency. I got down on my hands and knees, not quite literally, pleaded with the governor.

MR. MARCUS: Who was the governor? Do you remember?

MR. MORRISON: Graham, I think was the name.

MR. MARCUS: Oh, Bob Graham, yeah.

MR. MORRISON: This was in the early '80s and I said she has agreed to close her business and she's going to move out-of-state. They said if she closes her business within thirty days, we will withdraw the judgment of guilty. She really did not want to go to jail. She was a woman probably in her mid-fifties at the time and the notion of spending six months in jail—maybe it was only four months in jail—was just more than she could tolerate, and rightly so. There were a lot of people unhappy and the governor did the

politically right thing when we made the offer to do that. I didn't think she would get clemency because the Bar painted her as having willfully violated the rule, and in one sense she did.

MR. MARCUS: But she couldn't help it.

MR. MORRISON: She couldn't help it. She was doing what she thought was the right thing to do and she was—at one point she was on *60 Minutes* with this and she was all over the papers all over the country and the Bar just got a terrible black eye as a result of all of this. People today still remember, oh, the lawyers and Rosemary. In fact, she died a few years ago. I had lost touch with her—I thought she was still in upstate New York where I'd been in touch with her. She was not there. She had moved back to Florida. I think she had some family there and she passed away a couple years ago. A lawyer, whom she had helped out, named Eddie Farah, had become quite prosperous doing personal injury cases, and he commissioned somebody to put together a film about her. It was a documentary. It's a really lovely thing and they had it at the Legal Aid Society, and somebody who was from the Florida Bar was supposed to come at the time to sort of let bygones be bygones, but they cancelled and they didn't show up. I went down there and gave a talk on her behalf.

MR. MARCUS: That's nice.

MR. MORRISON: It was a nice thing to do.

The unauthorized practice issue continued to bedevil me and we had one other context in which we tried and didn't much succeed and that was bankruptcy. Bankruptcy is another area where we really could have done something important. The bankruptcy cases were situations in which the bankruptcy rules, or at least the customs, essentially required that lawyers fill out the petitions for individuals. We're not talking about corporate reorganizations, we're talking about individual bankruptcies, either the equivalent of a reorganization or a straight bankruptcy. Lawyers were being used to fill out papers, and there were real barriers. The bankruptcy judges, the U.S. Trustees, nobody seemed to understand that this was a bad idea. The thing that was most frustrating is that the credit card companies didn't understand that this was money being siphoned away from them. Because the lawyers got paid first as expenses of the administration, so they spent $500 off the top when somebody could have done it for $150 and that would have been $350 more for creditors. Never could get any traction on it, and I probably didn't work as hard on it as I might have. But every time I tried with the rules people or other people, nobody seemed interested enough to do anything about it. That was another area where unauthorized practice was bad.

Third area, immigration. That's sort of been one that has developed over the years that there are people helping other people fill out immigration forms now. We had one case in North Carolina where a group was doing that and the North Carolina Bar threatened them. They came to us and we wrote a letter saying, "This is a federal agency and the

state courts have no authority to regulate that." There was a case involving the Patent Office out of Florida many years ago in which it said that was preempted.

The federal agencies were perfectly happy to have whoever was doing the immigration stuff do it, and they backed off. We never had to bring a lawsuit about it. Interestingly, the best agency for unauthorized practice, and the model, is the Internal Revenue Service. The Internal Revenue Service has a series of gradations—if you are a lawyer you can do everything; if you are an accountant you can do other things, but an accountant can also pass the exam and represent people in the Tax Court. They have tax preparers and other people who get various statuses, depending upon what they can show. Our argument always was the way to deal with an unauthorized practice is not to say it is either lawyers or lay people, it is to have limited licenses for different people to do different kinds of things. Most of them do not want to be general practitioners.

MR. MARCUS: They don't want to litigate cases, right.

MR. MORRISON: No, no. Although in some cases they may want to. The other thing that always drove me crazy was the rules that mom & pop grocery store corporations had to have an outside lawyer. They couldn't represent themselves even in bankruptcy, even though probably a lawyer had incorporated them and not bothered to tell them that, by the way, every time you want to do something from now on, you have to have a lawyer. That always annoyed me enormously.

MR. MARCUS: What do you think is the reason for the difficulty in this area? Is it the problem that courts worry about the slippery slope and the difficulty of drawing lines between what you really need a lawyer for and what you don't?

MR. MORRISON: I think there are two sets of reasons. One is that there is no obviously applicable federal handle and, therefore, just as there wouldn't have been—if you didn't have a federal handle over advertising or minimum fee schedules, you wouldn't have got—

MR. MARCUS: Like the First Amendment, right?

MR. MORRISON: Yes. Well, somebody said to me, "Well it was a First Amendment violation." Rosemary would say to me, "All I'm doing is speaking." I said, "I understand you're saying that, Rosemary, but nobody's going to—you're practicing law. Maybe they'll get you because you took money."

Of course, I always used to say when I teach this stuff, I would say, "Does it matter that the people are taking money?" The answer is yes and no. It matters because it shows you what's going on but, no it doesn't because if the purpose is to protect the individual from bad advice, it shouldn't make any difference whether they are paying for it or not. Viscerally, of course, it always seemed to matter. Rosemary would have done these things for nothing.

So that's the first set of reasons. The reason on the other side is that there are the twin perils of protectionism and paternalism. There is a protectionist aspect to it. Some—even though people say they can't afford it, if they really, really, really want it, they'll scrape the money together and they'll be able to pay the lawyers. Second, there is this paternalistic attitude that lawyers—we lawyers know what is good for you and you really do need (as I used to put it) to drive a Cadillac even though you can get there on your bicycle. And that's the big issue. You have to go first class.

MR. MARCUS: Do you think the increased availability of free legal services for really poor people, even though it's inadequate, played a role in the attitudes of courts?

MR. MORRISON: Probably not very much because there is—in these situations, most of the people couldn't afford it—or couldn't get it. And of course, we've cut back so much on free legal services in recent years, that you couldn't get it. The other thing that was always odd was that they'd say, "Well, it's perfectly all right. You can come in and be *pro se*. But we can't have these outsiders coming in and messing up our court system." I always would say, "Look, Rosemary Furman doesn't mess up your court system. She makes it more efficient. She does it properly."

MR. MARCUS: You don't want these people *pro se*.

MR. MORRISON: You don't want these *pro se*, yes. The judges just didn't like it and so we never could make much progress. And there were no clear lines to be drawn as a matter of law. We've had to make movement as a matter of policy and they've recognized that, yeah, it's better to have a lawyer in some cases, but if you can't afford a lawyer it's better to have somebody than nobody—or having yourself do it. In some cases it's literally impossible. People can't read and write and they certainly can't understand these forms or figure out what to do. We would say to them, "Is giving legal advice telling them which courthouse they have to file in, how many copies they have to file, how many days they have to do it? Is that legal advice?" The answer was, "Yes, yes. You are applying the facts to the law." That always seemed to me completely unsatisfactory. And then what we had to worry about was, are there situations in which we want people to have a lawyer because we are too concerned about the quality of it. Just like medicine. Perfectly prepared to have people give you free advice about whether you should take cold medicine or take chicken soup and go to bed, but not to do surgery. So we were disappointed with that. Meanwhile, while this was going on, the lawyer advertising continued on for a number of years. Indeed, my old office has got a case now involving New York State—it's still going on today.

MR. MARCUS: I'm sure that's an area where a lot of progress has been made.

MR. MORRISON: Yes, yes. One of the first things—the year after *Bates* was decided, *Bates and O'Steen* was decided—two cases came up quite accidentally—cases which we never would have wanted to have brought up then—either one of them. Certainly the second one. One was from South Carolina and a lawyer affiliated with the ACLU there had been asked to go to a meeting at which she discussed the state's threats to

involuntarily sterilize women who were on welfare. She talked to the women about it and then subsequently made a written offer to represent women pro bono in their suits against the state for insisting upon, I think it was sterilization, but I'm not sure. I've forgotten the details. In any event, it was some clear civil liberties kind of issue against the state—for nothing. And the South Carolina Bar said she had engaged in solicitation. That case was extremely favorable. The facts could not have been better. It was a nonprofit organization, no funds, and so forth. Clearly a major public policy issue.

The other case involved a lawyer named Ohralik from Ohio. Mr. Ohralik was a bad guy. Mr. Ohralik found out that a young woman had been in an automobile accident and she was riding in a car with another woman who was driving it. The woman that Ohralik wanted to represent was very badly injured, she was in the hospital. The driver of the car was not badly injured. Ohralik went to the hospital, found out about it and solicited her in the hospital while she was in her bed of pain. She was probably on drugs at the time. He tape recorded the solicitation so he would have proof that she had said yes. Even when she later changed her mind, he said it's a binding contract. He was going to sue the other woman who was the driver even though they had an insurance policy that was perfectly prepared to pay up and he was taking a third. He was the worst of the worst. They got him on a solicitation charge that was under a rule that was extraordinarily broad. That is, it prevented any solicitation of any kind whatsoever. These two cases were granted at the same time and they were argued the very next term after *Bates*. We had to figure out what to do.

We filed an *amicus* brief in which we said that the rules were over broad and that a narrowly tailored rule surely would have been permissible to get Mr. Ohralik, but that in any event, Ms. Smith—she was originally Smith and then it was—she changed, she got married and it was Primus. I'll never forget—the briefs were filed under Smith and the case was decided under Primus.

During the oral argument, which did not go well for Mr. Ohralik, the Ohio state lawyer was there and Justice Marshall said to him—he was talking about hovering over her in the hospital and Marshall said to him, "And where was the insurance company at this time?" You know how he could go. He said, "Well, there was no evidence that the insurance companies…well I know what's going on in these cases." The Court unanimously said they could discipline Mr. Ohralik for it. They said clearly in these kind of circumstances they could discipline him.

I believe Justice Powell wrote both opinions, but he said in *Primus*, she was exercising her First Amendment rights at a nonprofit organization under *NAACP v. Button* and other kinds of cases; she was privileged to do that and she was protected by the First Amendment in doing this. So that immediately gave us at Public Citizen, of course, an endorsement to engage in all this solicitation which we were sort of engaging in anyway, but we felt fully protected after that. There was an argument made that she might get attorneys' fees and nobody thought that that was a particular problem because it was going to come from the defendant and it was not going to come from clients. So *Primus*

turned out to be a very important solicitation case on that side. *Ohralik* was in the other direction.

MR. MARCUS: I don't think *Ohralik* really hurt the development of the law in this area.

MR. MORRISON: No, no. It just meant that they didn't have to conform their rules to a narrow tailoring. They could have broad rules. It turns out that a lot of the rules were narrowly tailored anyway.

Anyway, so then there were written solicitation cases, some of which we were involved in in one way or another. That was held to be all right—that written solicitations, even though they went to specific people, those were held to be all right. The Court has sort of gone through a back and forth, much more stringent rules about television than about other things.

MR. MARCUS: In-person solicitation. They still allow some bans on classic ambulance chasing.

MR. MORRISON: Thirty days. Florida has a rule, thirty days. That was upheld.

MR. MARCUS: That has a funny name, that case. I can't remember it.

MR. MORRISON: *Went For It*.

MR. MARCUS: *Went For It*, yes. Another unfortunate name.

MR. MORRISON: Quite so. We had a case involving in-person solicitation by accountants and we won that case. Dave Vladeck won that case in the Supreme Court. We said, "Look, the line is not between in-person solicitation and other solicitation. The question is, in general, the nature of the solicitation and how intrusive it was." There continue to be efforts every once in a while—as I said, New York State had some rules about they didn't like certain things in their advertisements. Committees in the Bar and in New York State, I think the judges are obsessed with this thing. People don't like to see these advertisements and they think we've got to do something about it.

MR. MARCUS: I think it is still the same kind of thing. I think what keeps the opposition going is the same kind of obsession that Burger had—that it's going to destroy the dignity and reputation of the profession.

MR. MORRISON: Of the people who don't advertise.

MR. MARCUS: It's the bad guys are going to drag down our reputation.

MR. MORRISON: Yeah. Now, of course, everybody advertises.

MR. MARCUS: Oh, the big firms advertise now, yeah.

MR. MORRISON: One of the things with the New York State rule is it might have shut down their Web sites, so the big firms in New York State—that's clearly advertising. We do this, we do that. This is a list of our clients and all sorts of other stuff.

I remember sitting a couple years ago, being in the San Jose airport and seeing this enormous poster as I was standing in the security line, which is a very good place to have advertisements, for a big patent firm. I think it was Fish & Neave, standing right there in front of me. I said to myself, "This couldn't have happened." And when I tell my students when I teach Ethics that there was a time when lawyer advertising was forbidden, they look like I was from the Stone Age. Of course it *was* the Stone Age.

MR. MARCUS: It was completely forbidden, that's right.

MR. MORRISON: We also understood that solicitation was always done. It was just done at the clubs and at social events and it was perfectly all right to do it as long as the right people did it. Those people didn't do it. That was clear hypocrisy and everybody understood it.

Lawyer advertising has changed radically and, of course, with it has come a whole set of commercial speech doctrines including I've said, say a big push to help tobacco being able to advertise and disseminate information in ways that seems to me to be unnecessary and inappropriate. That's the price you pay for setting a precedent in this area.

Let's go to the next topic. This is residence requirements for bar admission. This idea came to me when I was taking the bar exam in New York. It turned out that you had to be a resident of New York State to take the exam. I also knew that lots of the partners lived in New Jersey and Connecticut. Then I subsequently learned that you could leave the state almost immediately. Most people didn't, but you certainly could leave the state almost immediately. I instinctively understood, even before I went to work for Ralph, that this was another anticompetitive practice. The reason that was there is because the Bar didn't want people poaching in on their practice. These were rules that were promulgated by the state courts, so we couldn't use antitrust against them, although they were plainly anticompetitive. There was no First Amendment problem. Before we got into this there had been a bunch of durational residence requirement cases originally arising out of welfare payments. But durational residence requirement cases for Bar admissions, where you had to come and live in—North Carolina was one that was a case—and other cases for six months or a year before you were eligible to take the bar exam. Meanwhile, you're a lawyer, you can't be employed. What are you going to do? Maybe some places would employ you, but lots of places wouldn't. Those durational residence requirements were equal protection cases and—

MR. MARCUS: Right to travel.

MR. MORRISON: Right to travel and equal protection. All of them said no good for these lengthy requirements, but the implicit assumption of all of them was—and you always know when you see words like this—that a "simple" residence requirement or a

"mere" residence requirement—those were okay. That was the underlying presumption of them. We knew that discrimination based on residence alone was going to be a very tough row to hoe. Fortunately, there was another clause in the Constitution which I didn't know much about but I learned a good deal about, called the Privileges and Immunities Clause in Article Four, Section Three. It has a long, not lengthy, but venerable history of being used to prevent precisely this kind of discrimination against out-of-staters. The idea was we were going to bring one of these cases. Before we had a chance to bring a case, I got a call from a lawyer here in Washington named Vickie Golden, who was then working for the federal government. I think maybe the Federal Trade Commission, but I'm not sure. She lived in the District and she wanted to take the Maryland Bar because she wanted to go into private practice and be able practice in two jurisdictions. Of course, in the District, being able to practice in multi-jurisdictions is a big plus, especially if you are dealing with commercial or individual clients who may have business and other matters in one, two or three jurisdictions. She used to live in Maryland at one point, then moved into the District. She had a husband and two children and she didn't want to move to Maryland. Best of all, she lived on a street off Western Avenue. She lived about a hundred yards from the District line—from the Maryland line. So not one of these Alaska kind of things. She asked us to represent her. She had filed the complaint and she served a bunch of interrogatories on the State Bar. We agreed immediately to undertake to represent her. The Bar made a motion to dismiss. We opposed it saying, among other things, that there were facts that they had tried to sneak in, saying that the residency requirement didn't serve any purpose and that this was necessary. They had two reasons: this was necessary to insure that the Bar could continue to supervise people and it was also necessary in order to do character checks on people. We got an affidavit from somebody on the D.C. Character Committee saying, "We admit people from all over the country. We don't have any problem. They have the burden of proof." We said we don't need a trial. It will be summary judgment, we have limited discovery. We wanted to depose the head of the Character Committee who would supposedly know about all these things and get some other records about a few things. Judge Frank Thompson in Baltimore ruled against us. He said, "No, this is a perfectly valid rule." We rather expected we were going to lose at the District Court level. After all, this judge got to be a federal judge by coming up through the state court system, and these were his friends and they all had written all the rules. We knew they were there for economic protections and purposes.

The complaint had originally four causes of action, one of which we dropped. She said, "I was a former resident and now I'm back and I shouldn't be discriminated against." We tossed that one out. Equal protection we sort of kept in there, but only because it was there. We had two others. One was the Commerce Clause. We said it's a violation of the Commerce Clause because it is a burden on interstate commerce. The main reason we put this in was because we wanted to focus on the fact that this injured clients. This was our same theory as in the advertising and in the minimum fee case, that these are about client protection. Somebody's got a problem in interstate commerce; we ought to be able to deal with this. This is a perfect example of where it is and, of course, the fact that she lived five hundred feet from the border was nice, but we always knew that was evidence

of how irrational the rule was but we would always have to say, of course, if she lived in Alaska, she could do it. She probably wouldn't want to do it if she lived in Alaska.

Of course, the big thing was all she wanted to do was to take the bar exam.

So we lost the case and we took an appeal. Meanwhile, somebody in New York was challenging the New York requirement. He had lived in New York and then moved to New Jersey and wanted to get admitted in New York. He filed a case *pro se* and he had done all the right things and now he asked us to argue the case. My colleague, John Sims and I, went—he wrote the brief and we went up and argued the case in the New York Court of Appeals in Albany and lo and behold, we won, seven to nothing.

MR. MARCUS: On Commerce Clause grounds or Privileges and Immunities?

MR. MORRISON: Privileges and Immunities.

MR. MARCUS: And had he had that in there already?

MR. MORRISON: Yes. But you know, there were a lot of cases. There had been a fairly recent case involving hunting licenses. There were a whole bunch of old fishing licenses cases. A hunting license was not held to be fundamental, the game licenses, but the right to engage in fishing was. In some of these cases they imposed massive amount of taxes on people who want to do things. There was a case in New Hampshire about income taxes where they taxed out-of-staters more heavily. There were lots of really good cases.

MR. MARCUS: And those were decided on Article Four, Section Three?

MR. MORRISON: Yes. There were a whole series of cases, all of which were extremely helpful to us on these grounds. The Commerce Clause never ended up getting decided in any of these cases. Anyway, the case that ultimately went to the Supreme Court came from New Hampshire. Kathryn Piper was a resident of Vermont, lived there with her husband. They also lived very close to the border. Her husband was also a lawyer. They decided that they did not want to practice together and, in general, it would be better if she practiced in New Hampshire and he practiced in Vermont.

