



**GEORGE W. BUSH ORAL HISTORY PROJECT**

**FINAL EDITED TRANSCRIPT**

**INTERVIEW WITH THEODORE B. OLSON**

March 28, 2012  
Washington, D.C.

**Participants**

*University of Virginia*  
Barbara Perry, chair  
Henry Abraham, *Emeritus*

*State University of New York at New Paltz*  
Nancy Kassop

*Covington & Burling*  
Sarah Wilson

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**Perry:** Nancy goes back to Penn [University of Pennsylvania] days.

**Kassop:** Yes, 1971.

**Abraham:** She was a student of mine.

**Kassop:** I was an undergraduate with Henry. I took my first constitutional law course with him.

**Wilson:** And Barbara and I were judicial fellows together.

**Perry:** This is not only the friend, mentor, teacher panel, it's also a wonderful, friendly conversation.

**Olson:** Well, I think I met the two of you through General [William K.] Suter for the first time over at the Court.

**Perry:** I think you did.

**Wilson:** Oh, that's right.

**Perry:** In fact, Henry and I got in from Charlottesville just about lunchtime yesterday and I said, "We can't resist." Henry had been offered a seat for Monday.

**Abraham:** For today.

**Kassop:** Oh, for today.

**Perry:** That's right.

**Kassop:** So Henry is giving up his seat to come for the interview.

**Wilson:** I'm glad you have your priorities straight.

**Olson:** Well, I know that tells you how important he is, because a couple of months ago I had lunch with General Suter and he said, "If there's anything I can do for you, just let me know. Just don't ask for a seat."

**Perry:** So we know where we are in the priorities of friendship for General Suter. But anyway, we couldn't resist the circus, so we just went up to watch the circus and then go meet with Bill,

and we had a wonderful time. With that, let us begin with the Ted Olson interview for the George W. Bush Presidential Oral History. For the transcriber, I'll begin by saying I'm Barbara Perry. I'm a senior fellow in the Presidential Oral History Program at the Miller Center. Henry—

**Abraham:** I'm Henry Abraham. I am an emeritus professor of government and foreign affairs at the University of Virginia. I taught for almost 60 years, and now I do nothing.

**Perry:** Not true. Continuing to teach in continuing education.

**Kassop:** Right.

**Abraham:** My students have to be 55 to take the course.

**Olson:** I'd be eligible, for a long time.

**Abraham:** I was going to ask you.

**Perry:** All right, Nancy.

**Kassop:** I am Nancy Kassop. I'm a professor of political science at the department of political science and international relations at the State University of New York at New Paltz.

**Wilson:** I'm Sarah Wilson. I'm a partner at Covington & Burling in Washington, D.C., a former senior counsel in the White House counsel's office, and trial attorney in the Department of Justice.

**Olson:** And I'm Ted Olson, Theodore B. Olson, partner at Gibson, Dunn & Crutcher here in Washington, D.C.

**Perry:** Great, thank you. We usually begin these by saying how did you first come to meet the President for whom you worked? How did you meet George W. Bush? When, under what circumstances?

**Olson:** I'm not sure I remember exactly when I met him personally. I was a supporter of George W. Bush in the election, and I may have met him at a fundraiser or two. They have those fundraisers where you get your picture taken with the candidate, and I suspect I met him at one of those. Then there was the matter of the five or six weeks in Florida and Washington in what people refer to as *Bush v. [Albert] Gore*, and at some point after that we had another meeting, but I can't remember exactly when that was.

**Perry:** Before the recount controversy, we'll call it, were you contacted by the campaign at all during the Presidential campaigning process about anything related to the Court or legal issues or possible short lists for Supreme Court appointments?

**Olson:** I only recall being involved in campaign-related support efforts like "Lawyers for Bush," or something like that. I have a vague recollection that Dick Wiley, who is a famous lawyer here in Washington, D.C., may have headed up some sort of Lawyers for Bush group, and I think I signed up for that, but I don't recall being consulted in any particular way. Maybe fundraising,

but I don't recall anything else about it.

**Perry:** Anything else on the campaign before we jump to election night 2000? All right, let's do election night 2000. Tell us where you were. Were you following the returns? What were your thoughts?

**Olson:** I spent election night 2000—my wife, Barbara [Olson], was with me. We went downtown to wherever the campaign headquarters was. I think it was one of the Hilton Hotels downtown. We went to the gathering of various Republicans or campaign people at that hotel. I'm not sure whether we went to more than one place, but I do remember participating in those typical election night festivities. Sometimes they're festivities and sometimes they're more like wakes. This one was close to one or the other, and I think as I recall it now—I must say that I didn't spend any time getting ready for this interview, I'm sorry to say, but I've just been so busy.

**Perry:** We understand.

**Olson:** But it will start to bring back memories, I'm sure, as we talk about it. My memory is that things weren't going as well as we were hoping. Barbara was a big Republican and conservative as well. I think things were uncertain and things weren't going as well as we were hoping, and we left. I don't know what time of night it was. It was well before anything was decided or over with. As we know, it took a while for that to happen.

We lived in Great Falls, as I do now, and we stopped on the way home at the home of Ken and Alice Starr. They lived right across from the Madeira School, across from the Georgetown Pike on the way to Great Falls, and they were having some people in to watch the election returns. We sat with Ken and Alice and maybe eight or ten of their friends, and watched some more election returns. My wife, Barbara, would have watched all night, and I think she did when we got home. I was getting tired of it and I thought, *I'll wake up in the morning and people will tell me what happened and that will be fine*. At some point, I don't know what time it was, we gave up and we both went home.

**Perry:** Gave up on the returns but not the results.

**Olson:** Not the results, just gave up on watching the process and being frustrated by it. It wasn't coming out, as I recall, the way that I wanted it to, and I do think that Barbara stayed up the rest of the night or a good part of the rest of the night and then reported to me in the morning. I can't remember what she reported to me, that we, the Bush-[Richard] Cheney team, was winning or not. I can't remember what the status was when I got started the next morning.

**Perry:** So take us through the first steps. What happens in terms of the legal controversy? I presume at some point you're called by someone in the Bush campaign hierarchy?

**Olson:** I went to the office, which is here, on Wednesday, and my recollection is that I was called twice during the day. I think I was called once by Dick Wiley, and I don't know, he must have been here in Washington, asking—because by then we knew that there was the controversy down in Florida and things were going to be unresolved for a while, and that there may have been by that time already suggestions of potential recounts or something like that. I think it was

Dick who called me and asked me whether I'd be available to go down and head up a group of lawyers in Florida to participate in this. Would I be willing to do so, and could I. My recollection is that I said that I would be willing to do so and I did have time and I could pull myself away from my practice and get down there.

And I do recall another telephone conversation. I think it came from Austin, Texas, and it was someone connected with the campaign. I think it was Ben Ginsberg, but I'm not a hundred percent sure of that, either—asking me somewhat similar questions. Would I be available, did I have people here who could help out, would I be willing to go down to Florida? I said yes, and then I didn't hear anything further the rest of the day. If you want me to continue on—

**Perry:** Well, let me pause right there and say, obviously they were calling you because of your prominence in Washington, your prominence as a Supreme Court litigator, your previous work in the government, your work in the campaign in the sense that you were supportive of the campaign. Did you have a particular expertise in election law?

**Olson:** I did have some expertise in election law. I had worked off and on in election law matters ever since I started with this law firm in Los Angeles. William French Smith was a partner in this firm when I joined Gibson, Dunn & Crutcher in 1965, an active Republican, a part of what became the [Ronald] Reagan kitchen cabinet and the Reagan administration ultimately in Washington. I went to him. I was a Republican, I said I was interested in Republican politics, and he put me to work on campaign finance, giving speeches and volunteering as a lawyer in one election controversy after another it seemed, from time to time in California, so I had done quite a bit of that.

I had worked on the Reagan campaign and I've worked on other campaigns since then. I had some experience with election law. I had some experience with campaign finance. I didn't consider, and I don't consider myself an expert on those things, but I did have experience and I was a litigator. I had done complex litigation. I had been an Assistant Attorney General in the Office of Legal Counsel in the Reagan administration, so I was familiar with constitutional questions, federal government questions, and things like that. They didn't exactly say why they were calling me, but I assumed that it was because I was a litigator and reasonably senior, and could participate in litigation efforts in connection with an election controversy in Florida. I presumed that's why they were calling me. I can't remember the conversations.

**Wilson:** What was your understanding of the scope of your role when you first got the call from Dick Wiley and Ben Ginsberg?

**Olson:** I thought they were looking for someone to be in charge of what was going to happen or what was happening or what was unfolding in Florida, but I don't recall specifically the conversations and I don't recall them explicitly saying that. That was the inference that I drew.

**Wilson:** Was there an expectation in those early days that this controversy would ultimately end up at the U.S. Supreme Court?

**Olson:** I don't recall thinking about that and I doubt it. I do recall that evening telling my wife, who was very excited about the possibility. Barbara was, as people know, a commentator. She appeared on television a lot. She had been a prosecutor, she had been a Congressional

investigator. She had written a book, and was finishing a second one, about the [William J.] Clinton administration, and she was to her core a political junkie, if I can use that expression. She was very excited about the fact that maybe I was going to go down there. I was scheduled to go to California the next day for a law firm meeting of some sort and Barbara encouraged me not to go. She said, “They’re going to call you and you’re going to have to go down to Florida,” and I said, “If they haven’t called me by now, I’m not going to sit around on my hands and wait for them to call me up.”

