ORAL HISTORY OF THEODORE B. OLSON, ESQ.

Seventh Interview with Ted Olson
December 3, 2020

MS. BESKE: Okay so we are here on what I think is our seventh interview. I am Lise Beske, and I'm here with Ted Olson. It is December 3, 2020. So last time we concluded our discussion of your work on the Proposition Eight case and *Hollingsworth v. Perry*. I want to, if possible, just double back a little bit to talk about *Citizens United*.

MR. OLSON: Yes, fine.

MS. BESKE: So how did you get involved in the case?

MR. OLSON: I can't remember the specifics. I had read about the case and that it was pending, and it was a case that involved a three-judge district court because it was a case brought under the campaign finance laws that had set up a special court to handle these kinds of cases. And I think there had been some proceedings before the Federal Elections Commission, and then it went before this three-judge district court, which was a district judge, I think, and at least one DC circuit judge and maybe two. I'm not sure. At some point the case was decided against Citizens United, and some of the issues that had been brought up early in the case had been weeded out. It looked like the case was going to the Supreme Court. We were contacted by David Bossie, who was the chief executive of Citizens United. We were asked whether we could handle the case in the Supreme Court, and now I'm trying to remember whether we filed the cert petition -- oh, it would have

been an appeal, not a cert petition -- and I think that we did, but I'm having a little trouble remembering exactly. Now I have a book someplace that with all those pleadings in it, but I can't remember off the top of my head. At any rate, David Bossie asked whether I could handle the case, and I said that I could. It looked like a very, very interesting First Amendment case, and I agreed to proceed with the appeal. One of the things that we had to deal with is that one of the issues that was central to the case, in fact, a core issue that was involved in the ultimate decision of the case, had been withdrawn or dismissed in the lower court proceedings, and we had to resurrect that issue in the Supreme Court as we were writing the briefs.

MS. BESKE: Do you recall what that issue was?

MR. OLSON: The issue was whether or not the prohibition, which was a criminal prohibition in the statute, of using corporate funds for an independent expenditure in connection with a federal election violated the First Amendment. There were several ways for Citizens United to win this case, short of that fundamental core issue, one of which was an argument that this was a 90-minute documentary, and the campaign prohibition wasn't intended to cover that, it was intended to cover spot ads. Another issue was that the Citizens United documentary was “on demand,” and therefore people had to ask for it. So there was a distinction based on that. We also argued that this was an essay, so to speak, a documentary. And that wasn't something covered by the terms of the statute. There were a lot of ways to win the case, and we had to try to win the case in whatever way we could, and so those were in the brief, but we also thought that fundamentally what was wrong is that it

did violate the First Amendment to prohibit individuals in the form of a corporation to speak out on issues pertinent to a federal election. And so we wanted to make sure that the Court had an opportunity to decide that core issue as well as these less global issues.

MS. BESKE: Now, the Court set the case for a second argument and specifically asked whether it should overrule *Austin*. Is that something that surprised you? I've listened to both arguments, and it seemed to me that I wasn't quite sure why they went to the trouble of setting that second argument.

MR. OLSON: I think I know the answer, but of course the Court never tells you that. It was a very interesting situation because I think we did the first argument in April or March or something like that. And we came to the last day of the term, and all of the other cases, except for three or four, had been decided. We were in Court. You do not always know when your case is going to be decided, but as it gets to the end of the term, there's a process of elimination. We were certain that the case was going to be decided on that last day of the term. David Bossie was there as well as other people connected with our clients, and we sat in the audience, and the Court decided all the other cases, and there was only one left. And we all assumed, okay, now they're going to decide *Citizens United*, and the Clerk had said to me just before the session started, stick around. I will need to talk to you immediately after the Court finishes its work. I couldn't figure out what he was telling me or what was going on. And to make a long story short, the very last words of the Chief Justice were, such and such a case is set for reargument on September 8 or something like that, which is which is before the beginning of the

typical term on the first Monday in October. And I believe the announcement specified that there would be supplemental briefs and focused on the constitutional issues. Now, why did the Court feel that it needed to set it for reargument? I understand from indirect sources and supposition that some of the justices who were in the minority said, you can't reach as far as I think some of the majority wanted to go without setting it for reargument. That issue had not been thoroughly briefed, I think the argument of the dissenters was, and you have to give the government a chance, you have to give everybody a chance, to focus specifically on that issue before you go that far. So that's our supposition about why it was set for reargument.