She was willing to take the bar exam. The First Circuit had ruled in her favor and New Hampshire took the case to the Supreme Court. The lawyer who was handling the case—we filed an *amicus* brief and the lawyer who was handling the case got us to help out. We went to the oral argument and during the oral argument—I often give this story as a reason why you don't want to have outsiders argue cases—the lawyer was asked by Justice Rehnquist, "Well now, you're a New Hampshire lawyer. When you want to know what the New Hampshire Supreme Court did, how do you find out?" He said, well there are two rules services—something of course which I wouldn't begin to know or even thought to ask him. Two opinion services; one you get it once a month and the other one once a week. Rehnquist said, "No, no. Suppose you want to know what they did yesterday? How do you find that out? Wouldn't you read the newspapers?" He looks him

straight in the eye—the lawyer looks at Rehnquist straight in the eye and said, "I would never read the Manchester newspapers for *anything*." Which completely floored Rehnquist. He did not get his vote, because he voted against it anyway.

It's a great lesson in the importance of local knowledge and local ability. If I had known everything and thought everything, I would never have said it as an outsider in the way that this guy could say it. It just was a great example. We won that case and there were a series of other cases. There was a case in Virginia which my colleague, Con Hitchcock, argued and won, in which Virginia said you can be admitted on motion, but you have to be a resident to be admitted on motion and if you are not a resident, you have to take the bar exam. The Supreme Court had no trouble saying, "You can't do that. It doesn't have anything to do with it."

Then we had another case out of the Fifth Circuit in which the Federal District Court in New Orleans for the Eastern District of Louisiana had a rule that said you had to either live or have an office in the State of Louisiana, not just the District, in order to be admitted to the Bar. You also had to be a member of the Louisiana Bar, which our client was. He lived in Mississippi. He was a member of the State Bar of Louisiana, the State Bar of Mississippi, the Federal District Court in Mississippi. He couldn't get into the Louisiana Federal Bar because he didn't have an office there. He lived in Pascagoula which was about ninety miles away—which was closer than a whole bunch of places in the State of Louisiana where, if he had lived or worked there, he could have qualified. Indeed, he could have lived in Texas and had an office in western Louisiana. The Privileges and Immunities Clause literally applies only to the states so we made a reverse incorporation argument.

Like *Bolling v. Sharpe.* We also made an equal protection argument and we made a supervisory jurisdiction argument—that the federal courts could supervise—the federal Courts of Appeals first and then the Supreme Court should supervise. We lost in the Fifth Circuit and we filed a *cert.* petition. It was less than ten pages and the question presented was, "May a federal District Court have a residence requirement rule for admission to its Bar that would be unconstitutional if applied to the state court sitting across the street?" And the petition was granted and we won the case on supervisory authority. Justice Brennan said, "You can't do this. It's completely irrational." We won that case because it was so irrational. The rule was really terrible. Everybody understood exactly what this was about—protectionism. We thought long and hard, but have never figured out a way to challenge the requirement that you be a member of the local Bar to be admitted to the federal District Court. We have never found a good way to challenge that rule. It still persists. It's less of a problem because the residence requirement is no longer there so people can actually become admitted. There has been a fair amount of increase in ability to get admitted to multiple bars aside from the residence requirement with one exception. I'll talk about in a few moments. In most cases, you want to have a local lawyer anyway. You need a local lawyer just to be there for other things and because they tell you things that you need to know.

MR. MARCUS: About the judge—

MR. MORRISON: The judge and the practices and it's not the end of the world. It is a bad rule, unnecessary.

MR. MARCUS: It doesn't exist in the Courts of Appeals anymore.

MR. MORRISON: No, no. The Courts of Appeals are completely open—you can be admitted anyplace.

Then we had another case for Ron Goldfarb. No relation to Lew Goldfarb. Ron had a practice in Washington, D.C. He lived in Virginia and as he got along in his practice he decided that he wanted to open an office in Virginia. At that point, the rule was you could waive into Virginia if you were admitted in a place that would have reciprocity but you had to promise to practice full-time in Virginia. He said he wasn't going to give up his practice in Washington. He would have an office in Virginia. He would go there on a regular basis, but he would not swear to be full-time.

We said this is plainly unconstitutional. There is no rational basis at all and we referred to it as the "full-time victimization rule." You don't have to prove that you know anything about Virginia law as long as you promise to victimize Virginians on a full-time basis. But if you want to do it on a part-time basis, then it was illegal. We had Commerce Clause and other grounds and all of our usual suspects. We lost in the Fourth Circuit and Justice White voted to grant *cert.* but nobody else—maybe one other person did, but we didn't get *cert.* granted. The "full-time victimization rule" is still there.

The last thing came up just two years ago. No, just a little over a year ago when I was out at Stanford, a lawyer came to me and he had taken the bar exam in Ohio and Indiana, practiced in both places. He'd moved to California and had to take the bar exam there because California makes everybody take the bar exam. He then moved to North Carolina and wanted to get waived in there. North Carolina had a rule—I'm simplifying the case just slightly, but the point becomes clear—that said you had to practice in a jurisdiction which had reciprocity with North Carolina in four out of the previous six years. Indiana and Ohio both had reciprocity with North Carolina.

MR. MARCUS: But California did not—they hate everybody.

MR. MORRISON: California did not, because it didn't have reciprocity with anybody. And so he had been there. Unfortunately, that was his tainted Bar admission and they wouldn't admit him. The trial judge, Judge Boyle, said, "This is completely crazy," and admitted him.

MR. MARCUS: This is the Judge Boyle whose nomination to the Fourth Circuit has been stalled for twenty years or so.

MR. MORRISON: Close. He admitted him. They took an appeal and they won in the Fourth Circuit. The guy came to me (his name was Morrison, actually) and asked me if I would represent him. I agreed to do so.

MR. MARCUS: For *cert*?

MR. MORRISON: For *cert*. Unfortunately, he had not raised the best issue, which was the Commerce Clause issue. There are a series of cases, in which the Court has said that you cannot use reciprocity as a justification for restrictions that burden interstate commerce. The fact that somebody else does or doesn't do it to you is not a legal justification. The issue had not squarely been raised. The Commerce Clause was sort of in there and sort of not in there. The Fourth Circuit didn't address it and it was a real stretch. I took the petition because I hate these reciprocity rules. I think they are misguided and they are anti-consumer and they are anti-lawyer mobility. I thought that this rule was doubly goofy that you had to have reciprocity to begin with and then you had this sort of strained version of reciprocity that sort of undermined everything. If he had done his life differently and reversed the order—been in California first and then the other two states, he could have been admitted. We said that's completely irrational. I though maybe the Court would be interested in this, but they weren't. *Cert.* was denied and so the reciprocity restrictions still apply.

It matters in a bunch of states where the reciprocity is significant—although the big problem is California, Oregon—Oregon has limited reciprocity, Arizona, Florida—

So I would say we substantially—not perfectly succeeded—substantially succeeded in this, and the legal profession is better for it and clients are better off for it.

MR. MARCUS: Yeah, I certainly think the achievements on the legal advertising side, particularly have had—

MR. MORRISON: And the other thing about the minimum fee schedule case, was that it became clear that the Bar couldn't do all sorts of things that it would have done without going to the courts in terms of their restrictions.

MR. MARCUS: Why do you think—there doesn't seem to be a lot of fee advertising—of price advertising by lawyers, though. Am I wrong? And why is that, do you think?

MR. MORRISON: The difficulty is that most lawyer services are on a contingency percentage fee or hourly basis or they are done by the job but a simple divorce with both parties consenting may be one price. If there are children, it's another price.

MR. MARCUS: So it's complicated.

MR. MORRISON: It's very complicated to do it in an advertisement. A little of my hunch is some assessment is made as to how much the lawyer thinks the people can afford to pay. Prices go up and down to some extent. Advertising locks you into a price. Sometimes you get a sense that although they say there are no problems, there are going to be problems. For all of those reasons I think that, in some cases, yes, simple incorporation, deeds, yes they could be advertised. People probably don't go to them for

that. There is a lot more advertising about the type of services, that is what you do. You couldn't be able to say before, "I do immigration."

MR. MARCUS: I understand that. Well big TV advertisers, a lot of them are contingent fee and I suppose there the dilemma is it's not attractive to say I charge thirty-three percent of your award. It is attractive to say, "You pay nothing unless you win." But even that is complicated because you have to pay expenses and so on. It is tricky.

MR. MORRISON: It's tricky.

MR. MARCUS: And maybe it is misleading saying you pay nothing unless you win unless you reveal that if you do win you owe me twenty-five percent or whatever it is.

MR. MORRISON: Yes and we had a case involving the Dalkon Shield that I argued in the Supreme Court. Mr. Zauderer was a personal injury/product liability lawyer and he was doing Dalkon Shield cases. The Dalkon Shield was a very bad device; it had lots of problems with it. It had been taken off the market, but there were a lot of women who were injured by it. He took out an ad with a picture of a Dalkon Shield IUD and said, "Did you use this device and were you injured?" It turns out that the picture was really important because many women did not know that they used a Dalkon Shield or they didn't remember the name. They would remember what it looked like but they didn't know its name. The doctor had given it to them and inserted it. They didn't know. A lot of them didn't know that they had any claims and he got a huge number of claims. The Bar went after him. There was a prohibition on pictures. He lost in the Ohio Supreme Court, then came to me, and I represented him in the U.S. Supreme Court. We won that part. The other part of the case was that they said if you said that there were no fees charged, you had to disclose that the person was liable for costs if they lost. At that point, of course, the rule in most states was that, in theory, the client was liable for costs. Everybody understood that no lawyer ever went on and collected the costs from the client, but the fiction was still there. Now the rules have changed in many jurisdictions so that the lawyer can agree to absorb all the costs instead of having a charade. In some places it has not formally changed, but it is, in fact, the same thing. They got him on that, and they gave him a mild reprimand. They upheld that and ended up with a mild reprimand.

That has made it more complicated and states have put in some requirements that if you say anything about fees, you've got to say this and that. We said it was too burdensome and the Court, I think, kind of in a split decision said, "Well, you can make them do that." They didn't think it was all that bad and they probably don't like these personal injury ads anyway. You can still say what you want to say. I remember when I was doing the *cert.* petition, I couldn't figure out what the question presented was going to be. We had five options and what I did was I had a little office pool. One of the questions was, "Is it unconstitutional to include this picture in an advertisement?" We decided ultimately to go with something else, but review was granted in any event.

And so we had that and we had some other lawyer advertising cases but that got me back to thinking about the requirements about what lawyers have to say. I think if you look at Web sites of most law firms, they clearly would have violated all the rules and, you know, in a way the Internet has made advertising much more useful because you could put so much more in there than having to try to do it in thirty seconds or in a Yellow Pages ad. I never mentioned this, but I remember reading in New York when I was—I used to read the *Law Journal* in those days, occasionally. I remember seeing ads in there that said, "Dominican or Nevada divorce available." And then it would say, "For lawyers only." Because it was okay to advertise to other lawyers, but not to advertise to the lay public. That's how they got around that. Of course, if somebody responded, I'm sure they represented them.

Oral History of
ALAN MORRISON
Sixth Interview - February 10, 2008

MR. MARCUS: This is Dan Marcus interviewing Alan Morrison on Sunday, February 10. Alan, now that we finished the legal profession cases, I think we were going to turn to class actions, and neither you nor I can remember what clever transition you had.

MR. MORRISON: Well I do remember one thing, though. You asked me the name of the lawyer and I went and looked it up—the lawyer from Crowell & Moring, Cliff Hendler.

MR. MARCUS: Oh, Cliff Hendler.

MR. MORRISON: Yes, Cliff Hendler, yes. He was the mediator who had the patience of Job in the Nixon tapes case.

MR. MARCUS: Well isn't that interesting because Cliff Hendler was in my old law firm at Wilmer, Cutler & Pickering as a young associate and then he went over to Crowell & Moring and had a very successful run there as an insurance coverage guy, I think. He was a good mediator, huh?

MR. MORRISON: He was—he got it done. He hung in there in the face of all kinds of adversity. Between the Nixons and the government and us it was quite—it was a three-cornered negotiation. At one time there was one group that was causing problems and he would both keep us in the room at the same time and then kick us out of the room.

MR. MARCUS: Okay, so why don't you tell us how you and Public Citizen got into the class-action world.

MR. MORRISON: We first got into the class-action world indirectly, and the reason we got into it was an outgrowth of our work on the legal profession. We're talking about the early 1970s, fairly soon after the '66 amendments to the class-action rule, Rule 23, got passed. You started to see class actions taking off and moving ahead and being engines for justice. I also started to see cases in which the lawyers saw this as engines for enrichment and started making a lot of money. Actually, our first foray into this involved stockholder derivative suits under 23.1, which are the first cousins of stockholder suits. They were all in one rule until '66 and then they got split out. We actually got into this indirectly.

In 1973, while Archie Cox was still the *Watergate* Special Prosecutor, he brought the first cases against corporations which had been making illegal cash contributions. They had set up slush funds and they slapped a small fine on the company. The first one was American Airlines. The first American Airlines case involved no fine for the corporate officers at all even though obviously a corporation can't siphon off money and deliver it

to candidates. I think Cox did that because American Airlines was the first and they may actually have come in to cooperate.

MR. MARCUS: I think my old firm may have represented them.

MR. MORRISON: Oh, yes, your firm had a matter and I'll tell a story about that matter involved in this situation.

When I saw this, I said, wait a second. Here you have corporate officers diverting money illegally for, presumably, their own political aims. Maybe they think they were helping the company, but who knows what they were doing. They were taking—it was clearly a crime as to what they were doing and not only didn't they get charged criminally, but they didn't have to pay back any money.

We brought a stockholders suit on behalf of American Airlines. We made a demand on the company to sue, they refused, so we brought a suit against American Airlines to require it to recover the amount that had been illegally diverted and the amount that had been paid in fines for the company and the legal bills.

MR. MARCUS: It's a terrific case.

MR. MORRISON: So we filed against American Airlines and it turned out that American Airlines had a relatively modest amount of money that they had actually given to candidates. It was something in the $125,000 range. Actually, you didn't even know how much money there was from the indictment, from the guilty plea. You knew that there was one contribution; they only hit them for one contribution. We brought the suit and I got a call from Lloyd Cutler and he said to me, "I'd like to come over and talk to you about the case and Cyrus Vance is coming also." I said, "Well whom do you represent?" He said, "We represent the situation." I said to him, "Well, okay." I had never met him before and so I said I'd be willing to meet with you. He said, "Cy will be coming down to Washington. Let me see if we can find some time." A few days later I got a call from his secretary. She said, "This is Mr. Cutler's office calling. Mr. Vance will be in Washington on Friday, how would 2:00 in the afternoon be?" I said, "That will be fine. Does Mr. Cutler know where my office is?" I said, tell him we'll see him then. So Lloyd and Cyrus Vance came up to our little offices on P Street with this beat up, ratty old furniture in what was called the Headquarters Building. They called it the Headquarters Building because that's where Richard Nixon had his first campaign headquarters. Bobby Baker had his offices there. Jimmy Carter had had his first campaign office in that building before. That was very early on. They came trudging up and sat with me in my office and explained to me why this was all very silly and we shouldn't do anything.

I explained to them that I thought that the officers should pay and they should be responsible and sure enough, we ended up, without any substantive litigation, with full disclosure. I got the disclosure, as I recall, of what they had given to the Special Prosecutor's office in terms of the total amounts. If they had lied to them, they had lied to them. I wasn't going to go taking a bunch of discovery and figuring out what they had

done. I assumed that they had done that and that's the prosecutor's job to get all the amount of money. I did that and they proposed a settlement. They came back to me and they said that they wanted the names and the amounts to be secret. I said no. First place, we had to go to court, because you have to get court approval of settlements in derivative suits as well as—and I said, "No." I said, "Are any of these people paying money on the Board of Directors?" They said, "Yes." I said, "Stockholders clearly have a right to know whether their directors having been doing things. We're not saying they can't serve as directors. That's somebody else's problem. But they can't do this." They said, "Well there is one guy who was a low-level person who was the bag man," as I recall. He said, "He's not an officer and not a director." They told me who it was and what his position was and I said, "We can list that as an 'other' contribution in it." The total payment, I think, was $125,000 and we took a small fee out of it, very small. The case was settled and approved.

MR. MARCUS: Did they ever say who they were representing?

MR. MORRISON: I think they were on behalf of the company and somebody else had an outside lawyer. They obviously didn't think this was a good way to spend their money and they were right. They did the right thing. That was fine. But they tried to talk me out of this and said, "They've already suffered enough." I said to them, "No, no, no. Just forget about it." They understood, of course, that we were economically irrational. As you said, it's a good case. It's exactly right, it's a good case and that we were prepared to go ahead and litigate this case. That was the first one.

At about the same time as that was going on; we brought a second case involving 3M.

MR. MARCUS: Also a campaign contribution?

MR. MORRISON: Same thing. This time, the Chairman of the Board, Harry Heltzer, had actually taken—had pled to a misdemeanor and paid a modest fine. I don't remember what it was. I had gotten some inside information that, although the amount reported in the press was a contribution of $30,000, that there was a huge amount more money at stake. More importantly, that there was a potential tax liability for fraud arising out of this because the way the tax law was written (and I hadn't known this) at the time is that fraud penalties, civil fraud penalties, are based on the amount of the deficiency in the year in which the fraud was committed whether it is fraud-related or not. Most companies have deficiencies every year with the IRS, particularly back then when the rate of interest the IRS was allowed to charge by law was less than people had to pay on the market. So the IRS was your favorite banker. They didn't ask any questions. So companies legitimately, more or less, would take every aggressive position that they could on their tax returns knowing that when they had to pay them, as long as they didn't do anything fraudulent, they were all right. So they would have routine tax liabilities of $10 or $12 or $20 million which was not much as far as the scheme was concerned. But, if you had a fraud penalty of fifty percent, that started to add up to money. And to the extent that the officers of the company were liable for the fraud—responsible for the fraud—they were arguably liable for the huge penalties as well.

We brought this case, they made a motion to dismiss on business-judgment rule, and we said we wanted to take the depositions of the officers, we wanted to see their investigative report that they had—an internal report that they had done and that we wanted to know how much. Well to make a long story—not so much a long story—short, they got smart and they gave us the disclosure. It turned out that there had been about in excess of a half a million dollars siphoned off—actually more than that siphoned off and put in pots of money, but only half a million dollars of three quarters of a million had gone into campaign contributions. They made a settlement offer of $475,000 which was very early in the case. The key question was what do we do about the tax liabilities, because they were unsettlable then because nobody knew what the substantive liability was. The IRS had told them that there was a potential fraud investigation.

MR. MARCUS: As a result of the Special Prosecutor, not as a result of you?