I’ll go to the next day. I got on the airplane the next morning and headed to California. In those days, the airplanes had telephones, and somewhere in the midst of the trip from Washington to California I checked my messages and I had a message, I thought more than one, but the one I remember was to call Ben Ginsberg and—I’m not sure, it was Michael, was it Toner?

**Kassop:** It could be.

**Olson:** Who else? There were two Michaels, and I can’t remember. Ben Ginsberg and someone else were down in Austin, so I had a message to call. I returned that call from the airplane and my memory is—and these things, as you know, are faulty—but my memory is that I reached Ben and he said, “How soon can you get to Tallahassee?” I said, “This is going to be difficult because I’m somewhere over Kansas, at 36,000 feet, headed to Los Angeles.” That was Thursday, and he said, “Can you get here tonight or tomorrow?” I said, “I’ll get to Los Angeles. I’ll turn around and come either to Florida or through Washington.” I think I contacted my secretary and made arrangements, and I got off that airplane in Los Angeles and turned around and got on the same airplane. I think the same flight crew, if that’s possible, was wondering what I was doing.

I flew back to Washington and contacted a couple of people that I thought might be able to help me, to arrange to meet me down—one was John Manning, who had worked here in this firm, I think he was by then teaching at Columbia, and Helgi Walker, who had also worked here at this firm. Each of them had clerked on the Supreme Court, and Helgi was then I think working for the FCC [Federal Communications Commission]. At any rate, I contacted them somehow and found out that they might both be available. They were sort of interested in politics and I knew they were Republicans and would be supportive, and I arranged for them to meet me in Florida. John came to Washington and flew with me down to Florida, and I think Helgi met me and we got there around—I got there around 10:00 or 11:00 on Friday.

**Perry:** And indeed you went to Tallahassee?

**Olson:** Yes.

**Perry:** And what did you find on the ground there?

**Olson:** Chaos. *[laughter]*

**Perry:** Do tell.

**Olson:** I was told to go to the Republican Party headquarters in Tallahassee. I must have been given an address. I went there and I was sent up to I think the third floor, and I think I talked to Ben Ginsberg. I saw lawyers all over the place, some of them in a big conference room like the

one we're in right now, with lawyers all over the place and pieces of paper and what appeared to be chaos, people doing things and it didn't look terribly well organized. I was then, shortly thereafter, taken in to see Secretary [James Addison] Baker [III] and a couple of other people in his office. I remember Bob Zoellick was there, I think Josh Bolten, Margaret Tutwiler—I'm not sure they were all in that meeting at the same time—and Ben Ginsberg and maybe one or two other people to get acquainted or just get started. I can't remember too much about those immediate conversations.

**Perry:** But James Baker was there and in charge at first, perhaps, of the chaos, but ultimately getting going on the strategy.

**Olson:** There's no question, as anybody who knows Jim Baker will tell you, that when he's anywhere in the vicinity he's in charge. And there was no question he was in charge. He was in a separate office, a little bit away from the big conference room where everybody else was trying to work, and he had a couple of small offices connected to his where I think Margaret was and I think Josh was, and Bob Zoellick I think was there too.

**Perry:** So how do things begin to move on from the chaos? How does organization develop and what was your role in that?

**Olson:** My memory is that it had become apparent to me by the time I got there that what was going on in Florida was a recount that had been called for, by the other side, of four specified counties in Florida that had voted predominantly for Al Gore. I think the strategy was—and I don't know how soon I discerned this—that if they could count votes cast in those counties, if there were votes that hadn't been counted the first time around because of ambiguity, because of the high percentage of votes that had been cast for their candidate, if you took an uncertain number of ballots and counted them and decided which way they were probably intended to be voted, they would theoretically, on percentages, be skewed in favor of their guy.

But by then it was also clear that the recount was a chaotic system itself. Four different counties were counting the ballots differently. They were unsure of what the rules were or they were changing the rules. The process by which you count these punch-out ballots is very problematic anyway, and it seemed to be chaotic and the rules seemed to be changing, and the process seemed to be unequal.

I had helped out in a case from Alabama a couple of years before. It concerned an election dispute involving the Alabama Supreme Court, which had gone all the way to the eleventh circuit, where the rules were changed after the election, involving the counting of absentee ballots. As I recall it now, there was an issue about whether signatures on absentee ballots had to be notarized or not. Before the election they had to be notarized, and after the election they weren't, or something like that.

The eleventh circuit, which was where we were in Florida, had found that process violated the equal protection and due process clauses of the Constitution. I felt that that was a predicate, especially since we were in the eleventh circuit, to file a federal lawsuit, trying to stop what was going on, what we thought was unfair rule changing after the election and that sort of thing, in federal court in Florida, using that as a predicate, and some other cases that we had found or had

come up with during the course of the day.

**Perry:** So this came to mind to you, I'm sure, immediately upon hearing what was happening in the four counties in South Florida. But how did you get the word about what was happening in those four counties, and did you go yourself, to the four counties, or did you stay in Tallahassee?

**Olson:** I stayed right in Tallahassee, at the Republican Party headquarters there. I didn't go look at any of this. I think it all came from news reports, constant reporting on television, CNN [Cable News Network], and all of those things I think that were going on. By the time I got back to Washington Thursday night, watching—I'm speculating a little bit, but I'm supposing that that's where I was getting my information, and in the papers the next morning. I think John Manning and I, as I recall, flew down. He stayed overnight at my house and we flew down together and we talked about these various things.

By the time I got there I was pretty much convinced that we had to file something in federal court to get control of this situation because it was falling apart. These four counties were controlled by the opposition. It was very close and you could see where it was going to go. They were going to arrange for these—I don't mean to attribute any bad motives to them, but we were concerned that the process that was unfolding was going to continue to unfold until enough votes had been counted to put their candidate ahead, and it seemed to me that that process was highly suspect, because you have an ambiguous process with ambiguous rules that are subject to manipulation after the fact, and we had to stop that. So it was already in my mind on my way down there that we had to do something, to file something in federal court.

**Perry:** And that ultimately is the litigation that becomes *Bush v. Palm Beach County Canvassing Board*?

**Olson:** That's not quite correct, because that case was filed in the federal district court in Miami the next morning, Saturday, and we set a hearing on a temporary restraining order for that following Monday. You'll have to help me with the dates. That case then went to the eleventh circuit and the case that went to the United States Supreme Court was a petition for certiorari from the Florida Supreme Court the two days before Thanksgiving, so that was a cert petition from the Florida Supreme Court decision and that was *Bush v. Palm Beach Canvassing*—

**Perry:** County Canvassing Board.

**Olson:** Yes. My recollection is we petitioned for certiorari from the Florida Supreme Court decision and from the eleventh circuit, which had not yet decided our appeal from the Florida District Court decision. We petitioned something called cert before judgment. The Supreme Court took the Florida cert petition and did not take—I don't know whether it was denied or just not taken—the petition to the eleventh circuit.

**Perry:** Did you have a sense from the very beginning, or almost from the beginning, that this would end up at the Supreme Court in some fashion?

**Olson:** I don't know when my thoughts crystallized on that. I felt that we had to be in federal court, that the—and again, I'm not attributing any bad motives to the judges or justices on the Florida Supreme Court, but they were all Democrats.



**Perry:** Henry will do that for you, if you like. [laughter]

**Olson:** I believe that we were concerned that we weren't going to be in the most favorable forum or the most neutral forum in the Florida court system. That was my feeling, and I think that was the feeling shared by others, and that we had to be in federal court. Notwithstanding, a lot of people saying this is a state court matter, this is Florida, blah blah blah. I was hearing that from everybody, or lots of people, it seemed to me. My position was no, this is a federal election; this is a federal constitutional question. There were cases, notwithstanding all of the people who were saying this is a state court thing, in which the Supreme Court has said federal Presidential elections, particularly, are matters of federal constitutional concern, and that what happens in one state can affect the outcome of a national election, and therefore it is an important concern of federal courts.

I had had experience with cases in federal court and constitutional questions and election questions and so forth, so I knew some of this. We learned more as we were going along. In my opinion, as I believe it evolved, I was pretty much sure that we had to be in federal court right from the beginning. I don't think I thought that it was going to go to the Supreme Court, but you know that's always a possibility when you're in federal court, a federal election, constitutional questions, Presidential election and that sort of thing.

**Wilson:** Tell us about the origin and the evolution of the equal protection concept. Is that something you discuss with John Manning on the first plane trip down to Tallahassee, or does that evolve later?

**Olson:** I don't know whether John and I discussed it on the way down. I suspect we probably did, because I was very much focused on this eleventh circuit case. I had filed an amicus brief on behalf of the Alabama attorney general or somebody. I had filed an amicus brief in that case. I was very familiar with that case and how it had evolved, because the Alabama court system was a system that I had been concerned about, going back years.

My second argument in the Supreme Court was a case called *Aetna v. [Margaret W. and Robert J.] Lavoie*, which had to do with punitive damages. An Alabama Supreme Court justice who had an interest in punitive damage cases had decided a case involving punitive damages without disclosing his interest. We took that case to the United States Supreme Court and won a decision, overturning an Alabama Supreme Court decision on the grounds that the justice on that Alabama Supreme Court decision had not behaved properly with respect to disclosure.

I had been involved in civil justice reform issues in Alabama, because Alabama court systems were churning out punitive damage awards against insurance companies and everybody else, which was making a great living for a lot of plaintiffs' personal injury and insurance bad faith lawyers in Alabama.