When it was set for reargument, it was the first argument that Justice Sotomayor participated in, and Elena Kagan had by that time been appointed and confirmed as Solicitor General, and this was her first argument as Solicitor General. In fact, as I understand it, and I think it's true, it was her first argument in any court. She had been a professor and Dean of the Harvard Law School, but she had never argued cases in court. So she was there for the first time, Justice Sotomayor was there for the first time, and it was a September argument, which is unusual, and it was all, therefore, rather exciting. One of the things that had happened in the first argument, in response, I think, to some prodding in our briefs, was that one of the Justices asked the Deputy Solicitor General, “well, would your interpretation of this prohibition cover books?” And I think that the argument was made that if a 300-page book happened to mention on page 276 someone who is running for federal office, would that make that book, if it was

published by a corporation (and most books are published by corporations), illegal. And the Deputy Solicitor General on prodding in that first argument had basically acknowledged that the theory that he was advancing on behalf of the government would have covered books. Then the second time it was argued that same issue came up and Solicitor General Kagan was asked that question, and she attempted to dodge it a little bit, and she basically said, no, it's no longer the government's position that the law would enable a prosecution of a publisher of a book. Then one of the justices said, what about pamphlets? And she said -- I'm hoping I'm doing justice to her response -- yes, it would cover pamphlets, and I thought, well, that's it; it's over. We win. Pamphlets are the reason that there was a Revolution, you know, Thomas Paine and so forth. And so that was one of the dramas that occurred during that second argument.

MS. BESKE: Now, I assume that she did that, and that Deputy Solicitor General Stewart did that, because they had to deal with the fact that you had a 90-minute film as opposed to a 30-second spot. And so they had a line drawing issue here that's quite difficult. So as you mentioned earlier, there were several different ways you could win the case. Were you surprised that the opinion went so big? I mean, you won in sort of the biggest possible way. Or did you think that the Court was likely to make some statutory distinction or limit its holding to nonprofit groups? Or did second argument sort of give you a hint?

MR. OLSON: Well, I think the fact that they set it for a second argument, and they focused the briefs on that fundamental issue, on the *Austin* case, which had been precedent written by Justice Marshall, who had articulated various different theories about

why you could prohibit corporations, one of which was equalizing access to elections, one of which was fairness to stockholders -- none of those arguments were very good, we thought, and the government wasn't really defending any of those rationalizations in the *Austin* case, but it was trying to win the *Citizens United* case anyway, on the basis of *Austin*. And we were hoping to win the case anyway we could. On the 90 minute documentary issue. We also made an argument that this was a nonprofit corporation and that only small amounts of the funding came from a corporation, and there were various different other ways. I wasn't terribly surprised at the ultimate outcome because we felt that the fundamental principle, if the government could prohibit a corporation (the other issue, of course, is this was an expenditure, it wasn't a contribution) from speaking out about issues, just because it happened to mention a candidate for political office -- and it was a criminal prohibition, that's another argument that we made, the penalty was five years in prison or something like that for putting out this kind of an expression with respect to a political candidate, and we did say this was at the core of the First Amendment. It was a federal election. That's why you have the First Amendment, to enable people to have a robust exchange of ideas about people running for office, federal office. One of the most important freedoms that you have is participating in the political process. It isn't so much about nude dancing or burning flags. It's about talking about our system of government, and this was a presidential election. And our client's documentary was about the qualifications of a candidate for presidency of the United States, and what could be wrong about putting out a discussion of the qualifications of

someone running for President of the United States? So I thought, if that can be criminalized, you really can't make a distinction based upon 90 minutes or 60 minutes or 30 minutes or how much money came from a corporation or how little money or whether it's a nonprofit corporation or a small corporation or big corporation or a rich corporation or a poor corporation, all of those things didn't seem to me to make sense at the end of the day. And so it's hard to say, now, how surprised I was by the ultimate outcome of the case, but it was consistent with the theory that we thought undergirded the case right from the beginning.

MS. BESKE: Were you surprised, then, that it was so sharply divided, given the fundamental appeal of political speech?

MR. OLSON: I wasn't so surprised because, I mean, I knew that views were very strongly held by the Justices with respect to this. I think Justice Breyer felt very, very strong. Justice Stevens felt very, very strongly about it. I haven't gone back to read those dissenting opinions, but I think Justice Stevens wrote the longest dissent he had ever written. Is that right?

MS. BESKE: I believe so, yes.