MR. MORRISON: It was because the money was siphoned off in years in the past. It was sitting in various kitties in various places. One was in Switzerland and they had a fancy way of doing it. They said that they were legal bills and other expenses when they were plainly not. It was real fraud. It was not done for defrauding the IRS; it was done so that you could make the illegal contributions. So we got the former Chairman of the Board, William McKnight, who had not been, insofar as anybody knew, involved directly, but he had a huge amount of stock. He put up a very large hunk of the $475,000, I think, probably, to protect his stockholding interest. He had the money to do it and he put up the money because he was afraid that all the bad publicity for 3M would drive down the value of his stock. Three corporate officers put in around, my recollection is, $100,000 each, $75,000 to $100,000 each, and we came up with that kitty.

We had filed the complaint, we opposed the motion to dismiss. We didn't actually end up taking any depositions because they turned over all the stuff that they had. But we'd gotten a terrific result so we took a ten percent fee.

MR. MARCUS: Your biggest fee.

MR. MORRISON: Yes, that was a big fee and for not much work, but we had a really good idea. At the same time as this was going on, I went back to Stanley Sporkin, who you may remember was the person with whom I had dealt on the ITT case over at the SEC. He was the chief of Enforcement by then. I said to him, "Stan, you know, these companies are not disclosing the full extent of the illegal payments and, equally important, they are not telling their stockholders who was involved. In almost all these cases, there were multiple people involved, including several who were corporate officers and directors." "Oh," said Stanley, "that's interesting." And so at the same time as we were going ahead, we got a pincer movement using the SEC. And the SEC did a thorough investigation of 3M, I now remember that, and they concluded, they confirmed the amounts of money that we had. And, of course, they had a big staff and they have subpoena power and all this other stuff that they can do. That turned the tide in terms of these cases because now the SEC was on top of every one of them. The SEC was going

to go after them. The SEC also made them do some other institutional reforms which we were fully supportive of. That made court approval of settlements much easier.

The third case we brought was involving Phillips Petroleum. Phillips Petroleum, the company, was represented by Clark Clifford's law firm—Clifford and a lawyer named Tom Finney. Finney was doing most of the work in the case. We quickly settled with them. Then there was another case and this one was brought by the Center for Law in the Public Interest, a firm out in California. They had spent—they spent a whole bunch of time and they had gotten all the money back, but the money wasn't a big issue in the case because there wasn't so much of it. They had put in a bunch of what they referred to as institutional reforms and a) they weren't very well done, and b) they didn't make much difference. Then they went in and applied for $500,000 - $300,000 in fees for accomplishing essentially nothing. I had been seeing some of these excessive fees cases in other situations and so I represented another stockholder and we objected to the fees.

MR. MARCUS: Was this this guy Phillips?

MR. MORRISON: It was John Phillips.

MR. MARCUS: CLPI.

MR. MORRISON: One of my law school classmates, Carlyle Hall, was in the firm and there was another guy—I've forgotten his name—who subsequently became a deputy counsel with the Defense Department. He's now with a firm here in Washington. I've forgotten his name. At any rate, they were furious. We objected to the settlement and said the settlement wasn't any good, the injunctive relief wasn't any good, and besides, they had this huge, excessive amount of fees. So I got to meet Finney first and eventually Clifford due to circumstances I'll tell you about in a second. They were so mad about this. At one point somebody said to me in one of our discussions, "Look, that's between Phillips Petroleum and us! Robin Hood. Why are you doing this? We should get the money. Everybody should have the money." I said to him, "No, it's a matter of principle. These cases are going to end up being subject to enormous criticism if the lawyers are the only people making the money." Fast forward, of course that's one of the big complaints now. I said, "We're going to kill off good devices," derivative suits being simply a variation on class actions and the same kind of thing happens in them as well. We said, "No, we are going to oppose it." As I was doing this, I wondered whether perhaps I was somehow jealous that they had somehow make all this money and we hadn't and that I was somehow letting my personal views about this influence what we were doing.

MR. MARCUS: Did you get any flak from the other elements of the public interest legal community on this?

MR. MORRISON: Well they actually went to Charlie Halpern and talked to him at some point. I can't remember exactly what point. But fairly early on in this thing, I called John Ferren. John was the pro bono partner at Hogan & Hartson and we had worked on a couple of cases, including the Howard Phillips case, that I mentioned earlier, when

Howard Phillips was the acting head of OEO, John was representing some people in the OEO case who wanted some money, but they were parallel cases. We were trying to get Phillips out of his job which, of course, they were too, but they didn't want to do that because it was too frontal an attack and they were trying to get some money and trying to do some other things. It also turned out that he lived quite near us and his wife and my wife, Anne, were car-pooling together to grade school with their son. So I called John and said to him, "John, can I ask you to do me a big favor? Will you look at these papers and tell me whether you think I'm off base in objecting to this fee—not as a political matter, but is this fee objectionable?" One of the things I had learned was that the defendants weren't objecting to these fees. Because they were small relative to the counsel fees that they were paying, if they objected to the fees, who knew what else would happen? All I knew was that they weren't objecting and so I thought maybe I'm mistaken in this.

John looked it over and got back to me a couple days later. He said, "You are well within your rights. This fee really appears to be excessive." Maybe then it was Charlie Halpern that came to me. Eventually we agreed to have somebody, an outsider, look at the fees.

MR. MARCUS: You agreed with CLPI?

MR. MORRISON: CLPI, yeah, and that they would make a recommendation to the court to look at the fees. My recollection is we had kind of an informal mediation-type of process. I think that the person was somebody at Paul, Weiss in New York. It may have been Arthur Liman, but I don't recall for sure. No, it was Morris Abram.

MR. MARCUS: As the mediator?

MR. MORRISON: As the mediator. I did this because I just didn't really want to have a big public fight about it and it was hard to object, but I knew in my heart of hearts that these guys were not in the business of cutting down fees and he recommended a small reduction in the fee which they accepted and I just said, "Okay, I'm not going to deal with it anymore." But it stuck in my craw and I just thought it was wrong because they were getting too much and it was a bad idea.

The last part of the story is there were some continuing monitoring responsibilities because they had a potential tax problem at Phillips Petroleum, like 3M did. Turns out in neither case did the IRS ever assert the fraud penalties about them so we didn't have to worry about this. Oh! I didn't tell you what happened in the 3M case. What we did with the 3M case is we wrote into the settlement agreement that the tax fraud issues related to penalty, interest and everything were expressly excluded from the settlement in both directions and so we didn't give up anything and they didn't have to pay anything for it because there was no number that we could have agreed upon. If we had agreed—there is no number that they would have paid, the individuals would have paid, because if they paid a low number ($10,000) it would have been ridiculous in comparison to the potential millions that might have been owed. On the other hand, they weren't going to pay a huge

amount of money, nor could we rationally expect them to do so, due to the fact that the IRS had not even firmly asserted the fraud penalty fees.

We ended up severing it out and in both that and the Phillips Petroleum case there were some continuing responsibilities to inform the plaintiffs. We actually had to write a provision in there saying that we had an absolute right to see their corporate tax communications with the IRS because otherwise stockholders wouldn't have had the right to do that. They would have raised that objection.

Anyway, in the Phillips Petroleum case, we had this continuing responsibility and the lawyer who I was working with for the company was Tom Finney, a partner of Clark Clifford. He was the third or fourth name partner in Clifford's law firm—really a smart, able guy. I'm pretty sure he was an aide to Senator Kerr from Oklahoma and then left to work with Clifford. He was a person who, although he was a name partner in a very outstanding law firm, did all of his own homework. He got out there and we'd be in meetings and he would grab the statute book out or the rule book out. He read the cases. He didn't have associates waiting on him. I'm sure they paid for it, but they got his advice. Unfortunately, during the process (this went on for several years) he developed ALS and ultimately he had to stop practicing law, and he died within a couple of years. It was a terrible thing because he was a lovely man and a superb lawyer and a really good person. He understood—he never said a word about my objection. He understood exactly why I was doing it and he—obviously, he couldn't say on behalf of the company, "We're delighted to have you do this," but that was implicit.

Clark Clifford took over the remaining responsibilities. We had, I guess, one phone call or one meeting and eventually we arranged to have a meeting and I was going to go to Clifford's office. I was supposed to be there at 9:00 one morning and I got there at 9:00 and his secretary said, "I'm sorry, Mr. Clifford is on a phone call and he can't see you now. He's terribly sorry. Could you please wait?" I didn't know how long I was going to wait. It turned out I waited at least an hour and I was really unhappy. Finally, Clifford comes out. He introduced himself, said, "Please come in," and he said, "I owe you the deepest apologies but I'm going to tell you why and I hope you'll understand." He said, "For many years we have advised Eastman Kodak and I got a call this morning from the chairman of the board who tells me that their lawyers just confessed in court yesterday that they had lied under oath about whether certain documents were destroyed. The case is in front of the jury now and he wanted to know what they should do." He said, "I thought I should take that call and discuss this with him then." He said, "It's a very difficult question, but I hope you will understand what happened." Of course, I understood and he was as charming as he could be. We discussed everything and I had some dealings with him after that.

The only other time our firm, I think, had any other matters with Clifford was in connection with the Detroit newspaper case which I'll talk to you about later on. But when Clifford himself, unlike with Lloyd Cutler, Clifford called Bill Schultz and said to him, "Mr. Schultz," he said, "my name is Clark Clifford. I'm a lawyer here in town." He

said, “I understand you’ve filed this case. I represent the Detroit newspapers. Could I come over and talk to you?”

So he understood what was going on. That was the beginning of our concern about attorneys’ fees. Then I read in one of the legal newspapers—maybe it was in another paper about a case involving the Ford Motor Company. Roy Cohn—*the Roy Cohn*—had brought a suit in state court against Ford over some matter. It had gotten thrown out. The reason now escapes me, but it doesn’t matter. Instead of re-filing the lawsuit again, Cohn negotiated with the Ford Motor Company to pay him and his firm and another firm a half a million dollars for not suing. I said, “They can’t do that!” So we brought a stockholders suit against that because this was the most abusive thing. We ended up getting a judgment affirmed by the Second Circuit requiring Cohn and his firm and the other firm to return the money—and the other firm actually probably bore the brunt of it because Cohn’s firm was dissolving and they were very good at hiding their money.

MR. MARCUS: How did you know about the payment to Cohn? Was it part of the settlement of the first case?

MR. MORRISON: No, no. The first case was dismissed and there was a story in the newspaper about it. And so we brought that case and that sort of got us going on these issues. Then we would get occasional calls from people sometimes—once there was a lawyer in our office whose wife owned twenty-five shares of some company and she gets this notice in the mail talking about there’s some huge big fee things for no gain. So we started doing a few of those cases in the early ‘80s.

MR. MARCUS: Were they all class action cases?

MR. MORRISON: Some of them were derivative suits and some of them were class actions, but essentially the same principles, as far as the fee actions were concerned and the settlements.

Then there was—and I think it was probably in the mid to late ‘80s—an airline antitrust suit. The airlines had been price fixing on fares and there was a big settlement. They had agreed to a coupon settlement. I’ve always thought that the coupon settlement, with exceptions I’ll discuss in a minute, was basically, in this context, okay because essentially there was no way they could get the money to all the people who flew in the past in proportion, without costing an arm and a leg. While the fit was not absolutely perfect between past fliers and future fliers, it was pretty close. The coupons were discounts on the price of future fares. I knew two things (although I know them better now). One is that, of course, coupons are not always redeemed; there are other things that are going on at the same time.

MR. MARCUS: So it doesn’t cost them as much as it looks.

MR. MORRISON: And it costs them over time. We were concerned about this, but we thought that given the possibilities, in principle, this was not a bad idea unlike some other

coupon settlements that we got involved in later on. But two things happened. The first thing that happened was there was a provision in the settlement agreement, and actually, this gets me to a point that we started with. Well before the Internet and, to a large extent, today, if you are a class member or a stockholder, you get a notice which is both pretty long and not very informative. You don't get the key documents. You don't get the settlement agreement. You don't get the release, you don't get the complaints, you don't get any discovery. We discovered quite early that, to say the least, class counsel was not terribly happy to see us show up, and they were extremely uncooperative and you would get things like, "If you want to go look at this, go down to the courthouse. They're all on file there." Which sometimes was in the District, but most of the time it was someplace else and you had to pay fifty cents a page and all sorts of other stuff. We discovered in the settlement agreement—and this could conceivably even have been in the class notice—that coupons were not redeemable through travel agents. Now, today most people never heard of a travel agent, but travel agents used to be—you'd call up your travel agent, you would book your fare and they would bill you. If the travel agent could keep the coupons on your behalf, then they would work it out. The settlement wouldn't allow coupons to go to travel agents, you had to have them, which meant that you had to send them over to your travel agent. It was an enormous pain in the ass. We thought that that would seriously cut down on the use of these.

We filed an objection and the class counsel said the airlines will never agree. We filed a formal objection. Guess what? They agreed, because what we were saying was perfectly reasonable and they thought that the whole thing could go down the tubes.

MR. MARCUS: They weren't dying to agree, but they agreed.

MR. MORRISON: Yes. They had no good explanation as to why, if they were doing this in good faith. They couldn't say, "We assumed that people wouldn't use them." They couldn't say the real reason. So one of the first lessons we learned is in some of these cases, although you think that they are settling too low, that's a very hard argument to sell. But where there are things structurally wrong with the settlement or where there are some misallocations, there is a possibility of getting the judge, who has no authority to change the deal, to say to the class representatives, "We're going to disapprove this unless you do such-and-such and so-and-so." We had leverage and we could make some improvements and, it turned out, incidentally, that we could tie up the fees for this. We had gotten some fees in Phillips Petroleum for making some suggestions to how to make this thing work. I think we took a very modest fee of $5,000 or $10,000 in that case.

The second thing we did in the class-action settlements—we said to the lawyers for the class, "Why don't you take your fees in coupons, too?" They didn't think that was too amusing.

MR. MARCUS: This airline case was a big case. Were you also challenging fees or not?

MR. MORRISON: We did raise some questions about fees. But that wasn't the principal issue in that case.

MR. MARCUS: So the fees for the plaintiffs' lawyers, the class lawyers, was just one of a number of issues that you were interested in in these cases.

MR. MORRISON: Yes. What we tended to find is that there was a rare case in which there was a really good settlement and a really high fee. That is, the exorbitant fees tended to go with cases in which there was nothing good coming out of the settlement.

MR. MARCUS: So they were attractive cases for you.

MR. MORRISON: Yes. So eventually—we may have done some cases where fees alone were an issue early on, but eventually—and it was partially an allocation of resources question—partially because we sort of made our point. If we didn't see something wrong with the settlement as well, we just didn't do it.

MR. MARCUS: So the classic kind of case you were going after was one—was the fee-driven case where the settlement for the class was not that great for any given member of the class. It was a $5 coupon or whatever, but there was a big fee for the lawyers.

MR. MORRISON: The best example of that case is the GM trucks case. GM trucks had a problem because they had the fuel tank in the wrong place. It was a safety hazard, but also, people didn't want to buy these cars and didn't want to keep them. They were worth less on the secondary market. There was a class action brought on economic damages alone, not personal injury.

MR. MARCUS: Based on the decline in value.

MR. MORRISON: Decline in value or the cost of removing it. The case was settled in a manner in which GM agreed to give every current truck owner a coupon worth $1,000 toward the purchase of a new GM truck. We said, "No. You can't do this!" And you can't do it for a whole bunch of reasons, which became part of our strategy and approach in later cases. Oh, and by the way, there was a huge fee for the lawyers which was, of course, driving all this.

The first thing was as a matter of principle, if you have a GM truck you don't like, you don't really want to go out and buy another one. And my recollection is it's only a year in which you could do it.

Second, it was not transferable so you couldn't find some other sucker who would pay you $500 to get $1,000 and there probably were some other restrictions on it as well. In addition, there were a large number of members of the class who were fleet owners of trucks. That is, the Department of Transportation buys a whole bunch of them, the police buy them, other people buy them—a lot of governmental entities and private companies.

Corporations buy them. This deal was no good for them; and they got discounts anyway and you couldn't use this one on top of the other discounts. So, in addition to the basic deal being bad, we saw this as an illustration of serious conflicts within the class. That is,

people had really divergent interests and the lawyers were trying to represent everybody at the same time because if you put everybody together, treat them all the same, they can settle the case and get a big fee. Of course, General Motors has no interest—not General Motors *qua* General Motors, but the defendants have no interest in worrying about these intra-class conflicts. All they want is to get rid of the case at whatever the total cost is and be done with it and then, of course, two things happen. Some of these cases where there was actually money, they didn't care, once they paid the money, whether the settlement went to the lawyers or the class. They were indifferent to that—they wrote a $5 million check, they didn't care what the internal allocation was. In these cases, even though the fees were separately negotiated and there were some cases involving when you had to negotiate—that was kind of the lesser of the problem. It was cheap because they figured that was just an added cost to it and even though it's outside what they figured they were going to have to pay, that was cheap and they, in my view, thought of this as buying goodwill with the plaintiffs' lawyers for the future. They were cooperative now, you be cooperative in the future and we have this nice, kind of long-term, cozy relationship. We couldn't ever prove that, but that was my sense of what was going on.

In any event, it was relatively modest amounts of money for them—for the companies—and it got rid of the cases. We objected and I was involved, but less so than other people were in the case, and we got the Third Circuit to set it aside. Approved by the District Court, set aside by the Third Circuit. *Cert.* was denied. It was the first really big class action that was rejected. It was rejected on multiple different grounds, but principally that they had thrown everything together and the class didn't work.

MR. MARCUS: Did you find in these cases that there was a problem with the trial judges being influenced too much by their sort of notion that settling is a good thing and getting rid of a case that would be a pain in the neck to try with all these discovery disputes and everything? Was that problem, do you think, in this whole system, or not?

MR. MORRISON: You did hear judges say, "Well, there is a policy in favor of settlements," and so forth and so on. You could not prove this, but there were very few district judges who ever rejected settlements.

MR. MARCUS: So you often had to go to the Court of Appeals.

MR. MORRISON: Absolutely. Absolutely. And I used to tell my students and others that we show up in these cases, we are the skunk at the garden party. Everybody—there is sweetness and light, happiness, everybody wants to settle and here you people show up and you want to make war. We want to make love. The first thing that happens was you can't get any information. Nobody will give you any information. Second, we discovered that the way to limit objections is by manipulating the scheduling. Here's the way they did it. The judges never stepped in and stopped them unless somebody was there or somebody had a proper notion of how to schedule. You would have a hearing set for, let's say, the fifteenth of May. The objections would be due forty-five days before and the documents supporting the settlement would not be filed until after your objections were due. Now this was bad enough with the settlement proposal itself because at least

you could look at the settlement agreement. But also the fees—all you knew about fees was the total amount that they were going to ask for, and the fee application was filed after you had to file your objections. So there was no way that you could do anything about this thing.