I had been very much involved in the Alabama civil justice reform issue, and various clients had participated in efforts to reform the system and so forth, so what had gone on in Alabama was very much in my mind. That particular eleventh circuit decision I thought was not perfect, but really a great thing to have in terms of concerns about changing the rules after the election, and I equated the due process issue with the equal protection issue as sort of overlapping. All the way

through this case I thought that they were synergistic, that what seemed to be unequal methods of tallying or recounting votes, and the changing of the rules after the election, sounded like due process and it sounded like equal protection. It sounded like the two together reinforced one another. So that was on my mind from the very first moment I started hearing about what was going on down there. How much we talked about it, I don't know.

We also, as I recall, put in the complaint concerns about—under Article II of the Constitution—the courts changing the method by which electors were selected. I think if you look back at that complaint that we filed that Saturday morning it was amazing, because we worked all day Friday, I think all night Friday, and I think we got it on file on Saturday morning in Miami. We were in Tallahassee, so somehow we got that complaint down to Miami. I think that we had co-counsel in Miami that managed to get it on file in the federal district court in Miami the next morning. I think if you look at that complaint, you'll see the equal protection, due process, and structural constitutional things in that complaint. I haven't looked back at it, so I hope it's all there.

**Kassop:** Who drafted the complaint?

**Olson:** Well, I think I drafted the complaint. I had help. John Manning and Helgi Walker were helping me with it, but neither one of them had spent a lot of time in their life as litigators. They were very smart and knew constitutional questions, but they hadn't done a lot of—we had to draft a complaint, a motion for a temporary restraining order points and authorities to support a TRO [temporary restraining order], and affidavits articulating what the factual predicate was for the granting of this, if it was going to be granted. There were other lawyers that were helping out, as I recall, but I can't remember who did what. I think a lot of it I did, because I had had lots of experience earlier in my life seeking preliminary injunctions and TROs and that sort of thing.

**Perry:** For us nonlawyers—

**Wilson:** Temporary restraining order.

**Olson:** Temporary restraining orders. That's the first thing you try to get is a temporary restraining order, which is good for a day or two or three, and then the next step is a preliminary injunction. Then if you win it's a permanent injunction. So the first step, what you do is you go into court and you ask the judge to stop what's going on right now until you have a chance to hear from the other side, and so forth. So it's a TRO.

I don't know how in the world we did it, because I didn't get there until pretty close to noon on Friday, and I think we were on file by pretty close to noon on Saturday in Miami. All of that stuff had to be done, so there was obviously more than me, but I think that was a lot of my work, because I had done this sort of thing before.

**Perry:** I think the briefing book refers to your being the head of the federal courts team as part of this process. Did you consider yourself that, and did James Baker do a laying on of hands and say, "Ted, you'll be the leader of the federal pack," or did that just happen naturally because of your experience?

**Olson:** I think it happened this way. The first thing to be done was the federal court filing, and

then we had a hearing on Monday on the TRO, which was a circus. There were something like nine law firms on the other side and me on our side, but we had to be down there on that Monday, and so I had to spend the Friday, Saturday, Sunday, and Monday working with all of that. And then when we didn't get the temporary restraining order, the judge said, "This is serious stuff, but I'm not going to stop what's going on now."

We determined, or I did, that we were going to have to take this up. Secretary Baker would have had to approve. I wasn't going to make these decisions myself, but at some point, I remember thinking that I was brought down here to help run this show. No one said, "You are in charge of this," and I probably never was, but I thought maybe that was my responsibility. At some point I said, "I cannot do—" ultimately there were scores of other cases going on; recounts this, veterans this, butterfly ballot this, and so forth, all this stuff going on in the Florida state courts.

Let me just rephrase it. My memory is that I decided I can't do all that and do the federal stuff, because I have to have a hands-on thing. I have to be writing. I have to be changing words, putting commas in. I have to do all that hands-on. I'm going to have to be in court, and I can't do the other stuff. So if that works, I will be in charge of what goes on in the federal courts and I won't worry about—or I'll help out if I can, ask me for advice if you want. And I did give advice, because I wanted them in the state court to be sure to get the federal issues in the state court proceedings, so if we had to go from there, that stuff would have been raised and not waived. But at some point, and I can't recall when, it was I think pretty clear to all of us that I was going to be in charge of the federal litigation.

**Kassop:** Was there any debate on the equal protection issue? I mean, was it pretty clear that that was the avenue you were going to take? Was there discussion or just dissent from that?

**Olson:** First of all, there was some dispute about whether we should go into court, because I think the concern that I recall being expressed was, "Well, we believe in the political process, we don't believe that the courts are solutions to all things, and we shouldn't be the ones to run into court for a resolution of our problems," or something like that. That was the flavor that I recall, and that there were some people, therefore, who were not in favor of going into court. My feeling about that is we have no choice. The other side is going into court in the state courts. That's not the court we want to be in. We have to be in federal court.

You asked me about the equal protection part of it, and I think there were skeptics. I can't remember who and I can't remember what, but I kept—in my mind we have this eleventh circuit decision that has to do with equal protection and due process and changing rules after the election and that sort of thing, and for God's sake, that's got to be in it. But I also felt strongly about the structural side of it, so I can't remember. There were a lot of people giving advice and wanting to tell me what to do, and so you had to just deal with that. At some point in a situation like this if you're in charge you have to just make decisions and say, "Okay, I heard that, and that's that, and thank you very much."

I brought some more people from Gibson Dunn down at some point, and I made one of them chairman of bright ideas. We were getting phone calls and emails and ideas, and people coming in, brilliant people from all over the United States, former Senators, former Attorneys General, former great lawyers or present great lawyers, all having ideas. I think some of them might

actually be bright ideas, so I do want to hear those, but I can't deal with all of them. I think there was a discussion, and at various different times I remember people saying, "You've got to do it this way." At the end of the day I had to make the decisions I made.

**Kassop:** Was there any contact with legal academics to ask advice?

**Olson:** Yes. I think there were a lot of legal academics. There always are, you know. With all due respect to the legal academics and academics in general, I get a lot of advice. I'm handling this gay marriage thing out in California and I'm getting all kinds of advice from professors who know how I should handle that case.

**Perry:** We'll come back another time and talk about that.

**Olson:** Yes. As I said, they're smarter than I am, because they don't have to waste their time handling cases. No, I'm just kidding.

**Wilson:** Were there any legal ideas from this pipeline of folks who wanted to share their ideas that actually influenced the legal and strategic arguments that were being asserted in the litigation?

**Olson:** Let me answer it this way. I did my best to listen to people, and I'm sure that the input that we received became a collective product. It wasn't all me and it wasn't all even the people close to me. I was listening as much as I could. Time constraints affected all of this, because you could only listen to so much. At some point you have to put—still for me—a number two pencil on a piece of paper and write these things. And so I'm pretty sure that there were good ideas and good thoughts and so forth, but at the end of the day there were only so many cases that had to do with Presidential elections and Article II of the Constitution, and there were a couple of statutes and a couple of constitutional provisions and a few due process equal protection cases. We weren't flooded with authorities one way or the other in this area, and so a lot of it had to do with tactics and that sort of thing. But I think that it's fair to say that yes, there were other people who contributed.

**Wilson:** You of course were involved in the VMI [Virginia Military Institute] equal protection case, and I actually saw you argue that in the Supreme Court. Did that have any impact whatsoever on the development of the equal protection theory in the *Bush v. Gore* matter?

**Olson:** I can't recall. I spent a lot of time in that case on equal protection and equal protection issues, and I knew a lot about what the Justices thought about these various things. I knew the Justices pretty well. It wasn't just the VMI case. I had had other cases involving equal protection, work I'd done in the Office of Legal Counsel. I can't remember when various different cases I had handled in the Supreme Court or federal appeals courts came in connection with this case, so that's about the best I can do.

When you spend a lot of time on a case like the VMI case, as you know, you have to spend a lot of time reading those cases and getting familiar with the law in that area. So that was part of the reservoir that I would have called on.

**Perry:** So at some point quickly then, you have to draft a cert petition?

**Olson:** Yes. First of all, when we did not succeed, when we got an adverse decision in the district court, we filed an appeal to the eleventh circuit, and my memory is that we filed a very extensive—because when we filed in the district court, we had only had so much time to collect evidence of what was going on. I think that we filed something in the eleventh circuit, which was a big compendium of factual information about what was going on in the various different Florida counties, so that there was a supplement to the record and something like that.

**Perry:** And where was that coming from, what was the pipeline of that evidence?

**Olson:** That was all, I think, mostly coming out of what was going on there in the headquarters in Florida. Ben Ginsberg had all these people going to these different courts and not only doing the pleadings and all of the things like that, but also collecting information. I'd have to go back and look at where those affidavits or declarations came from or who signed them. All I remember is that we put a lot of stuff together with a lot of tabs or something like that to get as much of the record as we could before the eleventh circuit. And by this time we were thinking this is going to go to the Supreme Court potentially, and we were thinking about Justice [Anthony] Kennedy, because Justice Kennedy was the circuit justice for the eleventh circuit.