MR. OLSON: They felt very strongly about it, and to this day people get very excited about the case. I have been on program after program after program, and people will say this is the worst decision in the history of the United States Supreme Court, they forget about *Dred Scott* or anything else. I don't know whether I told you this story before, but I was on a panel with the *New Yorker* at The New Yorker festival a number of years ago and the program was the *Citizens United* case and

campaign finance. And the moderator, I think was Jane Mayer, who is a staff writer for *The New Yorker*, said to the audience that the *Citizens United* decision was the worst case decided by the Supreme Court in history. And I said to her, what was the worst case decided by the Supreme Court in the history of the United States before *Citizens United*, and she said, *Bush v. Gore*.

So, I'm just going to get blamed for the two worst cases in history of the United States Supreme Court.

MS. BESKE: Well, so obviously the outrage is there. What accounts for it, and is it that the public doesn't understand it? I'm sure Jane Mayer understands it, of course, but it's become a boogeyman case. Why do you think that is?

MR. OLSON: I think the public doesn't understand it, in part, because the public does not like vast amounts of money in federal elections, and they think this case is responsible for it. People don't distinguish between contributions, which this case did not involve, and expenditures. President Obama, when he excoriated the case in his State of the Union address, not long after was decided, talked about how this was going to allow foreign money to come into federal elections, and that occasioned Justice Alito to mouth the words "not true," or something like that during his speech. And in fact, it wasn't true, because the Court had explicitly said, we don't go into that issue about foreign money. So there's a combination of things. And I've been on debate programs in front of audiences of several hundred people where everybody's against me, and I start to explain my view that the idea that people ought to be able to express their views about political issues and that that's

good for us, that the more people get to say whatever they want, the better off we are to make our own decisions. But people don't like it. People also confuse all of these super PACs, where large amounts of money are being given by individuals to candidates. They believe that is the responsibility of *Citizens United*. But *Citizens United* didn't involve contributions. It didn't involve even expenditures by individuals, it only involved corporations.

The *New York Times* actually repeatedly made the argument that corporations should not have constitutional rights. And I thought that was ironic given one of the most famous Supreme Court cases is called *New York Times v. Sullivan*, or the Pentagon Papers, which involved the *New York Times*, and the *New York Times* certainly wouldn't want their records to be searched without a warrant under the Fourth Amendment. So people think corporations shouldn't have constitutional rights, that there's too much money in elections, and all of those things come together, and there's this popular conception that it involves foreign money and all these other things, most of which I can take one by one in discussions with people, and they start scratching their heads. Well, maybe, maybe it's not as bad as they say, but it's impossible to change people's minds. The hostility to the case is pretty much indelibly etched in people's consciousness.

MS. BESKE: I think *Citizens United* is probably an inevitable result given *Buckley v. Valeo*. Do you think people's discomfort is more with the equation of money and speech, you know, that sort of original sin in *Buckley*? That seems to be the nub of the money issue.

MR. OLSON: Yes, I think you're absolutely right, and that's one of the points that Justice Stevens made. He said money is not speech. When people have made that argument in discussions that I've had, I've said, well, microphones aren't speech. Or books aren't speech or a bullhorn isn't a speech or a billboard isn't speech. You cannot express yourself very effectively if you only have your own voice. You can only talk to so many people. Those you can collect in a room or an assembly hall. You must be able to amplify your voice. You have to be able to use devices to communicate with large numbers of people, and that requires money, you can't do it otherwise. But it's very hard to get that notion across because people will come back and say, well, money is not speech, but there you go.

MS. BESKE: Do you think that history will be kinder to the decision, than, you know, than its popular reception right now?

MR. OLSON: I, I tend to doubt it, because it's been a long time and the attitudes haven't changed, and in the speeches that I give before groups like at the Aspen Institute and so forth, the anger with the decision is palpable. Now the other thing that people don't seem to quite recognize is that the amount of money that we spend on political advertising in a given year, if you put it in perspective to the amount of money that we spend on toothpaste or candy at Halloween or at Easter time and so forth, it's not quite as bad as it sounds. And, on the other hand, and in addition to that, you keep seeing people with the most money not winning elections. They spent enormous amounts of money to defeat Susan Collins in Maine for her Senate seat, and she won. Why did she win? Because the people of Maine liked her. And all the money that people spend on some of those races didn't make any

difference, I think, that, well, I won't go into other campaigns, but it has happened frequently over the past few years, even in presidential elections, that the person with the most money didn't win.

MS. BESKE: And it's interesting. You know, it's 10 years out after Citizens United this year, and there's a lot of stuff out there about how corporate spending has not become the tidal wave that doomsayers forecast. You know, there are issues with money in politics, but it's more super-wealthy individuals giving money and whatnot than it is corporations because you know, Republicans buy sneakers, too. I think that was the line.