I remember one case, in which the fee application was filed three days before the settlement hearing. I showed up in court and I said, "We haven't had time to look at the papers." The Court says, "Well we'll put it off for a month." I said, "I came all the way here to do this. I want to—do it now." I always thought, why shouldn't they be required to do all this earlier? They wouldn't serve you anything. They would not give you copies of anything that you needed. Eventually you could get copies of things, but they would take a long time and you had a very tight deadline to get the stuff and to make objections. Then you would get this: "Well, of course, if Mr. Morrison had been there from the beginning, he would have known such-and-such and so-and-so," where, of course, it's not in any of the papers. The parties were hostile. Generally speaking, the plaintiffs' lawyers were more hostile than the defense lawyers. Defense lawyers, this is all part of the game and they are going to get paid anyway. Plaintiffs' lawyers know they may not get paid and they want to get paid and they negotiated a good fee. The courts are unhappy about seeing all of this.

I guess we'll talk more about it, but I would say that there has been a real revolution in the class-action world, a lot of it driven by cases in which we were involved—mostly the work of Brian Wolfman and others, although I was involved in all of them. To really make the court understand that it has a serious responsibility to see that these class actions are run for the benefit of the class and that settlements, while appropriate, have got to take into account significant differences within the class. There has been a real revolution on that and judges are now, certainly in the federal courts and to some extent in the state courts, much better about this. That is, they don't like us any more, but they understand that they do have a responsibility. They take it seriously and the Courts of Appeals and—not in every case, but a lot of them—and in the Supreme Court in the *Amchem* case and others really put their foot down and said, look, you've got to look at these things. These are big things.

There is a long footnote on the GM truck case. The case ended up getting re-brought and re-settled in Louisiana and on much better terms. GM fought forever and ever and I don't know that Public Citizen ever got any fees for having objected to the first settlement. One of the ironies was that when we objected to settlements, if we were completely successful and got the whole settlement knocked out, we didn't get paid. There was nothing to pay us from. On the other hand, if we got significant improvements, then there was a fund from which we could get the money. So we did that in some cases, taking some money from the plaintiffs' lawyers for very obvious reasons.

The next big case—and there were some others along the way, but the next big case that we got involved in was *Amchem*. This was the massive asbestos settlement case. There were two groups of people who were objecting to the settlement. We represented one group of objectors and Fred Barron, who was a very well-known plaintiff's asbestos

lawyer from Texas, was representing another group of people. Brian Wolfman did most of the work on this case.

MR. MARCUS: Was this in the ‘90s?

MR. MORRISON: This was in the early ‘90s—’92 and ‘93 it got started. I remember getting calls from some of the lawyers who said to me—I think I was actually teaching in Hawaii the semester when it got started. I got a call from a lawyer at Shea & Gardner whom I knew quite well, John Aldock, and he said to me, “You know, this is a really good settlement and everybody has agreed to it. The people are going to get the money,” and so forth and so on. And I said, “Brian has taken a very careful look at it. I’ve taken a look at it and I’m confident that these are issues that need to be resolved.”

MR. MARCUS: Was the posture of your litigation to improve the settlement or to kill it?

MR. MORRISON: No, this was to kill it. There were, in our view, multiple conflicts and the principal conflict was between the present claimants and future claimants.

MR. MARCUS: Does that mean that the class should never have been certified in the first place?

MR. MORRISON: Yes. That was our view. Yes, with a small caveat. The present claimants were people who had asbestos injuries of one kind. Some of them had very, very serious injuries, mesothelioma. Others had fairly significant injuries, asbestos, lung cancer. The vast majority of them had what is called pleural plaque thickening, which is a detectable change in the composition of the lungs which is due to asbestos. So there was question of causation on some of these injuries.

MR. MARCUS: Which may or may not lead to a disease later on?

MR. MORRISON: Right. In most cases, it doesn’t. Because they are small cases, but large numbers of them, they command modest, but because of their numbers, significant dollar total settlements in these cases. The plan was to treat everybody the same. That is, treat—they had disease categories and while we had some quarrels with disease categories and also with the notion that one group of lawyers can be essentially playing God by allocating among the disease categories, that was not our principal objection. Our principal objection was that the future-injury plaintiffs were told that they had to opt out now if they wanted to opt out at all. Of course they couldn’t make an intelligent choice about whether to opt out. First of all, because they didn’t know what disease they were going to get. Second, they didn’t know what condition they would be in in terms of their lifestyle and what they would need. Most significantly of all, of course, they didn’t, in most cases, even know that they were a member of the class because asbestos is a disease that has a twenty-, thirty-, forty-year latency period. Many people who were exposed working very casually in brake shops or auto repair places or other places have gone on to lead lives that have nothing to do with that kind of work at all and suddenly come down with the disease thirty or forty years later. So notice was completely meaningless

because even if they saw the notice they wouldn't even know they are part of the class or wouldn't be able to make an intelligent determination.

MR. MARCUS: I take it, playing devil's advocate here a little, the dilemma was that if you didn't have this global settlement, the people with diseases or the pleural plaque thing—the "current" people—would use up all the money in litigation.

MR. MORRISON: Of course, there was no total amount of money. This was not a fixed pot.

MR. MARCUS: I see.

MR. MORRISON: That was the *Ortiz* case. This was not a fixed pot, but they said the companies might go bankrupt or whatever else would happen and that everybody was treated the same. Well, one of the things showing they were not treated the same was there was no inflation adjustment so that you got the same face dollar amount now, as twenty years from now; you wouldn't have gotten any increase to take account of inflation. In addition, they had crafted the class—and although this was not a big point in the ultimate resolution, they had crafted the class so that anybody who had a lawsuit on file as of the day the class complaint was filed was excluded. There was a side deal with the plaintiffs' lawyers to get those people paid on a different basis. Most people thought it was a better basis. The only point was, in our view, that it was different. What we had here was one group of lawyers who had negotiated this settlement before the complaint was filed, actually, trying to represent a huge variety of people with different circumstances. We said that was unethical. Not unethical in the sense of potentially-losing-your-license unethical, but it was a conflict. The kind of conflict that Rule 23 doesn't allow whether you look at typicality, commonality or adequacy of representation. I teach this when I teach Legal Ethics. It's essentially the kind of conflicts that the Rules forbid in terms of ethical conflicts—representing a husband and a wife or the plaintiff and the defendant in a case. You can't do it. You can't expect one group of lawyers to put together a group of people and then decide how they are going to divide up the money by playing God. That was the essence of what these cases were all about. That's essentially what the Supreme Court said in *Amchem*. You can't do it. At the least you can't do it unless you have separate "futures" representatives and, perhaps, for other parts of the class as well. They have to be there at the bargaining table.

In the meantime, there had been a bunch of these cases that had gone into bankruptcy and a similar problem arose in bankruptcy. Congress had passed a law specifically directing that in asbestos cases you had to appoint a "futures" representative. We said, "That's the model, that's the way you've got to do this." Now we had also become involved in the Dalkon Shield corporate reorganization for the A.H. Robins Company and that happened in the early- to mid-eighties. I was first approached in that case by a lawyer for a group of victims who wanted access to the list of claimants in the case because he wanted to circulate a newsletter to the victims who had filed claims to make them more informed and get them activated in the negotiation process. There were representatives for the claimants who are, in essence, like class counsel. They were

calling the shots and the women didn't understand what was going on. This lawyer, with whom I worked on a number of cases subsequently, named Ralph Pittle, from Seattle, got me in there. It turns out that there are some interesting parts of the bankruptcy law and we ended up getting an order from the judge requiring them to make available a list of names which they then used to contact these people and make them more active.

The case then went ahead and the first thing that happened was I was asked to look at the notice that went out. In a bankruptcy case, it is analogous to a class action except it is a closed-end class in the sense that everybody's in it. There is no choice. They had this elaborate Plan of Reorganization, which is the functional equivalent of a settlement agreement in a class action. They had drafted a proposed notice to the class. It's called a Disclosure Statement. There was a hearing on this and it was sent to me. I looked at it and I said, "No person who is a claimant will be able to understand a word of this." And I said, "This just can't be right." A woman who—I can't remember how she got in touch with us, but had heard about us maybe through this newsletter—said she'd gotten this and she couldn't understand it at all. I think she had a Ph.D. We filed an objection to the Disclosure Statement saying we didn't object to the Disclosure Statement itself—this is sort of like a Registration Statement at the SEC. That's the functional equivalent of what they are. They read like that—or a bond indenture. I said, "Nobody's going to understand this. What we have to do is to draft a special notice for the claimants. The banks have theirs—the secured creditors, all the rest of those people, they can have all this fancy stuff, but these people need to know what they are doing." Judge Merhige agreed.

MR. MARCUS: You had a good judge.

MR. MORRISON: Yes, but— As you will see.

MR. MARCUS: It was a local company.

MR. MORRISON: Oh, yes. Oh, yes, there was a lot of home-towning going on there. He agreed and this was, to my knowledge, the first time that there had ever been a special notice for claimants and it was used in lots of other similar situations in the future. It was two or three pages.

MR. MARCUS: In more or less plain English.

MR. MORRISON: Yes! Yes! These things are complicated and it can't be Run, Spot, Run, but it was pretty plain English and then in some later things they had Frequently Asked Questions in kind of question-and-answer format that was helpful and they had toll lines set up. But this was a first step. Then Ralph Pittle said to me, "The Reorganization Plan provided that you could get $750 [my recollection is that's the number—but it was in that range] by just saying that you had worn a Dalkon Shield. You didn't have to do anything else besides that." The estimate was that there were about 200,000 claimants and something like 130,000 to 140,000 were likely people who had no serious injuries or they couldn't prove it. There was a second group for whom there was

payments of up to $2,500 or $5,000 who had to show only a minimum amount of injury and proof of use of a Dalkon Shield as opposed to something else. Then there was everybody else, who had to go through an arbitration process. I think there was a back-end right to go to court. There was a cap on the total amount of money that was put in, and the rest of the money was coming from an outside company, another drug company who was going to buy Robins. Robins was going to be merged and the stockholders of Robins were going to get a big hunk of stock in the company. There was also a related class action, and I've forgotten the details of it, but it was also settled as part of this whole thing. Anyway, I was asked to look at the legality of the reorganization. I struck me—it may have been a good plan, but it was not done the right way. They had an estimation hearing and at the end of the estimation hearing, Judge Merhige came up with a number which became the ultimate number. There was no justification for it at all.

MR. MARCUS: The number of how much goes into the pot?

MR. MORRISON: From that number they created the pot. There was no evidentiary record, there were no findings as to how you got—how many people would do this and how much and what the estimate was. Worse, the victims had no idea what they were going to get because the only thing they knew was these were the amounts, but there were no criteria for whether you fell in which category or not or how many people would have had to file claims before the total amount of money would be exhausted. It was a very incomplete record. Merhige had come up with the number at the estimation hearing, as he was required to do. We said, "Look, you've got to make findings of fact and conclusions of law." That was an objection. Objection number two was that the Bankruptcy Code, analogously to what we ultimately saw in *Amchem*, says that in a Reorganization Plan, you have to provide for the votes of each separate class and you have to get the approval of two-thirds of the members of the class and fifty percent of the total number of dollars. Or maybe it's the other way around. I think it's the other way around, I'm sorry. It doesn't make any difference for reasons you'll see in a second. The way they set it up is that all claimants were treated equally, even though the Plan specifically provided massive differences and so the people who had weak claims got the same vote as the people who had really big dollar claims.

MR. MARCUS: Of course the people with the weak claims are a larger group of people.

MR. MORRISON: Much larger. Everybody estimated there was 130,000 of them out of the 200,000. We said that that was illegal under the bankruptcy law. We had a third objection, the nature of which escapes me now. It doesn't matter. There was a hearing. It lasted a day or two. I was the skunk at the garden party; everybody was very unhappy, especially Judge Merhige. He quickly ruled against us and we took an appeal. Everybody went crazy. We were taking money from all these widows and from all these women and doing these terrible things, but I said, "No, look this is a bad Plan. This is a fine Plan for lots of people, but it's not a good Plan—you don't know what it's going to be and when the money is going to run out."

MR. MARCUS: Then you have the argument that the people who were really in jeopardy were the people with the greatest need.

MR. MORRISON: Right, right. The Fourth Circuit sat on it for a really long period of time and ended up affirming it. Then, to make people really even madder, we filed a *cert.* petition. They went bananas about that. *Cert.* was denied. I think Justice White could be counted on to vote to take these cases. There were the class-action issues related to whether it was a mandatory or an opt-out class. We lost all of them. But this was important in the development of our thinking for two reasons. One is that it really helped inform us about the conflicts within the class. Second, it got me to think about the relationship between corporate reorganizations and class actions. If you couldn't do something in one that you could in another, how was that possible, did it make any sense, what about the due process objections and so forth and so on.

We subsequently became involved in the silicone gel breast implant—

MR. MARCUS: Before you go on to that, I don't think you said when the *Robins* case was.

MR. MORRISON: Late '80s.

MR. MARCUS: Late '80s. So it was before *Amchem*.

MR. MORRISON: Yes, yes. Before *Amchem*. There were multiple problems with implementation of *Robins*. There was a provision in the agreement—in the Reorganization Plan—that allowed holdbacks to prevent the money from running out. Judge Merhige started imposing holdbacks on people. He issued an order imposing a blanket holdback for people who were not cooperating sufficiently with the Plan Administrator. I can't remember what it was—if you didn't accept the settlement amount, then when you got your amount—it went to arbitration—there was a holdback on it because there might not be enough to pay everybody. It was clear that if you were not playing ball with them—this was Merhige's problem and as he said from the beginning, "This is not going to be Johns Manville. They are not going to run out of money." And whatever he had to do to be sure they didn't run out of money, he'd do it. Meanwhile, the company stock was worth five times as much when it came out of bankruptcy as when it went into bankruptcy. So the stockholders did just great. Anyway, it was a very complicated thing. We objected to that and took an appeal to the Fourth Circuit when they didn't allow it and the Fourth Circuit sat on it for two-and-a-half years. After the oral argument, I thought I had some chance at least of winning on this thing—meanwhile, of course, all the holdbacks were going on and I finally had to file a *mandamus* petition in the U.S. Supreme Court against the Fourth Circuit. I figured the court wasn't going to do anything at this point. Sure enough, while the mandamus petition was pending, the Opinion came out and so it became moot. Of course, we lost that and we gave up on that.

We also understood clearly that this was a harbinger of what happens when you object to really big cases. We knew what we were getting into when we did this, but we felt that we had to do it.

MR. MARCUS: Yeah, there's a dynamic of once the thing is approved that there is a reluctance on the part of the courts to stop the train.

MR. MORRISON: One of the things they said was, "Look at all the interest that is being lost." We said to them, "Well why didn't you negotiate for post-judgment interest to take care of all these people?" At least it would have done something.

So the next one of these things we got involved in was the silicone gel breast implant class-action settlement. Unlike asbestos, where we had no substantive involvement in the underlying product, in silicone gel, Sid Wolfe, the doctor that runs our Health Group, was essentially responsible for getting this product off the market. There had been some cases here in the United States—one had been tried to verdict and settled on appeal, a secret settlement and all the papers had been hushed up. Studies started coming out and people started complaining and eventually the FDA took it off the market. There was a lot of multi-party litigation going on. There were three defendants and the cases had gotten consolidated before Judge Samuel Pointer in Birmingham, Alabama. I called up Ken Feinberg, who was one of the lawyers trying to mediate this case, and I said to him, "Do you want to talk to us now or do you want to talk to us later?" He quite sensibly said, "Let's talk now." Through all of this, we became involved initially as an *amicus* and then got some women to be parties to participate in the process of negotiating the settlement. Although the outlines had been negotiated, lots had not been done and Judge Pointer, to his complete credit, wouldn't ram through the pre-trial scheduling orders. He had a hearing on scheduling, he had a hearing on the notice and he developed a list of Frequently Asked Questions and we actually worked through the notice to make it friendly, to do all this stuff. We ended up saying, "Look, the settlement is okay, but here are some problems with it," and it ended up getting approved and then it fell apart because there were too many opt-outs. That was a problem with the settlement to begin with. Dow Corning then filed for bankruptcy in Michigan and the other two defendants, Bristol-Myers and I can't remember the other one kept the settlement offer open and they said, "We will pay anybody who wants a settlement. We will pay it on this basis, the basis that we would have done in the settlement because we think it is a good idea for us. If we have to litigate other cases, we'll litigate them or we'll settle other cases, but we're keeping this offer open. Not binding, no opt-out, just if you want to come to us." Very many people took those settlement offers. I learned from that that the notions about global peace which defendants always thought—we won't settle unless everybody in the world from the beginning of time until the end of time is settled—was a desideratum but it wasn't what was actually happening in the real world. If you got ninety percent peace you could deal with it and people would either not sue or you would find a way to do it. You got rid of your biggest problem. You got rid of your bad publicity, you probably didn't have to go to trial, and you controlled the number of litigations. In fact, in the Dalkon Shield case, the principal problem was not that they were losing so many cases (although they were losing a lot of cases), but that they couldn't stop the hemorrhaging

litigation because the cases were being brought by individual practitioners all around the country and they had key Robins executives who had to testify because they had actual knowledge of what had gone on there. Essentially, they were in the litigation business instead of the pharmaceutical business. Going to bankruptcy put an automatic stay on all those cases. That wasn't the situation in the class action, at least not officially, although they were stayed when they were MDL, multidistrict litigation, before Judge Pointer. Anyway, in the Dow Corning bankruptcy, I became involved to some degree in that, but I remember the day that it was filed, I was on the McNeil-Lehrer show with the president of the company who said, "We've done this because we want to accelerate the conclusion of all of this." I said to him, "There is one thing that is going to be clear is it will be five years from now and we still won't be done with all this." "Oh no, you're all wrong," he said. It turned out that it was seven or eight or ten years before these things finally got done. It's barely done today. I mean, they finally got through with it in bankruptcy and they had multiple disputes there, some of which were fairly resolved and some of which were not so fairly resolved.

Anyway, that got us involved in all these class actions. In many of them we objected to fees and in many we objected to the way in which the class was being treated. The notice was insufficient—inadequate. The class members were being arbitrarily shuffled around and had not gotten adequate protection. We started to make inroads into all this and, at the same time, we started doing things like writing Law Review articles and becoming very active in the rule-making process.

MR. MARCUS: How about the legislation process? Two questions about legislation: One is the asbestos legislation that almost got through Congress and didn't get through Congress, which I think may have been designed to impose, after *Amchem* and the other case, by legislation, the same kind of settlement. The second question is about the class-action legislation that did pass the Congress that was very controversial that may have been passed over President Clinton's veto. I don't remember.

MR. MORRISON: No, he didn't veto that. He wasn't in office.