**Perry:** Right.

**Olson:** And so we were thinking we might need to get a stay from Justice Kennedy or he might be the circuit justice if we go from the eleventh circuit. Meanwhile, the various different rulings that occurred. There was an argument on the Monday, I think, before Thanksgiving, in the Florida Supreme Court, which was a very rocky thing, from our perspective, and my memory is that on that Tuesday before Thanksgiving, the Florida Supreme Court rendered a 7-0 decision adverse to us. By this time, I also had a team of people working here. I had people working from my law firm with me in Tallahassee, but I also had a team of people working up here, and when that Florida Supreme Court decision came down, I felt we had to take that one to the Supreme Court.

So I flew up that night, I believe, or very early the next morning, maybe it was the next morning, to Washington to supervise the preparation of the cert petition. We filed the cert petition to the Florida Supreme Court and to the eleventh circuit. I believe that we filed those by 5:00 or so that Wednesday night, which was 24 hours after the Florida Supreme Court decision, and we had a press conference.

**Perry:** Tell us about the press conference.

**Olson:** For some reason, we were in Haley Barbour's office. Barbour, Griffith & Rogers was the name of the firm that he had, and my wife, Barbara, was in the midst of this in every way she could be. She had flown down to Florida and she was on television. Sometimes we were on competing networks doing television interviews and so forth. But we had a press conference—why it was there I don't know, but that was a decision that someone made besides me. We had a press conference and all of the press showed up. It seemed to me there were an awful lot of people who showed up, and we announced what we had filed and why we had filed it and answered questions.

**Perry:** So now things are headed down the road to the U.S. Supreme Court. I think Henry had a

question about, speculation about, which justices voted to grant cert?

**Abraham:** Well, that wasn't very difficult.

**Perry:** But what was your strategy for reaching the Court? And did you have any issues in your own mind about the issues that had been raised back in Florida about taking this into the federal courts, and some fear that those Justices who would be most inclined to agree with you might be those Justices who weren't so inclined to want the federal courts to be involved?

**Olson:** Yes, there was a lot of that, and I'll tell you one little incident that I don't think has ever been reported before. Back in the district court, we flew down to Miami, I think it was Sunday night, and we were going into the federal court on Monday. We were in a car on the way there and Secretary Baker or somebody else who was on the phone to people in Austin said, "We may want to tell the court to hold off or not go forward or postpone this," and I said, "We cannot do that." There are going to be eight—I don't know how many, but there was an army of lawyers on the other side. Larry Tribe was there, Alan—all your friends, Henry. Alan Dershowitz was there, lawyers who were representing the Democratic Party, lawyers who were representing the Palm Beach such-and-such, lawyers representing the friends of the court, this, that, and the other thing.

I said, "We're going to go into a madhouse over there in the federal court. The federal courts are ready, the whole world is watching this. We said it was urgent. We can't stop now." But Secretary Baker was on the phone with people in Austin, who were very concerned, a little late, I thought, to be concerned about what the heck we were getting ourselves into. We were into it, and I was very concerned that this was going to look really bad if we walked into court and said, "Wait a minute, we've changed our mind," or "We don't know what our mind is," or something like that.

We debated that all the way to the federal court. These were people who were concerned about being in court. What if we lose, you know? What if we lose? My God, that would be terrible, and the other side would get all this momentum and that sort of thing. I can't remember all of it, but that was part of it, and I said, "I've got to know." I'm going into court, and we're up first.

Ben Ginsberg, if you ever talk to him or have, he will tell you this story, because he was there in the car. We got into court, and of course it was ringed by television cameras and satellite trucks and rivers of cables and people, and there are demonstrators for us, against us, people wearing funny hats [*laughter*], everything in the world. We got finally into court, and we finally got seated there, and there are these lawyers and these lawyers and these lawyers and these lawyers and so forth, and I still didn't know if we were going forward or not.

Moments before the judge walked in, Ben Ginsberg, with a prearranged signal, either did a thumbs up or a thumbs down, or passed me a note saying we're going forward with this, which was a relief. I only mention that because I don't think this has ever been reported, but it was one of those things that happened, typically. At every single moment in this case there were weird things going on or unpredictable things happening.

And to get back to the question about—there were lots of people at that point, when we filed the cert petitions, saying we shouldn't do this, there's no chance. Many people were saying, including people in the academic world, "There's no chance the Supreme Court is going to take

this,” people who were on television. One guy I remember saying it’s professional malpractice to even bring this to the Supreme Court. My wife, Barbara, really put him in his place at a subsequent television program when they took the case.

**Kassop:** What did she say?

**Olson:** I think she said we were going to sue you, [*laughter*] something like that. I think she said it on the air or something, but at any rate, there were lots of people saying we shouldn’t do this, we can’t do this, we’re not going to succeed, the Court will never take the case and so forth. And of course I didn’t know, none of us knew, whether this was going to be successful or not, but my feeling was that *Well, it’s either that or we’re at the mercy of the 7-0 decision*, and the Florida Supreme Court just announced new timetables, new ways of counting, new this, new this. It seemed to me that we were going to lose that way. We might not lose this way and we had to take this chance. That was my thinking as I recall it at the time, and I think on Thursday, Thanksgiving, the Court called for a response from our opponents to the cert petition. I’ve got a binder with all this stuff in it. And then on Friday, I think they granted cert.

**Perry:** Yes.

**Olson:** I think they set a very accelerated briefing schedule and a hearing for an argument for December first.

**Perry:** Right. The week after Thanksgiving, as I recall.

**Olson:** Yes.

**Perry:** Or not much after Thanksgiving. So tell us what that’s like. You’ve told us what it’s like to be writing and pulling all-nighters. What is it like to have to prepare to go before the U.S. Supreme Court to argue on a real rocket-docket time schedule?

**Olson:** We had to have—the first was a Friday?

**Perry:** Yes.

**Olson:** That was one week from the date cert was granted, on a Friday, I think. Then we had to argue it the following Friday and we had to do all these briefs in the meantime.

**Perry:** Right.

**Olson:** I think at that point I had abandoned the idea of spending any more time down in Florida, although something tells me I went down there one more time. We had to file all these briefs. Fortunately, I had a great group here, and by this time, a lot of what was going was the Supreme Court team here, as opposed to what was going on in Florida—and we did have input from other people, to answer your question. Everybody had input. Everybody had ideas and so forth; we had to pay attention to all that. But that was sort of a nonstop effort to get prepared for an unprecedented Supreme Court argument that following Friday, on December 1. It’s sort of a blur.

**Perry:** I was going to say, I happened to be at that one, and talk about people outside the Court— Al Sharpton, I remember marching around. I think there was someone dressed as a ballot box, if I recall. So what was that like, to just pull up? Where did you park and how did you get there and how did you make your way through the hoards of demonstrators?

**Wilson:** And if I may just piggyback on that question—was there ever any doubt that you would be the one to argue?

**Olson:** There wasn't any doubt in my mind. [laughter] There may have been in other people's minds. I don't know. I don't know. I don't remember—and I could have blocked this out—I don't remember too much conversation about that. They would have had to strangle me, I think. I thought I was the right person for it. I thought that's why I was there, but I think other people could have had different views about that, so I don't remember that. I do remember it was chaos everywhere, and going in all I remember about getting into court on these various different occasions, because it was like this a couple days later in the eleventh circuit, and then we were back in the Supreme Court again, everybody asking questions.

On one of those occasions I remember we got there and—I'm not sure. I think General Suter had arranged for us to be able to get in and that sort of thing.

**Perry:** This is General Bill Suter, the Clerk of the Court.

**Olson:** Yes, General Bill Suter, the Clerk of the Court. S-u-t-e-r. Who runs a fabulous operation there and was extremely helpful in terms of filing all these briefs, and everything that had to be done was extraordinarily well done from the standpoint of the Court. I think at some point the court had issued this order that the recordings—I think it's the first time in history that audio would be released the moment the argument was finished. I don't remember too much more about getting in there. I'll tell you a story about the second one when you come to that, if you want to hear it.

**Perry:** Sure.

**Olson:** Everybody in the world, it seemed like, was in that Court. I just looked out there and you could see the leading people from the two campaigns were there and people from the Senate and from the White House. Everybody was sitting there and you really couldn't—I thought I'd better remember this, because this is something that has never happened again.

**Kassop:** That was actually going to be one of my questions. At what point did you recognize, within this whole maelstrom of activity, that this was really big, that this was something historic?

**Olson:** I think that all the way through it of course you felt that way, but the biggest moment on that point was when I stood there with maybe a few minutes left to go. People always ask were you nervous. Of course you would have to be—we were very nervous, everybody was, and I certainly was, but I did take a moment and thought to myself, *This is history that is happening and you had better just let 30 seconds of it sink in because you'll want to remember this or tell people about it at some point.* And I just remember that it seemed like, with all of the journalists and all the famous Washington people and the famous this and the famous that, and judges were there, people from the D.C. circuit, as I recall, were there, I'm not sure. Every spot was filled and



there was all this anticipation, and it is now about to happen. So it was a very amazing moment.

I tell lawyers now, when you get up there—preparing for one of these things is nerve-racking enough. You're tired and you're exhausted and you know you're going to get it wrong and you're going to make mistakes, the world is watching and that sort of thing. I tell young lawyers, "Take a moment and look out there and ask yourself: Would you rather be here or out there watching? If you'd rather be out there watching, then you're in the wrong place."

**Kassop:** Sure. But even the lead-up to that? Obviously, standing in front of the Court you are faced with the fact that you're in this extraordinary position, but even prior to that, did you think this was—I mean this was something that had really never happened before in Presidential elections.