MR. OLSON: Well, you know, you're absolutely right, because most corporations with stockholders don't want to offend their customers by getting involved in controversy. Corporations don't want -- basically publicly held corporations, the ones with the money -- don't want to get involved in abortion or same sex marriage -- although they did, and that's not a good example – but they just stay out of it. So corporations don't spend a lot of money, big publicly held corporations don't spend a lot of money on these issues. They might spend money on issues like carbon emissions or something like that or the climate issues because their businesses are directly related to it. But corporations basically haven't been a factor in general elections in terms of expenditures at all, and certainly not with respect to contributions.

MS. BESKE: I'd love to move on to Deflategate and your representation of Tom Brady in 2016. So the claim that Brady deflated footballs during the 2015 AFC championship game, and in May 2015 the NFL announced a four game

suspension, a million dollar fine on the Patriots, and forced them to forgo several important draft picks. So you came in in preparation for an en banc Second Circuit petition, and press at the time thought it absolutely, manifestly clear that Brady was going to take it all the way up to the Supreme Court, and his decision to retain you was an indication of that. The Second Circuit denied the en banc petition, as it seems to do all the time, but Brady stopped. He didn't move on. What prompted that?

MR. OLSON: I can't get into it too much because it was a decision that he made, but let me put it this way, it made sense. At that point, since we weren't able to persuade the Second Circuit to take it en banc, there were some amicus briefs that we filed or arranged to have filed by engineers and physicists and so forth that gave all the reasons why it couldn't have happened that way, that the balls weren't inflated or deflated and wouldn't have made any difference. I can't remember all the science, but it was very persuasive and we really got nowhere with it. And so it made sense, at the end of the day, for him to stand down, since the football team that he was playing for was willing to accept the consequences of the Commissioner's ruling. And the four game suspension at the end of the day was not all that bad; they wound up winning three of those four games or something like that, anyway. It was a sensible decision and I'm not revealing anything about our communications, but it was a sensible decision that often people don't have enough sense to make when they're in the litigation. That prolonging isn't good. These things are just expensive. They don't help your reputation. You may not

win, and so forth. And it's best to just go on if it's a tolerable outcome that you can live with.

MS. BESKE: In addition to hiring all the scientists, you also hired Kenneth Feinberg, who's one of the nation's best known figures in dispute resolution. I thought the arguments that you guys made in the en banc petition for the need for regular process among above all things were interesting and I thought bringing him in was a masterful stroke.

MR. OLSON: I thought so too. I have to correct one thing. We didn't hire or pay the scientists or engineers. They did it on their own. And so we did not finance that brief, nor did we finance the Kenneth Feinberg brief. I have great respect for him. He is just a brilliant man and a brilliant lawyer, and because of his universal recognition as an expert on arbitration and the resolution of disputes, I thought if he was willing to make a statement or write his own brief -- we didn't touch a word in his brief -- that it would be persuasive because he's so credible and because the arguments that came out of his brain and his experience were so persuasive. I'm glad to hear you say that you felt that way about reading that brief because I thought it was a very smart thing to do, although it was his decision to do it and I thought his brief was brilliant.

MS. BESKE: Me too. Your opponent in that case is a figure who comes up quite a bit in my research for today's meeting, Paul Clement. You've had to square off against Paul Clement, who is your protegé of sorts, replacing you in the solicitor general's office in 2004, again and again. You two meet up not only in this NFL case, but also in the lockout case, and we'll talk about *Murphy v. NCAA* momentarily. Is it

fun to come up against the same players in that way? Is the sparring part of what gives you satisfaction in these cases?

MR. OLSON: Well, that's a very good question, and the answer is yes. If your opponent is the very best, it is most stimulating, and you realize that you're in a contest where, especially at the Supreme Court, but at most courts that make decisions on the basis of the arguments and how well they're presented and that sort of thing. You want to give the judges the best possible arguments and the best possible case. Paul Clement is someone that I asked to be the Deputy Solicitor General when I was appointed. I talked to several brilliant jurists -- Larry Silberman from the D.C. Circuit, Mike Luttig from the Fourth Circuit, Antonin Scalia from the Supreme Court, and I said I was looking for a deputy that would present the same kind of qualities as John Roberts had when he was Deputy Solicitor General under Ken Starr. And they all said, oh my gosh, if that's what you're looking for, Paul Clement's your man. So I brought Paul along to be my deputy. He was everything that anybody ever could possibly want. He's a brilliant, brilliant lawyer, hard worker, talented person, gets along with people. He's got a perfect disposition. They loved him in the office, everything that you could possibly ask, and I was glad that he became Solicitor General when I left. And when we're up against him, you know that it's really going to be good. And he is always good. He's very tough, and you'd better be on your toes. And so that's exhilarating in a way to have the opportunity. In the *Murphy* case that you mentioned, we argued against one another I think three times in the district court, three times in the Third Circuit. And then finally, in the United States Supreme Court. So it was

over and over and over again. And he is invariably very good, and he's a wonderful person, too. He comes from Wisconsin where my parents come from. He loves wine, and I do, too. So we can talk about things other than that our cases.