MR. MARCUS: Oh, it was passed in the Bush administration, that's right. The legislation which makes it easier to remove class actions from state court to federal court, is widely regarded as a pro-defendant, anti-plaintiffs' lawyer kind of legislation. Did Public Citizen get involved in either of those battles?

MR. MORRISON: We were very definitely and significantly involved in the so-called Class Action Fairness Act.

MR. MARCUS: On which side?

MR. MORRISON: We opposed it but supported an alternative. Let me answer your first question. The asbestos litigation went on for many, many years and we were much less involved with that, in part because the parties themselves, the unions and the plaintiffs bar were on one side, and on the other side we had the defendant companies, which

actually were not monolithic at all because there were at least three generations of defendants—the ones who were sued who were in bankruptcy or getting out of bankruptcy, those who were being sued and had not yet gone into bankruptcy, and those who were just coming on the horizon. In addition, there were all kinds of conflicts between them and the insurance companies, including both the main insurers and the re-insurers. It was a God-awful mess.

MR. MARCUS: So basically, you decided to stay out of that.

MR. MORRISON: Well actually, we stayed out of it largely. And then a couple of years ago, in about 2003 or 4, it looked like it was going to actually pass—there was some chance it would pass. There were all these deals. I took a look at the bill because it was going to become a government program. There was going to be an agency set up and I said, "I'd better look at this thing." I looked at it as an administrative law lawyer, not as a class-action lawyer or a plaintiff's lawyer. It was a God-awful mess. It was just terrible. What I did was I put together a couple of memos for people, which had a number of things that got changed between that year's version and the subsequent version (neither of which ever got enacted), which at least made it a workable solution. They had some really bizarre things in there and then there were some other things that were really nasty. For instance, there was a provision that was in both versions that limited attorneys' fees to five percent of any amount that was recovered—a means to get back at asbestos plaintiffs' lawyers. In the meantime, I had known from Ken Feinberg's work on the 9/11 Fund, that these things are extremely complicated even when there is no issue about liability and that sometimes you really need lawyers to work these things through. This was plainly a measure designed to keep lawyers out and to screw the lawyers who were already in there. It was written by the defendants and the defense bar and we opposed that and a few other things substantively. But mostly it was to try to straighten it out. In the end, two things ended up—well there were three things. One, there was a very substantial disagreement between the Senate version and the House version as to how—what the substance of it was. There were also huge fights over how to allocate the money and who should pay what share and how to treat the companies that were already in bankruptcy versus the ones that were not yet in bankruptcy, ones who completed their Plans and ones who were down the road. Should you give people credit for what they paid a lot in the past or what they're going to pay in the future? The final dénouement was there were both fewer claims being made than were expected and, second, state law had changed in a number of jurisdictions so the pleural plaques that had been the significant numerical component were no longer viable as a matter of state law claims. The bankruptcy court supports only claims that have independent state or federal law viability, and so these claims were largely knocked out as a matter of state law in enough places to diminish the numbers to where they didn't really need to be in bankruptcy or if they did go in bankruptcy, they were relatively good.

I just happened to have dinner last night with a friend who does a lot of this bankruptcy work who said to me that there are virtually no new asbestos bankruptcies being filed these days.

MR. MARCUS: That's interesting.

MR. MORRISON: There is one that has been filed, but it is a special case having to do with some quirky things in the way it was set up before and has as much to do with insurance as it does with anything else. So that has really slowed all of that down.

MR. MARCUS: All right. So what about the class-action legislation? I would have thought, playing devil's advocate, that you guys, based on your experience, would think it would be better to have these cases in federal court than in state court because you've got better judges who might be tougher on the issues that you cared about.

MR. MORRISON: Okay. As you remember, when we started practicing law, the goal was to be in federal court if you were a plaintiff. You had better discovery, had better class-action rules and you had better judges. And other little things, like you could find a local counsel in a big city, but you couldn't in a small town and you could get there on an airplane relatively easily. Anyway, you wanted to be in a federal court. That drove a lot of people to get into federal court. The Supreme Court in *Snyder v. Harris* and in—I've forgotten the name of the other case—basically said that you could not aggregate claims to meet the jurisdictional amount which was, back then, $10,000. It is now $75,000. Not only that, you couldn't use a single claim that had $75,000 and drag in the lesser claims. Whatever the merits of those rulings were, they were the clearly established law. The second was in many cases you couldn't get the case removed—the plaintiffs couldn't get it to federal court and, of course, if the plaintiffs couldn't get it to federal court, the defendants couldn't remove to federal court because there was no original jurisdiction if they wanted to be there. The second problem was that if you sued any defendant who was a local resident, the removal statute forbade you from removing that case. It was not removable. So plaintiffs would join local defendants sometimes with justification, sometimes without, to prevent removal. There were other removal problems as well. What we started to see was that plaintiffs realized that there were advantages to being in state courts and in particular in some state courts, because the kind of progress that I mentioned to you about courts taking class-action settlements more seriously were honored to a much lesser extent in at least some state courts. You came to see things like drive-by certifications where the plaintiff would file a complaint and a motion for class certification, the class would be certified that afternoon or the next morning if the judge was on the slow side. Settlements—and we experienced this because we had gone to some state courts and state courts were very unsympathetic to class objectors. So that became a problem for us as well. Forgetting about whether we wanted to be in federal court *ab initio*, there were some cases in which we would rather be in federal court if we were going to object to the class action. We also knew that one of the bases at the beginning at least, for the Class Action Fairness Act was that there were at least some number of cases of multiple class actions. Although the companies and their lawyers had access to this data, we never saw any good studies on how much overlap there was between class actions that were filed in different state courts, none of which were removable to the federal court, and cases in the federal court. Sometimes you would see cases in the federal court and cases in the state court and they couldn't be removed, they couldn't be joined and so sometimes you would see a race to the class certification and

who could certify it. Then the question was whether the federal court could enjoin the state court from doing it under the Anti-injunction Act. There was a whole series of problems.

MR. MARCUS: It was very messy.

MR. MORRISON: It was messy and we, from the beginning, said, if that is what the problem is, we support a provision which would allow that to happen, to be able to remove these national cases, overlapping cases, even some that are national in scope, to be in the federal court. We didn't care. What we said was this bill—and this is essentially what happened in the end while they were still tinkering with it—essentially says that any class action with more than a hundred class members and more than $5 million in controversy with the most minimal diversity (which we weren't opposed to as such) was removable, period, to the federal court. This meant that the defendant could virtually be guaranteed of being able to select its choice of forum in the federal court. And equally important, if they wanted to keep some cases in the state court, they could keep them in the state court by not removing them. If they wanted to use that as a settlement vehicle, staying in the state court where they could do it easier, then they wouldn't have to go to the federal court.

I conceived of an idea that I called "discretionary removal." I modeled the idea on the proceedings under the Multidistrict Litigation statute under which there would be no right to remove, but a party, any party, could make a motion to the Panel on Multidistrict Litigation to remove cases, and the principal grounds for a removal were overlap or any other good reason. We were prepared to write it very broadly. My view was that it was a fact-specific approach as opposed to a categorical approach. The categorical approach was both under-inclusive and over-inclusive and the supposed remands which they put in this bill were made out of whole cloth. They weren't worth anything because the only time you could do a remand was where the defendant was the home state defendant—the case was in the defendant's home state. Of course, nobody ever sues a defendant in their home state, or virtually never does. So the remand provisions are essentially meaningless. We never could get anybody to focus on this. We needed—and I was never able to find—part of it, there were some internal battles about whether we should be proposing compromises in this or not. The class-action bar wanted no compromise. They wanted to fight and they thought they could win it. I thought that ultimately we were right and they couldn't win it. There were some reasons why they shouldn't win it across the board, but ultimately my idea never got any traction. I actually ran it by some defense lawyers at various times who, in confidence, said they could live with this.

MR. MARCUS: But they thought they could win too, and they did eventually.

MR. MORRISON: And they did eventually. I ended writing a Law Review article which if anybody cares about, it's in the *Stanford Law Review*, that lays out the proposal in some considerable detail including some actual statutory language. Maybe someday someone will decide this is the better approach. But it was a really bad idea to do this.

MR. MARCUS: Do you think it is worse than the status quo ante?

MR. MORRISON: Well, from whose perspective? From the defendant's perspective?

MR. MARCUS: No, from your perspective.

MR. MORRISON: Well—oh, there is one other thing. We said, "Look, sometimes class members want to have these things removed." We got a provision in the bill early on that would have allowed class members to remove at any time after they received notice, which would be notice of settlement so that if we had a collusive settlement we could get it to the federal court. Everybody thought that was fair and equal and if these are foreign cases—

MR. MARCUS: But it is not in there.

MR. MORRISON: It is not in there because the defendants understood and the plaintiffs' bar understood that if they got a collusive settlement, the last thing they wanted was Morrison and his skunks at the garden party showing up and throwing this out. And as I said at various times, I think in the article also, this is the clearest evidence that this is not about fairness. This is about forum shopping. We are not opposed to forum shopping, but there ought to be some limits on it.

Now how has it turned out? The answer is we don't know yet.

MR. MARCUS: Yeah, it's too early?

MR. MORRISON: I think it is too early to tell. There are supposed to be some studies done. It's hard to know—the studies, you won't really know until you see—I mean, it is clear that there are many more cases in the federal courts now. There have been fights about remand. There was an initial fight about the effective date provision. When the statute failed to pass in the fall of 2003 and when it came back in January 2004, there was a deal, that they would introduce the bill exactly as it was before. It had in it a provision about the effective date, which was already passed. It said the effective date shall be no sooner than December 27 and it was already February when it passed. There was a couple of other things in it that were plainly mistakes. But the deal was nothing should be changed.

MR. MARCUS: Not a word, not a comma!

MR. MORRISON: Not a word, not a comma. And of course the committee report—the deal had been so sewed up that the committee report was issued two weeks after the bill was signed by the president.

It is too early to tell. Clearly there are more cases in federal court now. I think some of the prior provisions forbidding the removal unless all defendants join was not a fair provision. In some cases you ought to be able to get these things into federal court. There

were clearly some overlap cases which should be in federal court. We were prepared to concede that even a case in which there was no overlap but, for example, a national class action like the GM trucks case could, regardless of the amounts in controversy, there was no reason why that shouldn't be in the federal court. We also provided, in my proposal, that the Multidistrict Panel had the authority to order the removal of cases so if, in fact, some were in federal court, they would all be in federal court so you couldn't have the hangers-on. If the theory is that they all belong in federal court, then you shouldn't have the opportunities for collusive settlements in the state court. So we don't know. Part of the theory is that federal courts will be less willing to certify classes. I'm not so sure. And I'm not so sure because I've talked to judges and have gotten the impression that in other situations they've said we'll send the case back to the state courts. It's a state court matter. Let the state court do it. Congress has said, no, we want these things in federal court and they ought to be in federal court. The federal courts are going to say, look, if it is the federal court or nothing, we'll do our best to do something. The jury is out, the jury hasn't even been impaneled yet.

And so we worked on stuff with the rules and made a bunch of suggestions along the way. We've objected to attorneys' fees in some cases, in some cases without success. In addition, both Brian and I are working on the American Law Institute's Aggregate Litigation Project which is going to set forth some principles and will be, I think, quite influential. So part of this is that we operate on multiple forums. That is, we have to worry about legislation; we're worried about the Rules Committee. We've spent a lot of time making detailed comments to the Rules Committee. Individual litigations in which we are objectors. We have some of our own class actions in which we did this. Mainly b(2) class actions. There are some issues that are still very much outstanding about efforts to turn b(3) classes into b(2) classes in order to make them mandatory. Public speaking, teaching, and writing, and so the class-action area is one of the particular areas where we saw that we really needed to have a broad range of tools in our arsenal to be able to attack all of these problems and we had to concede that the defendants were right from time to time. At least I thought we did. The plaintiffs' bar was less than perfect. Our job was to make the class action a workable doctrine so that people would get the money and we would be able to say, it's not all going to lawyers, which is the mantra that goes around. Of course, that sells newspapers; it sells votes and everything else.

We thought that we were protecting class actions although many of the people didn't like it. We got and still get these kind of calls. We come in and object and they call us up and say to us, "Well, we understand what is going on here." And they say to us—

MR. MARCUS: Who is "they?"

MR. MORRISON: They, usually the plaintiffs' lawyers. The plaintiffs' lawyers are the ones who are calling us, and they would say to us things like, "What are you guys really looking for here?" We'd say, "Well, we want to fix this." "No, no, no, what do you *really* want?" And "what do you really want" translated means, "What do we have to pay you to go away?"

MR. MARCUS: Yeah, and you're very frustrating to them.

MR. MORRISON: Yes, because we don't respond to economical, rational things. We'd say to them, "Whatever we take, of course, it has to be court-approved." One of our campaigns has been to prevent these side deals. We've actually gotten the rules fixed up to prevent these side deals from going forward. They are the most pernicious things of all because either you are buying people off who have no claim whatsoever which is essentially extortion, or you are buying people off who do have good claims, in which case the class is being screwed because they are getting less than they should be getting if the claim was litigated. So we've had those kind of problems, they are still going on today.

I advised on a class-action settlement. One of my former students—this case involving BAR/BRI where they had price fixing with West and they settled the case, they gave them a bunch of money. It turns out that the plaintiffs and defendants agreed to sealing the class certification motion, the summary judgment motions and the expert evidence on which the estimate of the value of the case was based. I advised these lawyers out there—one of them was a former student of mine—you've got to file the objections. I helped him with the objections and Judge Real approved the settlement and went ahead and refused to lift the secrecy, and the case is now on appeal. Our argument was how can you possibly make a judgment about whether you object or not or make an argument when you don't have the evidence? So that issue was going up—this was an issue that nobody can believe is actually around because it is so contrary to all notions about litigation.

MR. MARCUS: I think it is finally getting a lot of attention now, this whole practice of courts sealing records. That's a whole separate issue although it relates to a lot of these class actions.

MR. MORRISON: It's actually less in the class-action area than in other areas. In products liability. In fact, we brought a number of cases involving unsealing of court records and were very successful in some and less successful in others. One of the things that used to happen and doesn't happen anymore is that the defendants would say, "You can have the documents in this case, but you can't show them to anybody else, including to all the rest of the plaintiffs in all the other cases around. The price of this is we'll pay you more money, but your price is part of your secrecy." I have a little article, too, that I wrote about that. That practice, by and large, has gone away.

MR. MARCUS: There's a problem with the ethics rules on that, right? Restricting the practice of law?

MR. MORRISON: No, that's a separate problem.

MR. MARCUS: Not bringing cases.

MR. MORRISON: That was also true. But the other ones, when they wouldn't let information be shared, they wouldn't let you give somebody a copy of the deposition because it was under seal, that problem has largely gone away and they have not got a situation in which the second lawyer has to agree to the terms of the protective order. So that problem has gone away. The problem that hasn't gone away is that—take a drug case. The FDA doesn't find out about any of this stuff. It doesn't get information that turned up in discovery and there is no way to do it, and that continues to be the major problem with this. Of course, the secrecy orders played a major role in the priests and pedophile cases. When the original cases that were brought were all sealed and the amounts of the payments were sealed (I feel less strongly about that), the plaintiffs' lawyers were put in the untenable position of being forced to say you can't tell the other members of the parish about Father So and So or even worse, in the next parish to which they have now sent him to prey on kids whose families haven't even heard about this thing. If you do, you could be subject to discipline. So court secrecy is a major issue.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Did we talk about the Terminix case?

MR. MARCUS: No.

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

MR. MARCUS: It sounds like termites, not—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MORRISON: No, no.

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

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

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

MR. MARCUS: Because you had the unions.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Sure, from your standpoint.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Right. Not a lunatic.

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

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

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

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

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

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

MR. MARCUS: But standing cases.

MR. MORRISON: Standing, yes.

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

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

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

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

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

MR. MARCUS: They, the agencies?

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

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

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

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

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

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

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

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

MR. MARCUS: To kill it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Regulatory agenda.

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

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

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

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

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

MR. MARCUS: FDA?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: It never occurred to Congress.

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

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

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

MR. MARCUS: On motions to dismiss.

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

MR. MARCUS: Really?

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

MR. MARCUS: Yes.

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

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

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

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

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

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

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

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

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

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

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

MR. MORRISON: Absolutely.

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

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

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

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

MR. MARCUS: Or been law professors.

MR. MORRISON: Some of those, too.

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Allegheny was awhile ago.

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

MR. MARCUS: Ah, they had bumped him.

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

They said, "The plane is full."

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

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

He said, "Was the plane overbooked?"

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

MR. MARCUS: Oh my gosh.

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

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

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

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

MR. MARCUS: Was the agency involved or not?

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

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

MR. MARCUS: That's a compliment.

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

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

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

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

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

MR. MARCUS: There was always some kid who—

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

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

MR. MARCUS: I think you did.

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

MR. MARCUS: Okay.

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

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

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

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

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

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

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

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

MR. MARCUS: Giving them the information.

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

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

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

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

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

MR. MARCUS: Of Public Citizen?

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

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

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

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

MR. MARCUS: Veto, yeah.

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

MR. MARCUS: But he could understand.

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

MR. MARCUS: You would tell him.

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

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

MR. MARCUS: And then let them do it.

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

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

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

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

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

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

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

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

MR. MARCUS: I'm sorry, okay.

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

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

MR. MARCUS: The Institute for Public Representation—

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

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

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

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

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

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

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

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

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

MR. MARCUS: On the consumer stuff, yes.

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Yes.

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

END TRANSCRIPT

Oral History of
ALAN MORRISON
Eighth Interview - March 23, 2008

MR. MARCUS: Okay. This is Dan Marcus interviewing Alan Morrison. I think this is interview number eight on Sunday, March 23. Alan, I think today we are going to discuss union democracy.

MR. MORRISON: Okay. We got involved in issues relating to workers in several different ways. One way was that Ralph was very concerned about truck safety. He was, of course, the moving force behind auto safety but he quite correctly recognized that truck safety was a big problem because when trucks and cars get in accidents, trucks win. And that means ordinary drivers get killed.

There were several aspects of truck safety that concerned him. One was the number of hours that truck drivers drive and the terms and conditions under which they drive. The Federal Highway Administration, I think it is, or Bureau of Motor Carrier Safety—they keep changing their names around, have something called the Hours of Service Rules. We got involved. Ralph hired a lawyer named Arthur Fox to work with him with a group of truck drivers called—it was called PROD and they were dissidents in the Teamsters Union, not so much from a political perspective, but from a safety perspective. They were very worried about safety and unsafe trucks.