**Olson:** Yes. Every moment of it was unprecedented. The Thanksgiving business, the Court saying all of a sudden—we were jubilant when the Court, if I remember it correctly, asked for opponents to respond. I was unbelievably jubilant when they granted cert, because all these people that were saying that I was an idiot for even thinking that it could possibly happen; that was vindication to a certain degree. So every moment of this was dramatic and exciting, but you didn't have too much time to reflect on it because then the brief was due the next minute, and so forth.

**Wilson:** Did you have moot courts before the argument? And if so, who participated?

**Olson:** Yes, we had something of a moot before that first argument. This space was configured differently, but somewhere close to this, on this floor, we had sort of a moot. I remember one of the people who participated either in that session or the one that was—I don't think we had one for the second argument. I don't think we had time. I'm pretty sure we didn't. But for that first one, one of the people I remember being in here was John Roberts.

**Wilson:** Do you remember what question he asked you?

**Olson:** No, I don't remember what questions he asked, but I think John maybe filed a brief or was being consulted in some capacity, and I remember having a discussion where he said—I have known John since he started in the Justice Department in 1981. He had come off a clerkship for Justice [William H.] Rehnquist and then came in as a Special Assistant to Bill Smith, who was the Attorney General at the time. John was someone that I really knew quite well and was very impressed with his brain and everything about him.

I remember John saying, "I think you can win," and it gave me a lot of confidence to hear someone I respected as much as John Roberts saying, "You're not crazy. There's something to what you're saying." For some reason that stands out in my mind. Now if you ask me who else was in that room, I could probably guess at some of the other people from Gibson Dunn and guess at some of the other people who were probably here, but John Roberts I remember particularly.

**Wilson:** Did you have a sort of Deputy of the Supreme Court team here in the home office at Gibson Dunn?

**Olson:** Yes, I think it was Tom Hungar. Doug Cox was still here and was very much involved in it. Tom Hungar had been in the Solicitor General's office, and so he participated. He was someone else who—I think Tom was maybe the lead drafter of the cert petition and someone that I relied on a lot in terms of that. I'd have to look at some of the other names.

**Wilson:** What were you most worried about in terms of legal challenges from the other side? What arguments did you spend time in the moot or in your own preparation efforts, preparing to rebut?

**Olson:** I can't isolate it out for you. The things we were concerned about—there were a couple of Supreme Court decisions that were extremely murky, and if you look at the transcript of that first argument, Chief Justice Rehnquist was very focused on this one case that was more of an Article II case. It wasn't an equal protection, due process case. That was one of the most difficult cases to read, and I can't remember if I anticipated that that was going to be an issue or not, but I remember struggling with it during the argument and trying to handle it as best I could.

We weren't sure, as I recall it now that you ask the question, about where the Court was going to go. I think we were at the Supreme Court, at that first argument, particularly focused on the structural issues, that this is a court in Florida taking over what the Constitution specifically allocates to the state legislatures, the selection of electors. I think that was more of our focus for that argument than the equal protection, due process issues.

**Perry:** Were you aiming that at any particular Justice or Justices?

**Olson:** I don't know for sure, but Chief Justice Rehnquist was the Chief Justice. He was very much of a person who was focused on structural concerns and very much someone who knew a lot and who thought a lot about federalism, separation of powers, structural provisions in the Constitution. He had been the Assistant Attorney General in the Office of Legal Counsel, and so I knew, having been in that office, a little bit about the sort of things that he wrote and the way he would think.

Justice [Antonin] Scalia, by the way, had also been, as you know, Assistant Attorney General in the Office of Legal Counsel. When you spend the time in that office, you're very imbued with structural constitutional issues. To the extent that I can reconstruct it accurately now—there's a lot of thinking now of what you thought then, which is probably not the best thing in the world—but I think that we were very focused on the idea that that was the way we were more likely to win. You asked what I was most worried about. I can't remember. I worried about everything. But that was maybe the part of it that we spent more time on.

**Perry:** Tell us about your opposing counsel in each argument at the U.S. Supreme Court.

**Olson:** Well, Larry Tribe handled either all of it or most of it. Was there anybody else arguing that side? Yes, there was, because—

**Abraham:** No, I thought not initially, but he did have some help.

**Olson:** Tom Goldstein was helping him, but I don't think he stood up and said anything. Was anybody representing the Florida—because on our side we had Joe Klock, remember him,

representing the Florida Secretary of State. I don't remember. I've got these bound volumes. I'll bring them in before we're done.

**Perry:** Great.

**Olson:** I created a bound volume for each case, which has all of the briefs and the orders and the transcript and so forth and so forth.

**Perry:** By the way, just for the record, if you would like to make any of that material available to us with your transcript, you can imagine of what import that would be to future historians.

**Olson:** All of what I have in the bound volume are all matters of public record anyway, because as I do for every case, I have someone working for me put all of the briefs and the transcript and the decision in one place with the bound volume and our names on it so we have it.

Larry Tribe handled the first argument, and I can't remember exactly how well he did, but I think he was awfully professorial with the Justices, and I mean that in the sense that he is one of the leading constitutional scholars in the United States and he's recognized widely as such. I think that his tone was a little bit, "I'm going to now tell you about the Constitution." He tends to lean over the podium maybe as if he were in a class someplace, dealing with some people that he was going to help understand the Constitution. That could be inaccurate or unfair, I'm not sure, but that's just the impression I have as I sit here today.

**Perry:** Let the record show that Henry is agreeing with you.

**Olson:** I'm not sure how well that all went over, but I don't think those of us who do this sort of thing think that everything we do is really important, and probably it's not that important at all.

**Kassop:** Were you at all worried about the federalism issue here, or the fact also that some of the Supreme Court Justices—this was during a period of the ascendancy of judicial federalism, and there was the concern that this was a federal court, the Supreme Court, getting involved in overseeing state court decisions on state law and shouldn't those have been left at the state level.

**Olson:** Yes, I was very definitely focused on that and concerned about it, because a lot of the commentators were saying that or opponents were saying that and so forth. I felt very strongly, and I can't remember whether this entered into the argument, but it certainly entered into our briefs—there were a couple of cases where the Supreme Court had said federal Presidential elections are very much a federal constitutional concern. I had a couple of Supreme Court cases, and I can't remember which ones those were, where we had the language. For some reason I think I have language from Justice [John Paul] Stevens, I'm not even sure if that's correct or not, but I felt that those were answers to that question and that was either going to work or not.

**Perry:** Yes, but a lot of the criticism afterward was of the fact that certain Justices, such as Scalia, and Rehnquist even, who were such strong judicial federalists, it almost seemed that this was sort of antithetical to what one would have expected them to have decided.

**Olson:** Right, but I didn't think so. And so to this day I thought that the idea that you can manipulate a close Presidential election at the state level, with the electoral college being what it

is and therefore determine the outcome of a Presidential election—we have had very close Presidential elections. I had spent some time preparing for this, studying the 1876 election and the 1800 election. I thought that we were on reasonably strong footing, notwithstanding the very valid point that you make. Lots of people were saying that it was a very valid concern, and I think our opponents were trying to make the most of that. Get out of this. It's none of your business. It's the Florida State Legislature, there's a mechanism in the Constitution, the legislature will pick this at the end, you don't have to be involved, and so forth.

I think our answer to that was that it does say in the Constitution that it shall be the state legislature that selects the method. The state legislature did select the method. After 1876 they put in place this federal statutory scheme which, if your method of selecting electors is going to be given presumptively conclusive effect, or whatever the words are in that statute, then you must determine challenges according to the rules that were in place before the election. That very much came up in I think the first argument. It very much came up. Justice [Ruth Bader] Ginsburg, as I recall, wanted to know why the heck the Florida Supreme Court didn't respond to the first United States Supreme Court decision, which was unanimous, vacating the Florida Supreme Court decision and remanding it back for various answers to questions. I'm digressing, but I'm trying to recall my thoughts now. We might have lost those points, but I thought that we had really good answers to them.

**Perry:** So tell us then. You argued on Friday, December 1. The per curium opinion in the *Bush v. Palm Beach County Canvassing Board* case, your first oral argument, comes down December 4, I guess that Monday. Where were you when you heard that the per curium opinion had been released, and what were your thoughts about that?

**Olson:** I believe I was here in the office. None of us spent a whole lot of time at home in bed during this entire period. What time of day, do you know?

**Perry:** It was in midmorning.

**Olson:** I'm pretty sure I was here. We were thrilled beyond description, not only that we had won. We had set aside a 7-0 decision against us; the decision was vacated. We thought that the way it was phrased, it put the Florida Supreme Court in a heck of a spot because of this post-1876 legislation that sort of governed the process and so forth. And I was thinking—I also had a suitcase packed because I had to go to Atlanta. I think the eleventh circuit, en banc, finally got around to saying, "Okay, after all, we are interested in what's going on here," thinking that since the United States Supreme Court was interested, maybe they ought to be interested too. From the district court decision, was that argument on Tuesday?

**Perry:** Nancy is looking at the timeline as we speak. That I don't have.

**Kassop:** The circuit argument.

**Olson:** I think it was the fifth. The U.S. Supreme Court decision comes down on the fourth, and I was thinking, *Well, wait a minute. Now we don't have to have that eleventh circuit argument because we've got all this.* And so forth. I can't remember the discussions, but collectively the decision was made. It's going to happen and you had better be there. So I went down there to argue that the next day.

**Perry:** But at that point, did you think the per curium opinion coming from the U.S. Supreme Court would be the last word from the U.S. Supreme Court? And did you imagine that you'd be back within a couple weeks, making another oral argument there?