MS. BESKE: That's great. Well, let's switch to the *Murphy* case. So having sparred with him in the district court in that case, you both obviously got in quite early with that case. And that was with Chris Christie.

MR. OLSON: Yes. Chris Christie was the governor. New Jersey was interested in legalizing sports betting because the legislature wanted to help rehabilitate Atlantic City, which had suffered hard times, and they thought that if they could use the casinos there to permit betting on sports, it would help. And they couldn't quite understand and didn't think it was fair that Nevada could allow and entertain betting on sports but no other state could. Why not New Jersey? Why just Nevada? And Chris Christie personally called and asked whether I could take the case, and we talked about it, and we both agreed that we were not going to do this unless we were willing to take it all the way. I didn't realize and he didn't realize I'm sure that we could keep losing in the district court. And then lost in the Third Circuit and then we went back to the district court, and we lost again in the district court, then we lost the Third Circuit. Then we convinced the Third Circuit to take it en banc, and then we lost again. In the meantime, I think at least one or two cert petitions were denied, and so -- and we were against Paul Clement and the NFL and the NBA and the NCAA and every sports organization in the country. So, everything was arrayed against us.

And so it was very, very gratifying when the Supreme Court finally took the case and the Supreme Court ruled in our favor. I think was six to three, or maybe seven to two.

MS. BESKE: It's a remarkable case for somebody who is a constitutional law nerd as I am, because having grown up through the 90s, with all the pitched federalism battles that were going on in *New York v. United States* and *Printz*, and of course, *Lopez*. It's really quite remarkable in this case, the absence of debate on the fundamental issues amongst all members of the Supreme Court. I mean RBG had some severability issues and Breyer sort of split that, but Breyer specifically endorsed the anti-commandeering principle articulated by Alito, and that's just all-out victory. So the interesting thing about this case is it presents a tough puzzle, how to square the anti-commandeering principle with preemption. Prior to this case, everybody had rested on the distinction that preemption tell states what they can't do, and commandeering affirmatively requires them to do things. And you basically demonstrated that this distinction was hollow and not useful. And that's really changed the debate.

MR. OLSON: It did. I had a wonderful group of people working with me on this. And so, those things are all team efforts, but we wanted to make the point that when the federal government wanted to do something and it could do it, it could regulate gambling under the Commerce Clause, and then if it did so, it would assume the expense of doing it, the responsibility to enforce it, and the blame for having done it. But if it wanted to do something like that but not take the responsibility or bear the expense or be blamed for it, but put it on state governments and say, either you

must do it or you don't do it -- that idea between affirmative and negative is just other sides of the same coin. And we made that argument. And that worked in the Supreme Court. Ultimately, the Justices, accepted the argument that if you are going to -- the word the Supreme Court uses is commandeer, I used the word "conscript" because I didn't want to use the word commandeer all the time -- but you're appropriating the minds, the talents, the energies, the discretion, and the responsibilities of state legislators or state executives to do what you want done, you being the federal government want done, you violate the Constitution. And again, it was important to sort of simplify that argument, to make the point that as a matter of federalism, and of course we went back to history, and in the end the Framers made the decision at the Constitutional Convention to regulate people, or activities of people -- not to regulate states. And again, that was an important thing that people don't see right away, and even the justices may have not focused on, excepting in those cases that you mentioned, but in fact that's what this case was all about -- the regulating of the states, making the states into the instruments of the federal government as opposed to regulating the conduct of people.

MS. BESKE: You won on both points, both in collapsing the distinction between negative and affirmative regulation and in really superimposing order on the distinction between preemption and conscripting or commandeering.

MR. OLSON: I'm tickled to hear you say this because most people don't see it and most people haven't thought about it in that way. And I have to say that Chris Christie gets a lot of credit because when you are a governor of a state and you lose and you lose and you lose and you're paying state's money. And people are saying, why are

you doing this because you're not going to win. And, it was his perseverance and the fact that he was willing to stick with us to the end that allowed us to come out on top.