Ralph hired Arthur and then Arthur came to work with us. He'd do work part-time for this dissident Teamsters group and part-time for the Litigation Group, but mostly doing litigation and other things. We got started working on truck safety from the inside. That is, literally from the inside of the cabs worrying about trying to get the drivers to focus on safety. The union (this is the Teamsters), in addition to all their other problems, were much more focused on wages than they were on safe driving conditions. The ethos of the union was that you drove what you drove and you drove hard and you drove long hours. In fact, the way the compensation was set up, it was to your advantage to drive long and hard and to push the limits. Ralph understood that they needed to get the drivers on board, among other things, because they had the inside information about what the safety problems were. And so he got this group of Teamsters and he helped them organize them and then Arthur Fox came to work with us working for them.

And one of the things that we did was to try to petition the Bureau of Motor Carrier Safety to change the rules on hours of service to lessen the number of hours the drivers could drive to be sure that they got actual rest time and do a whole bunch of other complicated things, all of which would have meant more safety for the drivers and, hence, for the public that is on the highways.

MR. MARCUS: And the dilemma, I assume, is how to do this while preserving their unusually high incomes.

MR. MORRISON: Yes. And also the companies didn't like it because this meant they had to put more people on and it was harder to make schedules and everything like that. The union was not interested in that. Anyway, to make a very long story short, we had a whole bunch of attempts at rule-making proceedings and got shot down and finally—

MR. MARCUS: When was this roughly?

MR. MORRISON: This was in the early and mid-'70s and continued into the early '80s. Then there was a huge period of time when nothing happened and finally, just before I left Public Citizen, the Congress got upset about this and they required the Department of Transportation to do some new rules on hours of service and they did a lousy job. The rules were, if not worse than the prior rules, at least no better. Public Citizen took them to court and a lawyer named Bonnie Robin-Vergeer took this case over and she just got hold of this thing and there was an enormous record of it. She took the case to the Court of Appeals and got the decision overturned. A very conservative panel—I think Judge Sentelle was on the panel—said, "This is just nuts." Sent it back. They did the same thing practically again. They sent it back and they sent it back again. Finally now they've gotten some rules that are better.

But this is one of the—it's the persistence of the long-distance runner.

MR. MARCUS: Something you can identify with.

MR. MORRISON: Yes, yes, yes. But the bureaucracies will just keep on and they'll outlast you. You have to have people with time—of course they had some other groups. There were some other auto safety groups that got involved with trucks that were formed in the interim period that were very helpful—Advocates for Highway Safety and some others. It just shows you that these problems don't go away and you've really got to keep on them.

That was one set of truck safety issues. The second set of issues, and these we were more successful at litigating—people were getting fired for complaining about safety. Turns out there are some provisions in the National Labor Relations Act and other laws that protect workers in this situation if they are acting in concert. Meaning that if you do this as a part of your effort to improve the safe conditions for all the workers, meaning you report what is going on, you actually get some protection. So we brought a bunch of cases, and won quite a few of them, on behalf of drivers who complained about unsafe vehicles and got fired. The unions often did not back them up. Some of these were unfair labor practice cases and some of them the union supported us on and went to the National Labor Relations Board, generally lost there, and we took a bunch of cases to court and won those. Important cases that gave workers the knowledge that if they reported unsafe vehicles, refused to drive them, which is what they often did, they would not lose their jobs. That was very important for safety and it was important for the workers as well.

Then we started to get into situations in which some of these grievances were subject to collective bargaining agreements and the union was not very favorably disposed. The

Teamsters, at the time, had provisions in their collective bargaining agreement that would send matters to arbitration and the arbitrations were resolved by two members from the Teamsters and two members from management. The effect of this was that if management held firm, which it always did, the worker would lose. Often the Teamsters who, as I said, didn't have safety as their highest item on their agenda, had to negotiate a whole bunch of these agreements and arbitrations. They would trade off, literally. They didn't care that much about an individual worker's safety and so they traded off for other things that the union cared more about. We had some very unsuccessful things with them and then we started taking them to court arguing that the arbitration a) couldn't override statutory law and b) it was essentially not arbitration in the ordinary sense that there were neutrals involved. We actually won quite a few of those cases. This is before the Federal Arbitration Act got as bad as the Supreme Court has interpreted.

That was very important, and then we started getting into union democracy issues. There were dissidents in the Teamsters Union who wanted to be able to vote on contracts. They wanted to have more say in the election. The process by which the elections were conducted was a process (and the details are a little shaky in my mind on this), but they voted for delegates at the local level and then the delegates to the International would elect the presidents, so there was an indirect vote and that was seen to be undemocratic; and the way the constitutions were set up, the delegates were chosen three or four years in advance when nobody was paying any attention to anything other than who was going to be the local secretary or treasurer and that was partially a patronage thing.

People were being disciplined for criticizing union officials.

MR. MARCUS: Now are you speaking here—when you say you got into this so that the focus was union democracy in the Teamsters Union?

MR. MORRISON: It was *principally* in the Teamsters Union, but we hired another lawyer to work with Arthur in the late '70s named Paul Levy who had a big background in labor. Very able. Very able lawyer. He and Arthur had, in addition to that, they had a union corruption case up in Baltimore that they got involved in. Teamster Local where Leo DaLesio was stealing huge amounts of money and had padded payrolls and had all of his friends and family on it and they recovered a half a million dollars for the local union and the pension fund. Big long trial up in Baltimore. They were doing other things on behalf of dissidents in the Teamsters Union which made us very unpopular with organized labor. Not just the Teamsters, but organized labor because we were setting precedents that were applicable across the board. They couldn't limit it to the Teamsters Union. In fact, this was one of the few areas where we at Public Citizen got in conflict with other parts of the organization because our lobbying group, Congress Watch, works very closely with organized labor. There were some tense times at various times in which people in organized labor would go to Joan—

MR. MARCUS: Joan Claybrook?

MR. MORRISON: Claybrook, yes–complaining, "How can we work together if you are stabbing us in the back?" I took the position (and I know this was Ralph's position early and more or less Joan's position although she wasn't as strong on it as Ralph was and I was) that it was very important for Public Citizen to criticize unions as well as corporations. If unions were doing undemocratic things, we could not stand by when there were laws that said that workers needed protection. We also worked with labor unions in our work on occupational safety and health before OSHA. Sid Wolfe, the director of our Health Research Group, did a lot of stuff on occupational safety and we had a large number of cases mostly involving chemicals in the workplace, Benzene, Cotton Dust, I can't remember all of them. Those have continued on over the many years and we worked with Tony Mazzochi and—

MR. MARCUS: Peg Seminario!

MR. MORRISON: Yes, absolutely. Absolutely.

MR. MARCUS: I remember her from it.

MR. MORRISON: So we had that relationship with labor but they were unhappy because we were doing this and then we had worked with labor. I remember very clearly working with labor on the statute—the Paperwork Reduction Act. Remember we talked about it? Some of the regulatory reform stuff we worked with Larry Gold very closely at the AFL-CIO and also on campaign finance, so it was important that we work with them. On the other hand, we could not be in a position of being tools of labor just like I thought we could never be in the position of being accused of being the tools of trial lawyers. When we thought the trial lawyers were taking too much money in attorneys' fees in class actions, we had to step in there and say no. Yes to class actions but no to this fee deal.

I felt very strongly as a matter of principle and I also felt that these workers really needed people to help them out because all the people—in the world of labor and management, you were either for labor or management and people like us didn't come around very much. We were for organized labor but we were also for the worker. This caused a lot of tension, but we brought a number of cases against the Teamsters and against other people as well. Those other groups, they didn't understand it any more than the Teamsters understood it. Some of them would say, "Well those are the Teamsters. They're worse. Stick with them." We said, well no. We had some situations in which there was a payroll padding case and there were others involving similar kinds of union democracy issues where there were schemes to cut out the union members to prevent them from participating in elections. We were quite clear we were not going to do what the Right-to-Work folks did and start complaining about money being allocated for political purposes. We stayed very far away from them. We had a lot of other cases, censorship in the union newspapers and all sorts of other things like that. In the Teamsters, we had a whole bunch of cases involving the right to vote on contracts and how they were manipulating those things around and we actually did very well in those cases. The Teamsters was a more democratic union as a result of those things. But it wasn't good enough and PROD had merged into another thing.

MR. MARCUS: Is PROD an acronym for something?

MR. MORRISON: Yeah.

MR. MARCUS: Who knows what it is?

MR. MORRISON: Professional Drivers Over the Road or something.

That became Teamsters for a Democratic Union and we represented them in a lot of their fights and eventually the Justice Department brought a RICO case against the Teamsters and it was partially as a result of things that we had done, but we don't take anywhere near full credit. TDU took deservedly a fair amount of credit for it. Once the Justice Department put the Teamsters into receivership, there were huge issues about how the receivership was going to be run. The case was pending before Judge David Edelstein who was quite a character, very irascible and unpredictable. He did all sorts of bizarre things, and he set up quite arbitrary rules that hurt TDU, and so we ended up representing TDU in a lot of cases there in the Southern District as part of the Teamsters RICO reorganization. Then eventually there were some elections and we represented people—there were huge fights about the rules for the election and some of the rules were set up in a way to make it very difficult for individual members to participate in the process and they had some disclosure rules that were intended to deal with the candidates but looked like they picked up TDU, as I recall. There was a whole lot of stuff going on there and it was also very important for us to be involved through TDU, to monitor what the Justice Department was doing, and by this time the Republicans were in and some of them were quite inclined to let the union go out of receivership because they thought that the Teamsters would support them.

We really—Paul, principally (Arthur had left by the late '80s; Paul continued on)—really kept on top of this and there were some very, very difficult fights continuing through the late '90s when the union finally got out of receivership. The Teamsters Union got out of receivership and about that time some of the difficulties we had internally with Public Citizen and organized labor and our work on behalf of the Teamsters came to a greater head. That was because Public Citizen had become very active in globalization of trade work, NAFTA, World Trade Organization, GATT, and so forth. The Teamsters were a very important part of that coalition. A lot of our Teamsters work was done. It wasn't all done, but we made a decision internally to ramp down the Teamsters work. Paul was not happy about it, but things happen and you've got to make decisions in life. One of the few times we actually had to drop things that we really would have liked to kept doing it but it was light years different in terms of the atmosphere and in terms of how the Teamsters Union itself was and organized labor in general. They had come to a lot of changes under the Landrum-Griffin Act through this work and this time, and we had made a lot of progress. So while we were—Paul particularly was unhappy about it—we decided that it was in the best interest of the organization and the overall work we were doing and so we backed off. I think they are doing some union democracy work, but not as much.

MR. MARCUS: So you consoled yourself with the fact that, while things weren't perfect, you had made a tremendous amount of progress.

MR. MORRISON: Tremendous progress in the Teamsters Union and I think everybody recognized—I mean, there were two issues—one is there was this corruption which we had something to do with, but mostly it was completely undemocratic.

MR. MARCUS: That's what I'm going to ask you because obviously the government has had a lot of these union corruption cases and they are very complicated and you couldn't avoid getting into that area to some extent. You mentioned the Baltimore case which you had which was a straight corruption or fraud case.

MR. MORRISON: Yeah. Financial finagling.

MR. MARCUS: But the basic thing that got you going on this was rights of workers in the union itself.

MR. MORRISON: It was safety. Safety got us in the door and then when we got in the door we looked around and said, "Oh my gosh!" The safety problems were magnified because the union was not providing adequate safety representation to the workers.

MR. MARCUS: That was a symptom of a lack of democracy.

MR. MORRISON: Yeah, and they were focused on other things.

MR. MARCUS: Yeah.

MR. MORRISON: Now, I think we talked before about our Internet cases?

MR. MARCUS: Yes.

MR. MORRISON: When Paul got off the union democracy case—it was at this very time when that termite case came in that I got Paul involved, because with the union democracy work he'd been doing a lot of First Amendment kind of cases. The Landrum-Griffin Act is described as the Bill of Rights for workers against the unions which are, in effect, the government. I got Paul onto these cases and the reason I raise it is just Friday an opinion came down in a case in which Paul represented a guy who really doesn't like Wal-Mart, the stores. He started a Web site, calling it—and taking out T-shirts and mugs—calling it Wal-Qaeda, Walocaust and all sorts of really unflattering things about Wal-Mart. So Wal-Mart threatened him with a trademark infringement suit. Paul brought an anticipatory trademark case against them in Atlanta where this guy lives and Friday the judge issued an eighty-six page opinion saying that no reasonable person could believe there was confusion between these marks and Wal-Mart's. It is a devastating opinion and Paul did a fabulous, fabulous job. As I've said to him many times, "If we were still doing union democracy work, you would never have gotten into this area and made the law." He's made tremendous law on the Internet with respect to both

trademarks and the right of free speech on the Internet. People go on and get out there and criticize and do it anonymously. It is fitting that we talked about union democracy today in that context because of the case that just came down on Friday.

MR. MARCUS: Great.

MR. MORRISON: The Teamsters was headquartered here so we were able to bring most of these cases here. We had some cases against the International Brotherhood of Electrical Workers. I remember we had a case of censorship in union newspapers. A lot of these election cases and, again, these arbitration cases whether they were preempted by the National Labor Relations Act and whether—various other claims that could be litigated. So there was a lot of preemption, administrative law and other things as well in these things. Some cases involving the Labor Department as well, and a bunch of cases involving the NLRB, principally, but not entirely, involving the Teamsters Union.

MR. MARCUS: Okay. Do you want to move on to another subject? Do you want to talk about—I think that probably finishes our list of sort of substantive areas that we were going to cover for Public Citizen. You wanted to talk about the Supreme Court Assistance Project.

MR. MORRISON: Yeah, I do.

MR. MARCUS: So why don't we talk about that next.

MR. MORRISON: Sure. I'm sitting in my office one day in the mid- to late-'80s and I got a call from a legal services office, as I recall, in Norfolk, Virginia, someplace in that area. And they had a case in the Supreme Court which had been granted. They were the respondents and they wanted us to file an *amicus* brief in support of them. So I said, "Send me the papers." They sent me the papers and three things were apparent. Number one, there was nothing we could say beyond what they had said—it was a Social Security case of some kind and we didn't know anything much about Social Security and if we did, they had written a pretty good brief. They had sent a draft of something. We didn't know anything about it and we didn't have any perspective different from theirs. Second thing, these were able lawyers but they didn't know very much about the Supreme Court. Third, they should have gotten to us before *cert.* was granted. This was a case that might have been kept out of the Court, because it may not have been *cert.*-worthy.

MR. MARCUS: They didn't understand how you write an opposition.

MR. MORRISON: Absolutely. Because they'd never done it.

MR. MARCUS: So the brief on the merits was good.

MR. MORRISON: It was okay, yeah. Although even that could have been improved.

MR. MARCUS: But if they had understood the *cert.* criteria and the lore of the Supreme Court, they could have perhaps persuaded the Court not to take the case.

MR. MORRISON: Right. And, of course, having won below, they can't do any better. So there is nothing that could go, but bad, if the review is granted. Maybe they'll make some national law but probably not. So I said you don't need us now, you needed us before. Yes, I looked over their brief and yes, I think we did a moot court for them, but that was not what they needed. They didn't need an *amicus* brief and it got me thinking that we had by this time probably done twenty-five case on the merits that our office had argued and probably been involved in another twenty or twenty-five cases—when you include *amicus* briefs, probably fifty or seventy-five others maybe. So we had a pretty good understanding about what the Court was about and certainly a lot more understanding than people who had never been in a case before or only had one. I said we could provide assistance to people that would be really valuable to them, and it would take very little of our time as compared to handling the whole case ourselves. I also knew that in most of these cases, it probably didn't make sense for us to take over the case in terms of time and I also thought that in most cases, the lawyer who's got the case will never want to give it up because it is his or her first and probably only time they will ever get to argue a case in the Supreme Court.

As I'll tell you in a couple of stories that I'll give you about this, it's often a good thing to have the local lawyer argue the case.

MR. MARCUS: Contrary to popular belief today.

MR. MORRISON: In some kinds of cases.

MR. MARCUS: Yes.

MR. MORRISON: The question was how do we find out about these cases? How do we get involved in them early? My idea was that we should hire somebody; initially I thought it didn't need to be a lawyer. I quickly concluded that it did—who would go to the Supreme Court and read every paid *cert.* petition that was filed and look for cases in which there was a public interest issue and a likelihood of Supreme Court grant because a) there was a State or U.S. solicitor general on the other side, b) there was a big corporation, or c) some other reason to think that there was a reasonable chance that it was going to be granted, including, often, members of the so-called Supreme Court Bar, lawyers who were hired to bring these cases. The person would go up and read these cases and write me a memo, read the cases virtually as soon as they are docketed, write me a memo on whether we should get involved in it at all. But they were short. They were one or two pages. It didn't have to be long because I figured out quite quickly that in ninety-five percent I could figure out the cases either yes or no and in the other five percent if I needed more I would need more and no matter how much they wrote, they wouldn't have figured out what I needed anyway. So these typically were intended to be one-, two- or three-page memos.

The problem was we needed to get funding for this because we didn't have anything in our budget to hire someone. It really took a while and finally the Public Welfare Foundation here in Washington gave us an initial grant to do this for a couple years. One year we got an Equal Justice Fellow, but we never could raise grant money for this. But we decided that it was so important that we wanted to do it anyway and so we hired a recent law school graduate and have continued to do that since—it's now eighteen years. They identify cases and we do as much or as little as the situation and the lawyer wants. We get the cases and we call them and we offer help. We are pretty good at identifying most of these cases. We've had more trouble identifying potential *cert.* petitions because they have to be filed before we can get access to them. We identified pretty well on the respondent's side. We offer to help them. We tell them—the first thing that's the most important thing is that there is no trouble getting an extension of time—which is, of course, what they want to know. We developed a mantra for oppositions, "unique and boring and short." We know this is a very important case to you but you don't want to tell the Court that it is a very important case. We work with them. Sometimes they write drafts, sometimes we would write drafts. Sometimes we'd do research. Among the things that we would tell them is jurisdictional and procedural issues that they might not have been aware of. Issues about mootness, ripeness and standing and all kinds of other things. We counseled them against writing long oppositions defending the decision below and we helped them in any way possible. Talked to them about things like schedules and when is a good time to file, when is a bad time to file. All the kinds of things that we know that they don't know. Typically, we'll have the Fellow who is working on the Supreme Court Project for a year will be in communications with principal counsel, and sometimes that person will work on the draft, but typically we'll have another more experienced lawyer in the office working on the draft and helping with the strategy.

MR. MARCUS: When you say "working on the draft," with the lawyer?

MR. MORRISON: With the lawyer who is the principal lawyer on the case.

MR. MARCUS: Do you ever end up—I know that's not the purpose of the program, but do you ever end up taking over the case?

MR. MORRISON: Yes, yes. And sometimes it happens at the *cert.* stage and sometimes it happens at the writing of the brief on the merits and sometimes it happens at the very end right before they get to argument. They suddenly realize that they can't do it. We tell them at the beginning, "It's your case." We start in with the presumption that it's their case.