**Olson:** A couple of days, you mean.

**Perry:** Yes.

**Olson:** I thought that we had turned the corner. Of course through this whole thing you were on cloud nine one minute and then down on the bottom the next hour because another thing happened. This was the whole way through the whole thing. But yes, I thought that would pretty much do it, but of course it didn't. I can't remember too much about that because I had to hurry on down to—I must have gone down that Monday afternoon to Atlanta to get ready—and then we had the whole circus again.

You asked about opposing counsel. Teresa Roseborough, as I recall, argued that one. She did a very good job. She's a very fine lawyer. That decision came down on that Thursday, I think, and it was 8-4 or something against us. Oh, I know. The eleventh circuit pretty much had thought that we don't need to do anything now because the Supreme Court has done this. Either that was in the questions or in the decision that was rendered, and I was frustrated. I think I remember saying in answer to the question, which gets back to what you were asking, "Wait a minute. It isn't over. More things can happen in Florida." If we looked at the transcript of that argument, I'll bet you I said something like, "This is not over. Florida might do something." And I had no idea. I think they rendered that decision on the Thursday, and then the Florida Supreme Court rendered its next decision, I think about 4:00 in the afternoon on Friday the eighth.

**Perry:** Yes, that's right.

**Kassop:** The eighth.

**Olson:** Setting a new timetable and a statewide recount, which set—everybody went completely crazy. People started that recount, it seems to me, right away.

**Wilson:** Yes.

**Olson:** We were seeing on television, people, whatever they were doing, doing this recount. That decision came down I thought around 4:00 or 5:00 in the afternoon. By 9:00 that night, this was, I thought, one of the most miraculous things ever. By 9:00 that night we had a new cert petition. We had a stay application and a motion that the stay application be treated as a cert petition as well, on file within five hours, I think, of the Florida Supreme Court decision. We had to read it, write the petition, do all the attachments, and whatever the associated documents, and get it on file over in the Supreme Court.

**Perry:** So by midnight of December 8, that Friday, or maybe into the wee hours of the ninth, you had your documents at the U.S. Supreme Court.

**Olson:** I think we had them over there by 9:00. I think we were there by 9:00. We can check.

**Perry:** I think that's right because Bill Suter was at the Abraham lecture on that December 8 in Charlottesville.

**Abraham:** I remember that very well. He had planned a wonderful weekend at his country home at Lake Anna. He was lecturing on that Friday afternoon and there was a call from Washington, and he turned to me and said, "I just got a call from the office. They told me to get my ass back to Washington immediately." And no Lake Anna, say goodbye. But he delivered the lecture first.

**Olson:** I'm very proud of the people here, because I couldn't have done it. We managed to turn that around in four or five hours, and I think we were on file in the Supreme Court, with the stay application and an application that the stay application be treated as a cert petition, by 9:00, 9:30 that night.

**Wilson:** Who worked on that cert petition here at Gibson Dunn?

**Olson:** I'm sure Hungar did, and again, I could pull that paper, but Hungar, and I think Cox, and there was a young lawyer here, who is with another firm now, by the name of David Sammons, and I don't know all the other people here. It turns out, if you read about it, all of the lawyers on the planet apparently were involved in all of those things, but that was the core group.

**Wilson:** If I might just circle back quickly to the topic that you were sort of—the very dramatic episode that you were describing, and not knowing where your client was. Should we go forward, should we not go forward. How did you, in all this cacophony, with this incredibly accelerated schedule, discern—who spoke for the client? What was the line of communication from the client, with regard to what authority—

**Olson:** Jim Baker. Secretary Baker was in charge of everything as far as I was concerned. I coordinated some of the legal things with Ben Ginsberg, as I recall. That Friday night, the eighth, there were—

**Perry:** December 8.

**Olson:** December 8. There were lots of people telling me what to do, and I finally had to say, "Don't talk to me any more. I'm going to do what I have to do and there's not time for a lot of discussion."

**Wilson:** Did you have any conversations with George W. Bush or folks close to his family circle?

**Olson:** Well, I remember most of my communications were with Secretary Baker, who was on the phone all the time with Don Evans and Governor Bush and other people, possibly.

**Kassop:** Governor George W. Bush.

**Olson:** Governor George W. Bush.

**Kassop:** As contrasted with his brother, Governor [John Ellis] Bush, in Florida.

**Olson:** Yes, yes. Yes, George W. Bush, the candidate. I think a couple of times I spoke with him on the telephone. I think only when he called, to probably say, “Go get ’em,” or whatever it was. My memory is that Governor George W. Bush said, “You’ve done the best you can. Go get ’em. No matter what, it’s okay.”

**Kassop:** You’re doing a heck of a job.

**Olson:** He didn’t say that, but what he basically said is that, however this comes out, this has been—he was terrific in terms of letting us do our stuff. Secretary Baker was really wonderful that way too, the handling of the press down in Florida, particularly. That was so beautifully orchestrated and coordinated. Secretary Baker would go out and he’d answer a few questions. A couple times I went out with him and answered a couple questions, and then in the corner of one’s eye you’d see Margaret Tutwiler stand up, and that was it, and off we would go and none of this conversation on the way out of the room and none of these five press conferences a day, and none of the confusion that I think characterized some of the things the other side was doing.

But back to December 8. We got on file that evening, and right in the middle of the day, during the counting—I remember watching it on television—we got word that the Supreme Court had issued a stay.

**Perry:** And that’s in midday, Saturday, December 9.

**Olson:** Correct. And you could see on television the word getting to those various places where they were recounting and people putting things—it was amazing. It was like something happening underwater. The time slowed down and you could just see people realizing that they had to stop, and putting things down. And then the 50-page briefs or something, due on Sunday at midday, and the argument was on Monday.

**Abraham:** Apropos of Nancy’s question to you on federalism and your comments about the role of the Florida Supreme Court, I soon found out, after the case had come down, how to teach it. It is a very difficult business to do, especially with the disparate kinds of public that I had to deal with—undergraduates, graduates, and then these elderly folks. My class average age is 80. Two-thirds are women. Men are an endangered species; you know all that. Well, the Supreme Court helped me. It took me a long time, because they all wanted to hear how Bush beat Gore, and how to oversimplify it and still get it across to them. So I got help from the Court’s opinion in per curium in a couple of sentences.

The petition presents the following questions. Whether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Article II, Paragraph 1, Clause 2 of the United States Constitution, and failing to comply with 3 U.S. Code, Paragraph 5, and whether the use of standard of this manual recount violates the EP [equal protection] and due process clauses. I think I got that across, and of course I mentioned *[William] McPherson v. [Robert R.] Blacker*, that case.

**Perry:** So the questions then—could we have you just speak a little bit about the oral argument on those questions?

**Olson:** Right. The interesting thing, that McPherson case is the one that’s very hard to read and

completely understand. That's the one I was thinking about before.

**Perry:** And was that the one that Chief Justice Rehnquist had zeroed in on in the first oral argument?

**Olson:** That's my memory, that he was really into that case. I thought I was less than perfect in terms of responding to those questions, but I at least had read the case, and I think I parried those questions.

**Perry:** I "Perry" all my questions.

**Olson:** On the eleventh we started out with, as I recall, the Article II thing, and I think it was Justice Kennedy who at some point early in the argument said, "Well, what about this equal protection or due process stuff?" It's in the transcript, but my memory is that it was he who said he was interested in that, and I think Justice [Sandra Day] O'Connor may have said some things too that got focused on that, and I was ready for it. My opponent then was David Boies. I don't think he had focused on that that much, but I had because I'd been interested in it right from the beginning. I'm not saying I handled all those questions that well, but I was ready for those questions and I was in a position where I could pivot to that focus, and there we went. During the argument, I remember having to adapt my argument to what I perceived was a very significant concern on the Court for those questions. I had no idea they were going to divide the way they ultimately did.

**Abraham:** Do you remember at which point David Boies replaced Larry Tribe?

**Olson:** I do. It was Saturday night.

**Perry:** December 9.

**Olson:** December 9. I'll come back to this because there's an interesting story about it. I don't know whether I should tell you.

**Perry:** Yes, the answer is yes. *[laughter]* Remember, you have the final say over what you wish to keep.

**Olson:** My wife, Barbara, was a mischievous person and was really into this, every moment of it. She was really wrapped up in it. When she was doing television, she had her own suggestions and so forth. At some point during the first go-around in the Supreme Court, our opponents filed a supplemental reply brief or something like that and Barbara was offended by that, and she said that's not—I said, "That's okay. That's what lawyers do. That's all right."

I've never been bothered by my opponent filing briefs, because the judges are going to figure these things out and so forth, but that was an extra brief that they filed and they probably got permission to file it. I can't even remember. But she thought that was a little bit underhanded and she decided she wanted to take revenge. So she and her friend, Barbara Comstock, someone that she had worked with, who is now in the Virginia legislature, decided that they were going to get revenge on Larry Tribe and the legal team for doing that. They contacted Matt Drudge and said that there is a rumor that the Gore team is replacing Larry Tribe with Walter Dellinger, who had



been working on the case. And sure enough—I didn’t find out about this until later. I certainly would not have countenanced anything like that, but found out about it afterward.