MS. BESKE: There's an article in the *Notre Dame Law Review* – you've probably seen it -- by Professor Edward Hartnett that makes precisely the point I made that this opinion really did a solid to concepts in the field of constitutional law by superimposing a really neat order because we have these two different doctrines, two different things, preemption and anti-commandeering, that were just on a collision course, and after this case, you've got a principle. Now it's regulating people versus regulating states qua states.

MR. OLSON: I can't recall whether I've read the article, so I'll make sure to dig it out. Thank you for mentioning it.

MS. BESKE: Yes, sure. So a couple things. The defect that the Supreme Court ultimately took the case to correct – after denying at least once, maybe twice beforehand – they took up in the absence of a circuit split and when the Solicitor General had recommended deny. What do you think, were they just tired of saying no?

MR. OLSON: I don't think they were tired of saying no, but you reminded me, not only were Paul Clement and all those sports leagues against us, but the Solicitor General came in against us and recommended that the Court not take the case. And then when the Court took the case, the SG wrote a brief on the other side. Why did the Court take it, despite all of that? I think that finally the arguments that we were making penetrated, the idea that this was fundamentally, you know you are a student of the structure of the Constitution, I am too. We're probably the two

geekiest people in the country about things like that. I love that sort of thing. But it was really fundamental, and I think that finally we got through to them, even though the court decisions and Third Circuit decisions were tough against us. Ultimately, I think one of the points we made is that the Third Circuit said, well, you can't do it this way, but you could do it *this* way. And then when the legislature said, okay, well, we'll do it that way, then the Third Circuit said we didn't mean it, you really can't do it that way. And I think the fact that the Third Circuit, the rationale for the decision of the Third Circuit was irrational may have helped in terms of convincing the Court to take the case. I'm not sure.

MS. BESKE: Interesting. Now another thing. You orchestrated that Chris Christie be in the front row during argument and got him sworn in as a member of the Supreme Court bar that day. It seems like you do that a bit to good effect. If we have time, we'll talk about the DACA case. You had that young lawyer who himself was a Dreamer sworn in that day. Is that, is there a little bit of kind of showmanship built in here?

MR. OLSON: Well, no, I don't think so. You never know about what your own motives are, but with Chris Christie, somebody I have known for a long time, he was the client, and he was the one that stood up and kept saying we're going to stay with this and gave us full support all the way through. And I like the fact that my clients can come to arguments and if they're a lawyer and they haven't been admitted to the Supreme Court Bar, I tell clients often, you know it's one of the greatest things in the world and it used to cost $100, now it's $200 or something like that, and you're a member of the Supreme Court bar for the rest of your life. What a great

deal, and if it's a case that you're concerned about you get to be in the front row, because you're being sworn in, and you get put right in the front row where they put those newly admitted to the Supreme Court Bar. And so that's something I like to do for clients. It enhances their experience. It makes them even more a part of that case. Because they're putting their heart and soul into it and they're investing their, their trust and confidence in us and it's like you're up on a trapeze wire or something like that. I mean, you're doing it for them and to the extent that they can be involved, that's a very good thing. I'll talk about the Dreamer situation if you want me to.

MS. BESKE: I would love to.

MR. OLSON: When I was asked to do that case there were several other law firms and law school faculties involved in it. There were solicitors general and attorneys general from all across the United States involved in that case. And so the Court took the case. And then there was a discussion about who is going to argue it. That went back and forth, and I wasn't going to put myself in that position unless everybody really wanted me to do it, and then ultimately there was a consensus that I should do it. And it was a great collaborative effort from all those lawyers.

And this young man who had been involved in the case, Luis Cortes, he was a great, great story. He was a Dreamer, he'd been brought to this country when he was young. He studied and he worked, and he managed, in the state of Washington, you could become a lawyer, you could go to law school, even though you weren't a citizen and you were undocumented. He got into law school. He couldn't afford to buy the books. He borrowed books from a roommate or