MR. MARCUS: We're not trying to take this case from you, right.

MR. MORRISON: And that has been enormously helpful in getting their cooperation and in getting them to recognize we're not there to steal your case, we're here to help you. In, I would say, I don't know what the number is now, but three-quarters of the cases, we end up doing just that. We help them at the *cert.* stage and then if review is granted we talk to them about how to write, about the brief and give them the information about

timing and all the rest of the stuff. Sometimes we will do some independent research and send it to them. Sometimes we'll know things in advance and we'll just have it and send it to them. We'll often work through them with drafts of the brief, outlines, we'll discuss with them in advance. The abilities of these lawyers range from top-notch to really bad. You can't tell based on their experience or anything else. Some of the most junior people turn out to be really good. Even the ones that are very able tend to know their subject very well, but have more difficulty trying to translate it into a way that this Court, who are not experts in Social Security or Bankruptcy, or ERISA or whatever else it is, understand it. We are not experts typically either, but we're sort of in a better position to understand what they have to do to make the Court understand.

We provide whatever service they want. Sometimes we write a lot of the brief. Sometimes we write none of it. Sometimes we, as you say, we take over—we're asked to take over the case. Sometimes it just sort of moves in that direction.

MR. MARCUS: Do you usually do moot courts?

MR. MORRISON: We always do moot courts, assuming they want them. And almost everybody does. As a result of this, we also do moot courts for a lot of other people as well in other kinds of cases that we are not directly involved in.

MR. MARCUS: Now what happens—I see how this is basically to help respondents whom we like preserve their victories by avoiding *cert.* and if *cert.* is granted, winning the case. What happens if your Fellow, whatever you call the guy who is doing this thing, goes up there and reads the *cert.* petition and says, "Hey, this is a petitioner who we like and who is involved in an issue that is important to Public Citizen." While it's not the focus of your program, do you ever approach petitioners because of reading the *cert.* petitions?

MR. MORRISON: Absolutely. Absolutely. Ideally, and this has happened in some cases we refer to as our recidivists, that we've helped before. They will come back to us. We met them initially as respondents and they will say, "I've got a petition. Can you help me with the petition?" So we then help them with the petition or sometimes the first time we meet them is they've filed a successful petition.

Typically here is what happens on the petition side: First, by the time the petition is filed, the case has pretty well been fixed in terms of what can be done. But once in a while there will be things that we will see that we will want—we think there might be a problem we might want to help out at the petition stage. But often if we see these petitions, we will simply contact the petitioner's lawyer and say, "Here's your petition. It's very good. We'll be glad to read the opposition and help you with a reply, and by the way you have ten days and it's tricky and here's what you can do. But if it is granted, we want to be able to help you on the merits." So we would move into it that way.

As you observed, it's a little different timing and function aspect, but it's also very valuable and we help them and, of course, we do the same thing if the petition is granted.

We help them with that. There are usually some cases every year in which we will simply have missed them or occasionally from the in forma pauperis docket which we don't look at because there are six thousand of them and most of them are criminal cases. We also find that there are issues, as I think I suggested earlier, we don't do many civil rights cases, employment discrimination, housing discrimination, but in our Supreme Court Assistance Project, we do those cases. And the same with environmental cases. Then we get called a fair amount to either do moot courts or to help out with the briefs in various other cases that we do. Sometimes we help out states and municipalities when they've got cases. Sometimes other people on whose side we would like to help out—we're quite agnostic in terms of who we help—we don't refuse to help anybody because of who they are or if we think they are on the right side of an issue. So we've done a lot of those cases either formally as part of the Supreme Court Assistance Project or as part of a broader work at the Supreme Court.

The office now, this year the office, which I think has seven lawyers and two Fellows now—has got four cases on the merits that we argued this year—including one that started off helping other people out and they recognized that we should complete the work that we did on the brief and argue the case. The other ones were all Public Citizen cases. Some of them we identified in the Courts of Appeals—for example, a case that Brian Wolfman argued this week involving the question about whether under the Equal Access to Justice Act paralegals are to be compensated at market rates or at cost (an issue of burning importance to the public). Brian argued it. I said, "Brian, I don't think it's going to be on the front page of the *Times*, even when it's decided."

MR. MARCUS: Well it's fascinating to me to realize that an important part of Public Citizen's Supreme Court practice is keeping cases out of the conservative Supreme Court.

MR. MORRISON: Well, it was not only the conservative. It was always true if you won below.

MR. MARCUS: Oh, of course, if you won, right. Even in the Warren Court, if you had a good Court of Appeals decision—

MR. MORRISON: Absolutely, you don't want to—it can only go one way. Especially from the client's perspective. And of course it's a wonderful tool for recruiting lawyers.

MR. MARCUS: Yes. Have any of your Supreme Court Fellows or whatever you call these guys, gone on to get permanent jobs at Public Citizen?

MR. MORRISON: The answer is yes. We initially had—we don't have very many openings. Turnover is very low. The pay is so bad that nobody has time to look for another job. Or do anything else. No, the people stay.

MR. MARCUS: Some people think you just can only hire lawyers with trust funds.

MR. MORRISON: Or spouses.

MR. MARCUS: Spouses, right.

MR. MORRISON: Very few openings. Sometimes years go by without anybody leaving.

MR. MARCUS: When someone leaves you tend to look for a lawyer with more experience than your Fellow would have.

MR. MORRISON: The trouble is that it's very hard to find them although in recent years we've had more luck in hiring lawyers with more experience. Several of the lawyers—well, I think—a number of the lawyers who are there now were hired after having three, four, five, six years of experience in other jobs which, of course, is much better but it's not always possible. The salary differential gets bigger and bigger and proportionately more and, in addition, as people have children and are thinking about high school and college it becomes even more difficult to make do on a Public Citizen salary.

So originally we had decided that if we had a vacancy it would be—we originally weren't going to hire anybody who had been a Fellow for a year and the reason I did it was it would be very awkward if they competed for a job to start in September and we told them in March or April that they weren't going to get it, that somebody from the outside was going to get it. Then we had a really good Fellow and we had a vacancy. We offered her a job and she ended up deciding she wanted to go clerk for Paul Friedman for a couple of years and so we couldn't tell her that she shouldn't. Then we didn't hire—and now in recent years I think they have occasionally had somebody who they have moved over, but not very many. Partially because of questions of timing or they just don't have it. We tell them essentially that it's not likely that they'll have a chance for a permanent job—it's only for a year. Some of them actually are pleased because some of them have clerkships. Last year's Fellow is now clerking for Judy Rogers on the D.C. Circuit and other people have gone on to do other things as well. So the one year has actually worked out very nicely for them. The Equal Justice Fellows had a requirement—that the Fellowships have to be two years. And frankly, we said we don't want to have to hire the Fellows because a year is a good period of time for them to do it, but after a year they are not learning that much more, and we'd rather give the opportunities to more people so they didn't have any Equal Justice Fellows after that.

We've never been able to raise—get much foundation money for it. I do not understand why. We made the pitch; look you may not like litigation but these are cases—you're in the Supreme Court, you've got to do the best you can. The other side has got all this money and all these efforts and everything like that. What are you going to do about it? And foundations give us almost no money at all for that.

MR. MARCUS: But some of your other projects have significant foundation support?

MR. MORRISON: No, very little. A little bit for the Open Government and a few other things. The Litigation Group has not much luck in raising money. We've had a few—some money, but not much. Some of the attorney's fees—actually, the union democracy turned out to be—because we won a lot of cases, pretty good on the money side in terms of fees. Because we won cases and got fees. When I left Public Citizen in 2004, they had a dinner in my honor and we used it as an opportunity to raise money for the Fellowship. It was renamed the Alan Morrison Supreme Court Fellowship. We raised close to a half a million dollars.

MR. MARCUS: No kidding? That's great.

MR. MORRISON: Which is not enough—the interest is not enough to pay the salary every year but it comes reasonably close and so it's there.

MR. MARCUS: So that really sort of assures the continuation of the program.

MR. MORRISON: I think the program—it's a wonderful program. It's substantively wonderful for all the people we help, but it's wonderful for the office.

MR. MARCUS: It's good for the other lawyers in the office in terms of their professional…

MR. MORRISON: Also, they get more Supreme Court arguments that way.

MR. MARCUS: Yeah, it's great.

MR. MORRISON: Also, they learn a lot about different things. They get to teach other lawyers how to do things. You had asked earlier on about the arguments and whether it is a good thing to have outsiders argue cases or not. We have two stories about that.

One of the first cases that we ever took on in the Project was a case from the Second Circuit involving a Connecticut statute under which if—let me try to get this straight—it had to do with a lien on the sale of a house and apparently under Connecticut law, if I get this right, you could get a lien on somebody's real property simply by filing an affidavit saying that they owed you money. The lien was such that you could not sell the property or mortgage it during this time and you got it by the person simply filing a complaint with an affidavit in court and it was virtually automatic. The case involved, if I remember it, a dispute between two neighbors and one of them—it was an assault and battery case and it had nothing to do with real property and they filed the lien—they filed the complaint with the lien and it tied up this person's property.

MR. MARCUS: So this is a notice and due process case?

MR. MORRISON: Yes. The plaintiff's lawyer was a former legal services lawyer in New Haven who went into the federal court and she got an injunction against the enforcement of the statute saying it took her client's property without due process of law. She won in

the Second Circuit and Jon Newman wrote a dissent and the State filed a *cert.* petition and it was granted. This did not look good. This was the first case that we identified. We called up the woman to offer help and she said, "I can't believe this." She knew who I was and she said, "I have been trying for the last three days to figure out how I could get in touch with you to get you to help me with this case." Turns out she was a really good lawyer. Really smart and knew what she was doing. We told her about a bunch of things and helped her out and did moot courts for her, but she did really well. Gets to oral argument and this is one of the cases that taught me the lesson that you have to be very careful about who should take over the case. Much of the argument was consumed with the discussion of the intricacies of Connecticut state procedures. Connecticut law is really arcane. It and Virginia are really arcane. She knew everything because that's what she did. If I had argued this case I would probably never have thought to try to learn all that stuff, let alone would I have been able to master it to the same extent. She completely wowed them and explained to them how devastating this lien was, and she won the case nine to nothing. Great, great job. So that was the first lesson I learned. You've got to think about which cases to have local counsel argue.

The second, and this had nothing to do with the outcome of the case, but it's a great story anyway. We talked about our residence requirements for the bar admission cases early on. The case that ultimately got to the Supreme Court was a case called *State of New Hampshire v. Piper.* Mrs. Piper was a woman who lived in Vermont.

MR. MARCUS: Right on the border.

MR. MORRISON: Her husband was also a lawyer and they decided they didn't want to practice in the same jurisdiction so she wanted to open up an office in New Hampshire. She couldn't because she didn't reside there. She got a New Hampshire lawyer who, it turned out, I had known at some point at some other time or maybe he applied for a certain job. Anyway, we got in touch with him and we worked with him on the case. We filed an *amicus* brief on the case and did a moot court for him. He was a very able lawyer.

During the oral argument, then-Chief Justice Rehnquist said to him (maybe Rehnquist wasn't the Chief then. I don't remember), "Well now, so and so, you're in New Hampshire. Suppose you want to find out what the New Hampshire Supreme Court did? How would you do it?" This was, of course, in the mid-'80s and we didn't have anything like the Internet. He said, "Well there are two services. One comes out once a month, one comes out once a week and you subscribe to one or the other." Of course I would never have known that in a million years if I had argued the case or thought to ask him. Rehnquist says to him, "No, no no. I mean, suppose you want to find out something right away. Don't you read the newspapers? Don't you read the Manchester newspaper?" He looks him right in the eye and he says to him, "Mr. Chief Justice, I never read the Manchester newspaper for anything." Well I, of course, wouldn't have had the temerity to say that, and it was an unbelievably effective comeback for an inappropriate question. Rehnquist was in dissent as he continued to be. But the guy won the case. I always tell those stories as stories about, yes, you should argue the case, but sometimes it's not such

a good idea to have the outsider come in. But having said that, no question in any one of these cases, I always advise people, whether they are going to retain me or get me to help them out or not, get somebody to help you out with the Supreme Court briefs, everything at every stage. It may not be worth the time and the money to get them up to speed on everything, but to get them to come in and give their expert advice along the way is incredibly valuable. We found out at Public Citizen that you can do this with relatively modest investments of time. You've got to read the briefs, you've got to read the opinion and you may have to read some cases, but even if you do even less than that, you can still be very, very helpful. Sort of things not to say and not to do and this is too long and that's the wrong…have you thought about this and thought about that. The moot courts are very useful and they are very important, but I have a story on the moot courts to tell about one of these project cases.

This was a case involving an arbitration and securities case. The Supreme Court granted review to decide the question of whether it was permissible to order punitive damages in a securities arbitration. The arbitrator had awarded substantial punitive damages in this case and the brokerage house took the case up and the Court agreed to hear it. We offered help at various stages. One of the problems with a lot of these lawyers, especially those in small firms, but not only small firms, they don't get you things in time to be able to read them and make comments about them. And/or they are insufficiently self-confident that they don't want to hear your comments. They just want to do it themselves.

So we got the brief. The brief was okay and a guy comes in for an oral argument with a young, female associate. It was a small firm in Chicago as I recall. It was clear that he had not written the brief and he didn't know very much about it and he wasn't very good. So he starts to do the moot court and I asked him a hypothetical question, as we always do. He says—he doesn't answer the question. And then he says, "Well, that's not this case!" So I tell him my Justice Scalia story where Scalia says those are the five worst words you could say to the Justices; "That is not this case. Of course, we know that is not this case. We're not dumb. We want to know the next case. You have to answer it. If you must say, it's not this case, tell us after you've answered the question." So he says, "Well it's not this case. I don't have to answer that question." I said, "I think you do." Another couple minutes goes by and he says, "I'm leaving. This is insulting. You're not treating me with respect." I said, "We're trying to—we do this a lot and we're trying to give you an idea of what's going to happen in front of the Court. You really need to hear this. They don't really want to get those kind of answers. Can we continue for a while and see? I'll try to tone down my comments." So he said, "Okay." Another five minutes goes by, I've tried to be a little more mild and he says, "Didn't work, okay, I've had enough of this. I'm getting out of here." So I said, "Okay, sorry you feel this way." Goes up there the next day, gets up to argue. They started asking him questions and he's not answering their questions. They stop asking him questions. At some point, they are not asking him any questions anymore. He sits down. A few months later an opinion comes down. He wins nine to nothing.

The moral of the story is there are some cases even a bad lawyer can't screw up.

MR. MARCUS: Right.

MR. MORRISON: So, you know, it gives you a little humbling experience. I do think that the moot courts are useful, they are important, they get people ready for the kind of thing that they are going to have to do. You make them think about why they are there and what are they trying to accomplish and make them realize how little time they have before the Court and how little that they are actually going to get to say. The most important thing I always tell people is how are you going to use your time? The little time you have, how are you going to use it? What do you want to say and what do you want to *not* say? You can't refuse to answer questions but you don't have to stick your neck out and talk about things you don't want to talk about. Anyway, the project has been enormously successful. In a number of years they do twenty or so moot courts out of eighty cases that are being argued. It actually produces—it doesn't have any grants but in cases that we do and win we get fees out of it because some of them are fee-generating. Brian's case this week on the paralegals, he's going to get fees. Of course, they are Equal Justice Act fees. Public Citizen, by necessity, does not over-lawyer any cases and therefore when we get fees, we don't get big fees. But it's very valuable and I think that it's been a great contribution. Other places are—Georgetown has got an Institute but they do just moot courts.

MR. MARCUS: Right. So sometimes one of your lawyers you are helping will have a moot court with you and also have a moot court at Georgetown.

MR. MORRISON: Yes and we participate in some of their moot courts.

MR. MARCUS: You sit on some of their moot courts?

MR. MORRISON: And there are cases in which they're mooting people—they are completely agnostic on who they will moot—on which side. That is, they will represent the forces of Death and Evil.

MR. MARCUS: You won't help those forces—even with a moot court, you won't help them?

MR. MORRISON: Exxon Valdez. We did a moot court for the plaintiffs in the Exxon Valdez case. We would not have done one for the other side.

MR. MARCUS: Okay. Let me ask you—before we leave Public Citizen to talk about the D.C. Circuit and the D.C. courts, let me ask you a couple of questions about the future. Sort of two related questions. One is to what extent is the Litigation Group institutionalized so that after Alan Morrison leaves in 2004, it's an institution that is going to continue into the future. And you might want to say a little bit about the leadership that you trained to succeed you. The second thing, which is related, is a big question which is, what happens to Public Citizen in the future, after Ralph Nader? And to what extent are the two tied together? It's a little like the NAACP and the Legal Defense Fund which, of course, parted ways a long time ago.

MR. MORRISON: The last question can be answered in an interesting way: Ralph has had nothing to do formally with Public Citizen since the fall of 1980.

MR. MARCUS: That's right, that's right. You told me that before. But it's still identified with him.

MR. MORRISON: Of course. Most of the time, it's a happy identity, except when he's running for president. Not only did he step down as president, he stepped off the board, too. And he has had no formal role at any time. He used to write letters for us, for Public Citizen. I think he's not writing any letters. The letterhead says, except during presidential election time, "Ralph Nader, Founder," on it.

MR. MARCUS: So it has already survived Ralph Nader's departure.

MR. MORRISON: Oh, yes. One of the things that Ralph did with every one of his groups is he cut them loose. He cut them loose for two reasons. One, he didn't want to be in the business of managing a lot of groups. Second is he had new ideas and new things he wanted to do. He didn't want to be burdened with running groups and he thought that people ought to do them on their own. When he hired me and others at Public Citizen to run the Groups within Public Citizen, he basically said, "I'm hiring good people and you're expected to run with them yourselves." When Joan retires, I think Public Citizen will continue on. It will be different but it will continue on just as it continued on without Ralph.

MR. MARCUS: Has she been the only head of Public Citizen since Ralph?

MR. MORRISON: Well Sid Wolfe—Joan was working in the Carter administration at the time.

MR. MARCUS: Oh, right. Sid Wolfe actually ran it for a while?

MR. MORRISON: He was also the head of the Health Group and he was the president of Public Citizen. He grumbled, didn't want to do it.

MR. MARCUS: He doesn't strike me as the kind of guy who likes running big organizations.

MR. MORRISON: Absolutely correct. And he did it for about a year and a quarter. Joan took off a year after she left DOT to do other things and figure out what she was going to do and she came back to Public Citizen. She had been director of our lobbying group and done other things related to Ralph's work before that.

MR. MARCUS: So she's been running it for a long time.

MR. MORRISON: Since '82. A very long time.

MR. MARCUS: Yeah. Twenty-five years.