That afternoon or that evening there was a thing on Drudge with one of these alarm bells that the Gore team was replacing Larry Tribe, he had lost 9-0, and blah blah blah. They were trying to play with his head. It was unbelievable. I saw that, but I didn’t pay any attention to it. Again, I’m not worried so much about the other lawyers on the other side as I’m worried about myself. Lo and behold, later that night or first thing the next morning, we learned that sure enough, Larry Tribe had been replaced, only it was David Boies instead. I’m sure that the Drudge thing had nothing to do with it, but that’s another one of those weird stories. Barbara felt for sure that she was the one who had anything to do with it.

The next morning, I thought it was interesting because David, who is a remarkably good lawyer, was on *Meet the Press* and *Face the Nation* and whatever the other programs were on Sunday morning. I’m sitting in my office with the television turned on, and I have a team of lawyers taking notes as to what he says his arguments are going to be, and I thought, *That’s great. He’s giving us a rundown of what his arguments are going to be in the Supreme Court, and he’s not preparing to argue in the Supreme Court.* I’m preparing to argue in the Supreme Court and we’re taking notes on what our opponent is saying.

And then we were finishing the briefs on Sunday and preparing for whatever was going to happen. You asked a question, I think, about moot courts, or somebody did. I don’t think we had any. I don’t think we had time.

**Perry:** No time. Go ahead, Sarah.

**Wilson:** How do you size up David Boies as an opponent compared to Larry Tribe at that time?

**Olson:** Well, there were a couple of things, and I can’t remember what I thought then and what I think now. David had been brought in a couple of days after I had, and he had been very much focused on what was going on in the state courts down there. He really knew the Florida election code and the Florida law, and he had Florida cases. He had all of this really well doped out, number one. So he was focused on Florida law and Florida issues.

Number two, David is very good at synthesizing an argument down into just a few sentences, and he’s very skillful at saying it’s very simple, it’s A, B, and C. And you listen to that and you think, *Oh, my God, he’s right.* He’s so persuasive. And so I saw him as extremely formidable. He had only argued one case at that point, in the Supreme Court, so he didn’t have the depth of immersion throughout his career in federal constitutional questions. He was a trial lawyer more than an appellate lawyer, and he was focused on Florida law. He was very good at making crisp points. Trial lawyers are good at asking questions. Appellate lawyers have to be good at answering questions. And so there were all of those things going on.

At one point during the argument, as I recall it, he recited some decision from the Florida courts and gave the volume and page citation to something he was quoting from, and I thought, *You don’t need to do that in the United States Supreme Court.* It looks like showing off, and they’re not going to run and find the federal report and so forth. Because he was focused on Florida law, I think some of the constitutional questions he hadn’t spent as much time thinking about as he

might have.

**Wilson:** Who sat with you at counsel's table at the two ordinates?

**Olson:** I suspect Hungar did, and whether there were any—Klock was there. He was representing the Secretary of State. I don't think anybody else. There were four people up there I'm sure, but I can't remember. I'm pretty sure Hungar was there.

**Perry:** So take us through now the release of the opinion. What was that like, waiting for it and then finally—

**Olson:** Oh, gosh, we were going crazy. That was the twelfth and it was very hard to keep Barbara from climbing the walls, eating the paint off the walls, or whatever. She was going completely nuts. I'm used to the fact that you don't get decisions right away, although I was pretty much—everybody in the whole planet was pretty tense. We were very tense. I decided to take her mind off of things by taking her to Neiman Marcus, because that was her other favorite thing to do. She was wrapped up in that, in the election and the Supreme Court decision. She couldn't even buy shoes.

**Perry:** Now that's a serious bit of tension.

**Olson:** And so I said, "Okay, what we're going to do is we're going to go to Balducci's," or the highest-end gourmet giant or whatever it was, and we bought the most expensive food that we could think of, the steaks, caviar, salmon, and then we brought all that home and I said, "We've got way too much food. We couldn't possibly eat this. Let's have somebody else over." And so we called up Ken and Alice Starr, with whom we had spent a couple of hours on election night. Ken had been a partner here for a few weeks before he went on to other things in his career, so we'd been close to Ken and Alice. We had them over and we had this spread. I opened up very expensive wine and so forth, and we were consuming and talking about it and agitated about when is this going to happen. Then shortly before 10:00 I got a call from the deputy clerk, Denise.

**Abraham:** Denise McNerney.

**Olson:** Yes. And she said, "There's going to be a decision." I can't remember her exact words, but General Suter had orchestrated all of this so that he could get each of his persons to get the lawyers on the phone and to stand by so that we would get the word simultaneously and no one would get an edge on anybody else. It was close to 10:00 at night, and then when the signal came, I'm pretty sure it was still Denise, read off the front of that thing that said that there's a per curium decision and then there's a concurring decision and then there's a dissent by Justice Stevens, joined by Justices [David] Souter and Ginsburg and [Stephen] Breyer, something like that, and then there's a dissent by Justice—there in the sequence you know, and I was thinking, *What is going on?* I want to know, *did we win?* But I sort of felt that we had won because of the dissents and who had dissented and so forth.

**Perry:** But Denise McNerney was reading the syllabus?

**Olson:** No, she wasn't reading what they decided.

**Perry:** She's reading the opinion.

**Olson:** Let me see for a moment. She said there's a per curium decision, and I don't know whether she said much beyond that, and then it's concurring. There is no syllabus, right? There's no syllabus. They didn't have time to write a syllabus. So she was basically saying there's a per curium decision and then there's a concurring opinion by Justices So-and-So and So-and-So.

**Perry:** Rehnquist, Scalia, [Clarence] Thomas.

**Abraham:** That was on due process.

**Perry:** That was on the due process portion.

**Abraham:** That was the second opinion, and of course Ginsburg's dissent—she refused to add the words “with respect.”

**Perry:** Respectfully.

**Olson:** I didn't get that. Then I got the fact that—and she had to read Stevens, Souter, Ginsburg, Breyer, and then it was Souter, Stevens, Ginsburg, Breyer. She was doing this and I was writing this down, and pretty soon I'm thinking, *I have no idea what the hell has happened here*, except that the four people that consistently dissented were the ones that I was least likely to get. And then we arranged for it to be sent electronically.

**Perry:** From the Court?

**Olson:** From the Court.

**Perry:** To—

**Olson:** To my home. And I think I had to get Barbara off the other phone so the damn thing would come in.

**Perry:** By fax?

**Olson:** Was it fax? It probably was a fax.

**Perry:** Probably, or email.

**Kassop:** Or it could have come to your computer by modem, in which case you'd have to be off the phone.

**Olson:** Was it email? In those days what was it? It was either email or fax. I think it was email.

**Wilson:** Was anyone listening with you? Was Ken Starr listening with you?

**Olson:** No.

**Wilson:** Just you?

**Olson:** I went upstairs to my office.

**Perry:** No one turned on the TV?

**Olson:** The TV was on downstairs and the reporters, of course, were coming out and trying to figure out what it was, and the wind was blowing.

**Perry:** Exactly.

**Wilson:** And David Boies was on the phone as well, or Denise.

**Perry:** McNerney.

**Wilson:** The deputy clerk was reading to both of you.

**Olson:** No. Each person was given the news by a different deputy clerk, or the clerk himself. I don't know whether General Suter spoke to anybody, but there was a different person on the phone for each of us.

**Wilson:** But simultaneously.

**Olson:** Yes. Anyway, I came to the conclusion that we had won, and shortly after that I think Secretary Baker and I think Governor George Bush were on the phone. I can't remember now, but there were phone calls from Florida and phone calls from Texas, and I was asked, "Did we win?" I stuck my neck way out and said that we had won, and stuff was still coming off the machine I think and it wasn't coming off as fast as we needed and so forth, and when it did come off, because there was no syllabus, it was impossible to decide what had happened. Except that the first thing you do in that situation is you go to one of the dissents, who then will say what happened. So I think that's where I figured out what had happened, but it was certainly chaotic for us, as well as for the reporters, who were just having a dickens of a time without a syllabus, in the wind.

**Kassop:** It's cold.

**Olson:** With sheets of paper.

**Perry:** Standing on the steps of the Court, as I recall.

**Kassop:** Exactly.

**Perry:** Do you remember what Secretary Baker and/or Governor Bush, now seemingly President-elect Bush, said to you?

**Olson:** They wanted to know whether we had won. My memory is very unclear about this. I'm confident I said—I do remember saying that we had won, but I don't remember saying very much else about it because I hadn't read anything yet. I'm now trying to interpret what I might have done, but I can't remember much else. But shortly after that, the papers started coming through, and then several of us were reading different parts of it and trying to piece it all

together.

**Kassop:** What was your reaction when you had a chance to sit down and actually read the opinions?

**Olson:** Well, I was of course very pleased, thrilled, gratified. It took me a little while to figure out the per curiam versus the concurring opinion and so on and so forth. The bottom line, in a way, you don't get the stay unless five Justices have the view that there's a substantial likelihood that you're going to win. So going into the argument and the process, it would have been very deflating had we not won at that point. Maybe I was hoping for a little bit more than 5-4, but it took a while to figure out that it's 7-2 on the equal protection issue and the outcome of the case, and the 5-4, the non-stay thing, I was quite convinced they couldn't go much beyond December 12 anyway, because if you link up the provisions of the election code—

The next day—I think it was the twelfth or maybe eleventh, the Florida Supreme Court finally got around to saying that indeed, the federal election law, the post-1876 election code, had been incorporated into Florida law. So they didn't have any time left anyway. They couldn't have done it. The Justices that were against the stay I think were wrong in terms of what could have possibly happened. There was no way they could have done a statewide recount anyway, and they certainly couldn't have complied with those statutory deadlines.