another student. The other student would go to sleep and then Luis would read and study the books and be prepared. I don't know whose idea was, I'd like to think it was my idea but it was probably somebody else's idea, that -- I wonder if we could get him admitted to the Supreme Court bar. He's been a member of the Washington State Bar for a long enough period of time. And anyway, let's say it was a collective decision that we will have him admitted to the Supreme Court bar and then there was a discussion. And I won't get into names, but a lot of people want to sit right next to you when you're arguing a case in the Supreme Court. And there were some very, very prominent lawyers who participated in this, but we thought what a perfect thing it would be if Luis could be the lawyer that sat next to me. The Dreamer, the first Dreamer to be admitted to practice in the Supreme Court, and then he would sit there next to me and he's a very smart guy, so it was not just a gimmick or anything like that. He legitimately deserved to be there and had been involved in working this case up from the beginning. But we put him there. And so the poetry of this. I don't know whether the justices even knew it, but I suspect the Clerk may have told them. That here was the case involving the Dreamers -- and you can't talk about the Dreamers without getting tears in your eyes. There are 700,000 families or 700,000 individuals and their families and their children that are in this country that you can't -- it'd be unconscionable to deport them to a country that they've never really understood. They may not even know the language, rip them from all they know. I mean, the whole thing is, and I spent a lot of time meeting with Dreamers, both in person and over things like zoom, phone conferences, to hear their individual stories.

Well, his story was perfect. And there he was, the Dreamers case in the United States Supreme Court and a Dreamer, who had never even been inside the Supreme Court before was sitting there at the table, being one of the lawyers to represent the Dreamers in the Supreme Court. Lots of people didn't think we would win. So the odds were against us to begin with. So it was perfect.

And then, then we always have a lunch after a Supreme Court argument where everybody involved, all the lawyers, all the friends, family, and so forth, come together and have lunch and we drink wine and talk about the case, and each person at the lunch tells the story about why they were involved in the case and what their thoughts were and that sort of thing. And Luis got up, just like Chris Christie did in the *Murphy* case, and we were all weeping because here was a perfect situation if we could just win the case. And fortunately, we did.

MS. BESKE: The choice of you to argue. I mean, it's reminiscent in a way of your selection as the lead challenger to Proposition Eight, I mean this is a situation, I think your colleague Ted Boutrous, he said something that I read -- you know, Ted Olson can bust through the partisan atmosphere surrounding the case. And it's very much reminiscent of what happened with respect to the gay marriage case. I mean, I think having somebody known to be right of center, which of course, you had bona fides, enabled more acceptance of the issue as a human issue rather than as a partisan issue. Do you think that was deliberate in this particular case?

MR. OLSON: I do. I mean, I think that when you're doing a case in the Supreme Court, you have to think about everything. You have to think about the arguments, you have to think about how well it's written, you have to think about how you are going to

capture the essence of the case in a sentence or two in your oral argument and in your briefs. When I was a college student, we thought of ethos, logos, and pathos. So an argument has to have logic on its side, it has to have emotional appeal on your side. I mean, you're not making jury speeches to the Supreme Court, but the emotional content of the case is important. The logic of the case, which is your briefs and their citations, and so forth, and the ethos, which is the integrity that you bring to the argument, and that involves the quality that you put into the brief and the argument itself. So you'd never want to make misleading or hyperbolic arguments or anything like that. You know, all of this is a complete picture of the art of persuasion and so yes, the people that were involved in this decision thought that, well, you know, he might be an effective advocate there because he would normally have been perceived as being on the other side, you know, the whole idea of the executive. The hard part of that case is, one President says, well, I'm not going to prosecute people in this category. And the next President can come along and say, well, yes, I am. You know, I mean, if the one President has the right to decide not to prosecute categories of people, the next president can say, well, I disagree with that prosecution policy. That's a loser. So we had to explain that, while the President had the power to do this sort of thing, he had to do it right. Had to do it according to the law and had to do it by the numbers. He had to take responsibility, explain so that people understand, especially when there's been manifold reliance on the decision of the previous President. So it was so important to make a case, we had to get the fifth vote. Where was the fifth vote going to come from? And we thought it was going to come from, if we could get

it, the Chief Justice because of the earlier census case that he had decided. And so we focused on that very thing. Presidential power, we didn't want to argue about presidential power because we thought that was a loser. But presidential power properly exercised was what we thought was the winner. And I think we all thought that maybe I could contribute, you know, just an eyelash worth of difference with respect to that. It's certainly a part of a composite structure of the whole presentation.

MS. BESKE: It's interesting. It's like you have this tremendous asset, given that you are known to be right, a center -- like you can't do it all the time – but to jump into an issue that is politicized and render it apolitical. It's kind of an amazing gift. So talking about Trump, then if I could. So, it's well known that he asked you to join the team during the Mueller investigation. Let's see, I guess there were a couple days where it was unclear what you would do -- your deliberation process wasn't transparent in the media. And then I believe your colleague tweeted out that that wasn't going to be a thing. And you said we always believe there should be an orderly process. And of course, government is not clean or orderly ever, but this is turmoil, it's chaos, it's confusion. It's not good for anything. Was this, in fact, a significant deliberative process or was it an easy decision?