MR. MORRISON: Yeah, yeah, yeah. Twenty-six now. Anyway, as far as I was concerned, I don't think I was as good at it, at cutting away, as Ralph is, but I firmly believe that people should move on after times. And when I had been at Public Citizen for twenty-one years I took six months off to teach at University of Hawaii Law School in the beginning of '93. I had previously taken a year off back in '78 to '79 to teach at Harvard, but I was intending to come back so somebody was just caretaker there for me at the time. When I left at that time—

MR. MARCUS: The '93 time?

MR. MORRISON: January '93. I'd been there just a little under twenty-one years. I agreed with Joan—Joan and I talked to David Vladeck, who had been there since '76, would be in charge and take over. Not just in my interim, but period.

I had thought about my successor before and it was unclear to me whether David or Bill Schultz would take over. Bill left in about '88 or so after being there for only about thirteen or fourteen years. David had been there fifteen or sixteen by this time. I was going to teach in Hawaii and I thought it was a particularly good time to make the transition because, first, I would not be there physically for the six months that I was gone, which meant that he could do what he wanted to do without me being in his hair. I was really far away. I was five or six time zones away and I wasn't about to pop in and I certainly wasn't going to leave Hawaii to come back to Washington in the middle of the winter. So we made the transition and as far as I was concerned, it was a permanent change.

I came back and whatever else people said about—

MR. MARCUS: And your role when you came back was kind of a senior counsel—

MR. MORRISON: Senior lawyer, right. I don't know whether we have a good way of practicing law at Public Citizen or not, but for whatever reason, probably either to credit or blame, we all look at litigation the same way. We all think about cases the same way. We all think about writing briefs, making arguments, writing complaints the same way. That may be because one of the things that I did was that I supervised every single case for most of the time I was there, at least for the first fifteen years. Nothing went out of the office of any substance that I hadn't seen and read multiple times usually. It was a lot of work, but I felt that part of what I gave young lawyers is the promise that they would get close supervision, and I felt comfortable giving them a lot of responsibility knowing that I would at least see and read everything carefully, even if I didn't do the basic legal and factual research.

I didn't know whether Bill or David would be in charge and when Bill left to go—first I think he went to work for Henry Waxman first. Yeah. Then he went to the FDA and then he went to the Justice Department.

MR. MARCUS: Right.

MR. MORRISON: It was clear that David would be my successor and that was fine with everybody. He had done a lot of things by that time and it was very useful. It was very good to have him there and it was easy because we had the six-month buffer period when I was not there—not that he didn't ever call me, but he was running it and people got used to him and he was somebody that everybody knew and had worked with and it was fine.

MR. MARCUS: And by that time he had real stature, not just physically.

MR. MORRISON: Then about three or four years after that, I was minding my own business one day when David came to my office and told me that he had been asked to go to Georgetown for a year and a half because Nina Pillard was going to the Justice Department, to OLC, and they needed somebody to teach, I think, procedure. Maybe ConLaw. I can't remember what it was. Whatever it was, they wanted him to come and do it and would he do it. He asked me what he should do and I said to him, "Look, I'm here. I can take over again and so I will do it." So I took over again for a-year-and-a-half or two years.

Then he came back and I think then he left again.

MR. MARCUS: To go to Georgetown?

MR. MORRISON: Permanently.

MR. MARCUS: Permanently, yeah. When, about—I think it was actually—

MR. MORRISON: '98.

MR. MARCUS: I taught—no it was later. I mean, he went to Georgetown maybe the first time in '98.

MR. MORRISON: Yeah, maybe.

MR. MARCUS: But he went there permanently the year after I was there, so it would have been 2002, I think. Fall of 2002.

MR. MORRISON: Okay. Oh, yes, I now remember because here's the sequence. He came back and took over again and then in the summer of 2001 I went to Stanford for the first time. I went there for a year and then I stayed an extra half a year. Then while I was there the first year, David got the offer to go back and decided to go back—to go to Georgetown permanently in the fall of 2001—

MR. MARCUS: 2002.

MR. MORRISON: Fall of 2002—2002, right. Yes, you're correct. We worked it out that it would be handled on an interim basis. Somebody would—they would muddle through until I got back in January. I came back in January 2003 and then that summer I decided that I really had had enough and I wasn't going to do it.

So I resigned effective early 2004 and then taught at NYU in the spring of 2004 and then went to Stanford for the three years starting in the summer of 2004.

MR. MARCUS: Now were you involved in the selection of your successor at that point?

MR. MORRISON: The answer is, "No." Part of the reason I left Public Citizen was because I had some substantial disagreements with Joan about how the organization ought to be run. I also (and this is no secret) told her that I thought that she had been the president too long and she should no longer be the president, and it was not good for the organization for somebody to be there that long. She disagreed and the board is not an active board and the board did not really press her to leave. This is the board that we've had and it's been a problem. You need an active board when you need an active board. Most nonprofits would prefer to have their board be completely inactive except when they need them or to raise money. It's very hard to shift off and on.

Joan initially asked Scott Nelson, who had been at Miller, Cassidy and had been on the other side of the Nixon tapes case. David was still the Director of the Group, then this must have been somewhere about in the spring of 2001, I would think it was. Around that time. Scott called me and said Miller, Cassidy was about to be absorbed by Baker & Botts. He did not want to go to Baker & Botts and he didn't want to go to any of the big firms. He was looking for a job at Sierra Club Legal Defense Fund, which is now Earthjustice, and he wanted to know whether he could use me as a reference. My first thought was, "I'm not letting you go to Sierra Club Legal Defense Fund." I said to him, "Let me call you back in a few minutes, Scott." I walk into David's office. I say to him, "David, Scott Nelson, etc., etc. I think we should try to get him to come to work for us."

David said, "Of course."

So I said to him, "Scott, I'm not going to give you that reference because I want you to come to work for us here."

He said, "Well, I didn't think about it." I said, "Just think about it."

Anyway, he came to work with us. Turns out he had been Brian Wolfman's roommate at law school.

MR. MARCUS: He came to work in what capacity?

MR. MORRISON: As a Senior Lawyer.

MR. MARCUS: As a Senior Lawyer, ah, yeah. But you were thinking in terms of him as a possible replacement for David, huh?

MR. MORRISON: Well, see, at this time we didn't even know David—this was before David had decided to go to Georgetown permanently. So David was just delighted to have him on the staff and I was about to leave to go to Stanford.

Anyway, the bottom line was that he came and he's done really good work. Unfortunately, he's had some medical problems. He had them before he left Miller and he came with his medical problems, he had to work them out before he came to Public Citizen. He thought they were worked out. He came to Public Citizen and was doing all right and then when I stepped down, Joan decided that he, rather than Brian Wolfman, should be the Director. Scott agreed reluctantly, because he didn't really want to do it—he didn't know what else would happen and—

MR. MARCUS: So this is 2004.

MR. MORRISON: Fall of 2003. And it turned out that his health would not let him do this. He has some internal thing for which stress is very bad and stress—the job is stressful generally, but it is also stressful because you've got to deal with other people within Public Citizen and competing interests in doing things, and it was just physically bad for his health. He stepped down and then Joan decided that Brian Wolfman should be in charge and Brian took over in the beginning of 2004, has been there ever since, and has done a terrific job. I always had great confidence in Brian. I had plenty of confidence in Scott, too, but I thought Brian actually would have been a better choice originally because he'd been there longer and so forth and so on. He didn't want the job either because he didn't want to be a manager. He much preferred to do these cases.

MR. MARCUS: To be a lawyer, yeah.

MR. MORRISON: Yes, yes, which is, of course, true for a lot of people. He's done a wonderful job. Things are not the same as they were when I was there, but they are not big changes. He looks at things differently, which is hardly surprising since he's twenty years younger than I am. (I guess about twenty years younger, maybe more.) The world has changed. Change is a good thing and so I'm happy both that I left a legacy. If you look at the things that we're doing now, everything is a lineal descendant of what we did back then. Of course we didn't have an Internet back then. We didn't have electronic records back then, but the cases are the same, but they're different. The profession cases today—they've got a lawyer's advertising case that they argued in the Second Circuit. They've got another fascinating case in which somebody sued Morgan, Lewis & Bockius in the federal court in Philadelphia. Morgan Lewis has partners who are not U.S. citizens. No, I'm sorry—it has partners who are U.S. citizens but who reside abroad. They make the argument that there is no diversity jurisdiction because of this quirky way, because of these U.S. partners abroad, which means you can't sue any of the big law firms in the federal court and you have to sue them in the state court. The federal court threw his case out and the case is going to be argued in the Third Circuit.

MR. MARCUS: That's a perverse argument. My God.

MR. MORRISON: It's a perverse argument, but here's the thing. This is a case that no one but Public Citizen would ever take up on appeal. Everyone would just say, "We'll just sue them in state court and we won't bring the lawsuit." This is a matter of principle. And if we lose this case, undoubtedly someone will go and get the statute changed. Normatively, it can't be the right result. One of the great things is they have the ability to continue to press for remedying these kind of injustices wherever they happen to see them. I couldn't be happier that the office has continued on. It's strong, it's doing great work, and the people are terrific. They are all different from when I was there. Paul Levy has now been there thirty years. Brian has been there since '89—no, '91, I think, and others have been there a long time.

MR. MARCUS: Let me ask you sort of another life-after-Public Citizen Litigation Group question which is: looking back now after twenty-five, thirty years, what has been the pattern of what has happened to the young lawyers who have come to Public Citizen Litigation Group and worked with you? What have they gone on to do? Are most of them still in the public interest world? Some of them are teaching.

MR. MORRISON: Some are teaching.

MR. MARCUS: Is there anything that you can generalize?

MR. MORRISON: Most of them are doing public interest work of one kind or another. Some of them—Kathy Meyer and Eric Glitzenstein set up their own environmental firm. Patti Goldman is with Earthjustice. Bill Schultz had a career with the FDA and Waxman and the government and now he's with a private firm, but he's doing very similar kind of work that he did with us. He's working on the tobacco bill.

MR. MARCUS: He's probably representing a couple of bad guys, but he's doing a lot of good stuff.

MR. MORRISON: He's representing mostly generic drug manufacturers who, most of the time, are better than—they need to be represented. They are the under represented. Let's see. Some of the people have gone into teaching. Some are not practicing law anymore. Mark Lynch went to work at the ACLU after he left us and then went to Covington. He's one of the few who has gone to a big firm. Several people went into the government because the government was paying better. Some of them have left the government and gone—Paul Wolfson went to the SG's office for a while, now he's at Wilmer. Collette Mattzie was in the Appellate Division, she's now at a small plaintiffs' firm. Mike Tankersley is still at the FTC. So I would say most of them have stayed in the public sector of some kind. A few not. We haven't had—if you take out the Fellows, the people who were there for one year—there probably haven't been more than forty or fifty people in all these years.

MR. MARCUS: Is Hitchcock still there or has he headed on to something else?

MR. MORRISON: Con has gone on. He worked first with a lawyer and now he's independent but cooperates with a lawyer who is doing principally private plaintiff's pension benefit cases. Suing under ERISA and actually suing plans or companies for people who don't get their proper pension. So that's sort of the first cousin of what we were doing here.

Some of them have left, frankly, for monetary reasons.

MR. MARCUS: Sure. They couldn't afford it anymore.

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

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

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

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

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

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

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

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

MR. MARCUS: I remember that, yes.

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

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

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

MR. MARCUS: And sit there for months.

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

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

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

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

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

MR. MARCUS: I see.

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

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

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

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

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

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

MR. MARCUS: It probably does a little.

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

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

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

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

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

MR. MARCUS: I think she was.

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

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

MR. MARCUS: I didn't realize that.

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

MR. MARCUS: Yeah, that's amazing.

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

MR. MARCUS: That's right.

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

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

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

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

MR. MARCUS: A decision he may have regretted.

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Bork of course, didn't—

MR. MORRISON: Then he left.

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

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

MR. MORRISON: He's still there.

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

MR. MORRISON: Yes. David Sentelle—

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

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

MR. MARCUS: Pat Wald did it for Mikva—

MR. MORRISON: And I think—

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

MR. MORRISON: Yeah.

MR. MARCUS: Something like that.

MR. MORRISON: And the same is true for—

MR. MARCUS: Sentelle.

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

MR. MARCUS: That was the Bazelon issue.

MR. MORRISON: Bazelon.

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

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

MR. MARCUS: Start after you are 65.

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

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

MR. MARCUS: Tamm also.

MR. MORRISON: Tamm.

MR. MARCUS: Yes.

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

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

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

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

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

MR. MARCUS: No kidding?

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

MR. MARCUS: You got the statute changed?

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

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

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

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

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

MR. MARCUS: On First Amendment grounds?

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

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

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

MR. MARCUS: And to consumer interests.

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

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

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

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

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

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

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

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

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

MR. MARCUS: Right, no one knew.

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

MR. MARCUS: And expertise.

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

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

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

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

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

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

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

MR. MORRISON: Yes.

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

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

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

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

MR. MARCUS: Yeah.

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

MR. MARCUS: Right.

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

MR. MARCUS: Was great.

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: Yeah.

MR. MORRISON: And there was this ridiculous practice—

MR. MARCUS: The race to the courthouse.

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

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

MR. MARCUS: A lottery, not a raffle.

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

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

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

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

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

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

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

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

MR. MORRISON: But only a little.

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

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

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

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

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

MR. MORRISON: They now wait until you—

MR. MARCUS: Until you go home.

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

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

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

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

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

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

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

MR. MARCUS: He was great.

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

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

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

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

MR. MORRISON: Two.

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

MR. MORRISON: Were there two additional?

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

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

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

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

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

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

MR. MARCUS: More and more, actually.

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

MR. MARCUS: Well, there was Gladys Kessler.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: That's terrible—

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

MR. MARCUS: At the very end.

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

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

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

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

MR. MARCUS: Yes. I remember that.

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

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

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

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

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

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

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

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

MR. MARCUS: Right.

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

MR. MARCUS: You didn't get asked.

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

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

MR. MORRISON: Sure.

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

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

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

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

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

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

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

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

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

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

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

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

MR. MARCUS: The lions—whatever it was.

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

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

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

MR. MARCUS: Right.

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

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

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

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

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

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

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

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

MR. MARCUS: I read it.

MR. MORRISON: I read it too.

MR. MARCUS: Of course you did.

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

MR. MARCUS: I didn't remember this.

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

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

MR. MORRISON: He quotes this letter—

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

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

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

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

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

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

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

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

MR. MARCUS: It is part of the Arboretum.

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

MR. MARCUS: I remember him.

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

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

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

MR. MARCUS: In Duck?

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

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

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

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

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.

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 dong 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 you 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

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Biography, Alan B. Morrison
University of Virginia Law School
Public Service Program, January 30-31, 2009

After spending 20 months in private practice in New York, Alan Morrison moved to the public sector and continues to practice there and teach law today. In May 1968, he joined the Office of the US Attorney for the Southern District of New York, where he handled mainly civil and tax cases. He was lead counsel in a six week trial and later appeal against US Steel Corp of what was then the largest tax case in US history ($250 M), and he served for two years as the assistant chief of the civil division, where he was the principal supervisor of the work of 20-30 lawyers.

In 1972 he moved to Washington to found the Public Citizen Litigation Group with Ralph Nader, where he worked until February 2004, with some time off for teaching, serving as its director for about 25 years. The Litigation Group docket extended to areas such as open government, separation of powers, the legal profession, reining in administrative agencies, consumer protection, protecting dissidents in labor unions, representing absentees in class actions, and, most recently, protecting consumers and others who wish to use the Internet to express their views. He has personally argued 20 times in the Supreme Court, and others in the Group have now argued another 30 times. While he was with the Litigation Group, it created a project that helps other lawyers who have public interest cases in the Supreme Court.

He has taught at Harvard, NYU, Stanford and Hawaii law schools, including courses in civil procedure, administrative law, legal ethics, and workshops in civil litigation, mass torts, and separation of powers. He is author or co-author of more than 30 published law review articles, and is the principal editor of two books, "Fundamentals

of American Law" and "Beyond the Big Firm: Profiles of Lawyers Who Want Something More." He was an elected member of the Board of Governors of the District of Columbia Bar for three terms and has served on many committees of the Bar, the courts, and the American Bar Association. He is an elected member of the American Law Institute and the American Academy of Appellate Lawyers, of which he served as president in 1999-2000. Since 2000 he has been a member of the Committee on Science, Technology, and Law of the National Academies of Science.

He served briefly as special counsel to the Attorney General for the District of Columbia in 2007 where he was lead counsel in *District of Columbia v Heller,* until he lost his job in a political dispute. Starting in February 2008, he has been working with the Fair Elections Legal Network trying to assure that all eligible voters are able to vote in November and have their votes counted. For the 2008-09 academic year, he is a visiting professor at the Washington College of Law at American University.

Mr. Morrison is a graduate of Yale College and Harvard Law School on whose visiting committee he currently serves, and he was for four years a commissioned officer in the US Navy. He is married to the former Anne Scherck (Smith, BA, and Harvard, MPA), and they have two daughters who live in New York: one a chef and the other a lawyer with the Innocence Project.

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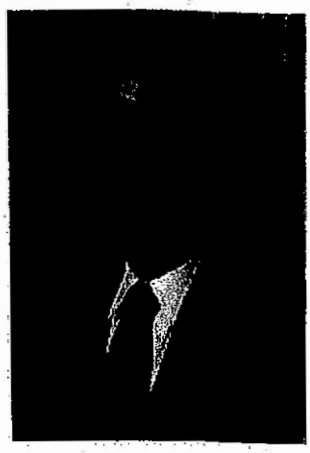

- **CV (Adobe PDF Format)**
- **Bio (Adobe PDF Format)**
- **Print Profile**

Dan Marcus joined the faculty of WCL in 2004. Previously, he was General Counsel of the 9-11 Commission. He was for many years a partner in the Washington law firm of Wilmer, Cutler & Pickering. During the Carter Administration he was Deputy General Counsel of the Department of Health, Education and Welfare, and General Counsel of the Department of Agriculture. He returned to Government service in 1998 as Senior Counsel in the White House Counsel's office. From 1999 to 2001 he held several senior positions at the Department of Justice, including Associate Attorney General. He has also been a Visiting Professor at Georgetown University Law Center. He was a law clerk for Judge Harold Leventhal of the U.S. Court of Appeals for the D.C. Circuit.

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- LAW-503-003 Constitutional Law
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Selected Publications
- Daniel Marcus, *OSHA's Hazard Communication Standard*, in *The Environmental Law Manual* (ABA 1992).
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- *Radio Times*, "The Challenges for the Next Attorney General" (WHYY Radio/NPR Sirius Radio Sept., 20 2007) (Radio Interview).
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- *Dissecting The Decision: The Libby Sentencing*, "NBC Local News" (WRC-TV July 2, 2007) (Televesion).
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- *Wiretapping and Government Surveillance* (WTTG Fox 5 Feb. 6, 2006) (Television Interview).

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