MR. OLSON: Well, it was, it was a decision that had lots of aspects to it. That quote came in, I think, with Andrea Mitchell on a separate broadcast as to a slightly different issue. I wasn't explaining a decision not to participate on the President's side. That request came twice. And I thought as a matter of respect for the people who were asking me that I would take it under consideration and consult with my law firm.

And we had plenty of we had ample reasons why it would not have been a good idea, including existing litigation against the Administration, including with my partner Ted Boutrous. It wasn't such a long process. So, I simply explained, we've got conflicts of interest that we cannot discuss. There are other considerations. We would rather not get to the point where we're just saying no to the President of the United States – we just don't need to bring it to that point. The second time around. I said, well, we said the first time we couldn't do it. And they said, I'm sure the answer is the same, but would you please ask your management if they're willing to change their mind on this. And I said, sure. That was in an afternoon. And then the people in the White House leaked out that that I had been approached about this. And so I read about it in the newspaper the next morning that I had been approached. I thought we were going to have a serious consultation and go through a proper process and so forth. But they preempted that by leaking it out to the press, which is what happens in Washington, all the time. And so we had to hurry up and say, no, that's not going to happen. So Ted Boutrous was the voice that said that. Interestingly, Ted was one of the persons in civil litigation matters against the Administration, so there would have been other issues.

MS. BESKE: Yes, I guess, at about the same time you represented CNN in a lawsuit against Trump over the withdrawal of Jim Acosta's press credentials. And did you argue that before Judge Timothy Kelly?

MR. OLSON: No, Ted Boutrous did. I was in a courtroom. But he argued it; it was his victory.

MS. BESKE: Got it. And then most recently, I'm looking at the time and I know I've only got an hour, but most recently, then, in the build up to the election, there was an idea that we're going to become mired in *Bush v. Gore*, Jane Mayer's second-least favorite decision. The notion that after this election, we're going to be enmired for months and months in litigation, and it's all going to go to the Supreme Court. At this point, it seems like the punchline is it will not, but you came out on November 12 distinguishing this quite clearly from the *Bush v. Gore* situation. There was a lot of interest in what Ted Olson had to say about the election.

MR. OLSON: Right. I think that, well, David Boies and I did that collectively. David Boies and I were opponents, as everyone knows, in the *Bush v. Gore* case. And there was a lot of argumentation and commentary in the press that, oh this is Bush versus Gore all over again. Everybody remembers five weeks, contests, the Supreme Court ultimately just, you know, the resolution that resolved the presidential election. David and I felt that no, we need to make the point that this is not like that at all. That was 500 votes in a close election where the outcome of that state was going to determine that state's electoral votes, and that state's electoral votes were going to determine the election. And so there was litigation, none of which involved allegations of massive fraud or anything like that. So now we're in a situation where there are six states, tens of thousands of votes, depending upon which state you're in, separating the two candidates, and litigation all over the place, and we wanted to make the point, this is not Bush versus Gore. This is all those other issues, and the number of votes that separate the candidates are such that it's not going to change the outcome. There isn't evidence that we have seen

that's come forward with respect to massive fraud or miscounting of ballots or anything like that, which would change the outcome. So, it's over. Get over it. And let's move on. And I do think, and we said that in the piece that (I think we said it -- we tried to imply it if we didn't say it directly) that Vice President Biden won the election. And it's not in the interest of the people of this country to drag this out in litigation forever and ever. I don't think that lawyers ought to be deciding presidential elections; people should be doing that. And I guess once in a while there might be a case where it's appropriate for a lawyer to file briefs and make arguments, but the idea that candidates for office have to have fleets of lawyers -- there was an article in the *New York Times* that said the Biden team had hundreds of lawyers all over the place, led by three different or two different former solicitors general and so forth. And it seems to me that masses of lawyers involved in elections, in most cases, is not desirable. Candidates shouldn't have to spend all of their time and resources on litigation. Judges shouldn't be deciding these things unless they have to. And we thought that they had to in *Bush v. Gore*. So David and I both wanted to make the point because we thought people might listen to us, just because the *Bush v. Gore* dichotomy or if it's not dichotomies, not the right word, but the fact that we were against one another in that case that we could come together and say this is not that. This should be over. Let's move on.

MS. BESKE: That's great. We are out of time, so I'm going to turn off the recording.