**Perry:** So Breyer and Souter's dissents, that indicated that they joined on the issue of equal protection, that there were equal protection violations, but they said they thought there was time to correct those. You believe they were wrong in terms of the calendar and the federal statute.

**Olson:** Yes, yes. They've always been pretty equivocal about the degree to which they agreed on the equal protection part of this thing. I think the way you expressed it is correct. They did say that and they did agree with it, but over time their memory of that part of it has faded, and the 5-4 part has loomed larger in their memories, because I've listened to them speak. But when people say it was 5-4, I said no, it was 9-0 and 7-2, so the outcome in the Supreme Court was 16-2.  
[laughter]

**Abraham:** That's good. Good math.

**Perry:** Well, I think that's a perfect note to stop and have a little midmorning break.

**Kassop:** Can I ask one more question, as long as we're still on it? Did you think that the equal protection part of the ruling was something that would have precedent for later cases, or was this really the case for one day only, as the Justices put it?

**Olson:** I don't know when I started to really compute all of this, but I never did buy into this as a one-case-only kind of a thing. It's the United States Supreme Court decision saying that in elections, there has to be some kind of—and again, I pulled together the due process and equal protection provisions, because it was a combination in my mind and always has been, of changing the rules after the election and then changing them in a disparate way from one place to the next within a jurisdiction.

The equal protection that has to be understood in the context of the fact that votes aren't counted

the same way in states, never have been, typically, all the way across the state. In Florida they were using one kind of ballot here and another kind of ballot there. That in and of itself wasn't the equal protection violation in my mind, and I don't think that's what the case stands for. It was the changing of the rules and then doing it unequally, when you know that you can affect the outcome of an election subjectively by counting ballots subjectively. I put all that together and I would say that that is not something that's just good for this case. It could happen again in another context, and people would cite this decision.

**Kassop:** Well, it has been cited in subsequent cases.

**Olson:** Yes.

**Perry:** Again, I don't mean to cut off prematurely, but I think it's a good stopping point. We'll have about a five-minute break and then we'll come back.

**Olson:** Okay.

[BREAK]

**Perry:** All right. So we're back from our break, and we thought we'd move on to our next segment about your becoming Solicitor General. Can you talk to us about how that came about?

**Olson:** After the election was finally resolved and George W. Bush was going to be President, I was asked, and I gave some thought to independently, what, if anything, I would want to do in the administration, and the only position I was interested in was to be Solicitor General. I think the two best jobs in government are the head of the Office of Legal Counsel and the Solicitor General. So I thought that would be something that I would love to do.

It's a fabulous experience to be Solicitor General of the United States. There's nothing quite like standing in the United States Supreme Court as the lawyer for the people of the United States. And so I answered questions from—who asked I don't know, but I said yes, I'd love to have that position. During the course of things they interviewed several of us who were interested in that position. There were a few more people who were interested, as you might imagine. The word finally came to me, I don't know from whom, that the President was going to nominate me for that position, and it went forward from there.

**Perry:** Do you know who the competition was?

**Olson:** I met a couple of the people. I think Chuck Cooper, who had been Assistant Attorney General in the Office of Legal Counsel after me. I hesitate to mention any other names because I'm not quite sure. I knew at the time there were a few other people, and I would have known the names generally at the time.

**Abraham:** Did Ken Starr follow you as Solicitor General?

**Olson:** He was before. He was Solicitor General under George H. W. Bush.

**Abraham:** Oh, yes.

**Olson:** He left the D.C. circuit and took that position at that point.

**Perry:** Would Roberts have been in the running for that, or was he too junior at that point?

**Olson:** I don't know whether he would have been too young to be considered, but I don't recall him putting his name forward. He had been Deputy Solicitor General to Ken Starr and he was then at Hogan & Hartson. One of the reasons why he wasn't more involved in the case that went before the *Bush v. Gore* cases is that he and his wife, I guess in late November, December, were adopting children. They adopted their two children, both I think at the same time, in Florida. I don't know whether he put his name forward.

When I was considering who would be my deputy, which became Paul Clement, who then became Solicitor General—Paul had worked for Ken Starr and he had clerked for Justice Scalia and for Judge [Lawrence H.] Silberman. I asked each of them, “Is Paul Clement the kind of person who could be as good as John Roberts was?” I thought that was maybe the best you could possibly expect as a Deputy Solicitor General, and they each said that if anybody on the planet could be, Paul Clement could be. And of course he became the Deputy Solicitor.

**Perry:** Historically, we know that the SG [Solicitor General]’s office had been a stepping-stone to the U.S. Supreme Court, though since the Reagan years it was more likely a lower federal judgeship, an appeals court judgeship leading to the Supreme Court. Did it cross your mind at this time that you could be in that position as a stepping-stone from the SG’s office up to the U.S. Supreme Court, as a Justice or Chief, and did you think about the possibility that having led the litigation in *Bush v. Gore* that that could have an impact on your future?

**Olson:** I didn't really think that I would be someone who would be nominated to the Supreme Court because I had turned 60 in the year 2000, and these days they appoint people to the Supreme Court ideally who are in their fifties. I had a relatively contentious confirmation process to be Solicitor General, part of which was attributable to *Bush v. Gore*, at least if you believe what people were saying. I didn't really give it a lot of thought. My name kept getting mentioned because as you say, it's true, people think of the Solicitor General—and because I had won this case and so forth, or I had been involved in winning this case, that would come up in the press and people would ask me, but I didn't really in my heart think of it too seriously.

**Perry:** Tell us about the confirmation process.

**Olson:** It's not something you want to do. [laughter] It was very contentious for a dozen different reasons. I can't enumerate them all, but part of it was *Bush v. Gore*. I was a little bit surprised that people would hold that against me, because all I was doing was being a lawyer, but it made people really mad, and what the Supreme Court did a lot of people felt was not a legitimate exercise of judicial power. They couldn't very well blame it anymore on the President, so I was the only one going through the confirmation process who could take the heat on that.

The Senate was essentially evenly divided, and in fact Senator [James] Jeffords switched right in

the middle of this process.

**Perry:** That would have been in May of 2001.

**Olson:** Yes. I thought that was the end of it for me when that happened, but I think that there was some sentiment in the Senate that we need to send a message to President Bush, that he's not going to just be able to appoint anybody to the courts, and that this would be one way to send the message, to really make this a very contentious process. If they could make this a contentious process, they could make a lot of things a contentious process. And I had written some things critical of the previous President, President Clinton, and Barbara had written a biography of Hillary Clinton, called *Hell to Pay*, which gives you a feeling for what that book was like. [laughter] Lots of people resented that, and there were a few other things that people mentioned to me during the process, so it was a very contentious process.

When the Jeffords switch took place, I thought that pretty much killed me because then they wouldn't have had to even bring it up to a vote. That was just before Memorial Day, as I recall, and I've been told and I think it's true that the leadership in the Senate on the Democratic side decided that they were going to allow a vote on this. They were going to make it clear that it wasn't going to be easy, but they were going to allow a vote because they didn't want to come back to start the period where they were in charge of the Senate with a long battle over me. Because there were some people out there who thought that's not fair, to hold him hostage because he won the Presidency, or whatever. For whatever reason, shortly after that happened and right around Memorial Day, the vote was permitted and I squeaked through.

**Perry:** And what were you doing in the intervening months?

**Olson:** During the confirmation process I was basically—

**Perry:** Were you based here at the firm?

**Olson:** Yes. They tell you, "Don't go over there."

**Perry:** To DOJ [Department of Justice]?

**Olson:** Yes. Paul Clement did get appointed to be the Deputy, which was an Attorney General's appointment, not a Presidential confirmation thing, so he was able to go over there. Barbara Underwood, who had been Deputy to Seth Waxman, was Acting Solicitor General, but Paul was over there. I did not participate in any way in any of the decisions that were made over there. You spend an enormous amount of time just filling out forms and papers and answering questions. It's a miserable process. Just the paperwork is a miserable process, and no matter how many times you've gone through security clearances, they do it all right from the beginning as if they had never heard of you before.

**Perry:** Did it ever cross your mind that it wasn't worth it?

**Olson:** Yes. It's not the sort of thing you want to do. I never thought I'd pull myself out. I'm not one of those persons that does that. So I figured I'd either make it or I'd be defeated, or I'd be told by the White House, "Get yourself out," and of course I would have done that, but it didn't



cross my mind to withdraw.

**Perry:** Who was your sherpa?

**Olson:** I didn't get a lot of help. It was a new administration, and the man who had been Assistant Attorney General for Legislative Affairs in the Reagan administration when I had been there was a fellow by the name of Bob McConnell, and Bob was, I thought, very good at it. He was trusted by people and he had come to work here. At some point he left here and set up his own firm, so I don't know whether he was still here at Gibson Dunn or had his own small little firm, but he was the one who helped me the most, guided me through the process, and interfaced with people at the Judiciary Committee and so forth.

**Kassop:** There also seemed to be a lot of young lawyers during the Reagan administration who then come back again during the Bush administration, in very prominent positions. Can you maybe speak a little bit about that as well?

**Olson:** Well, that's the natural thing, although some of them may have been involved in the H. W. Bush administration. But a lot of the people in the Justice Department are the ones that I think of who did come back. John Roberts is one, and various other different people. I thought we had a great group in the Justice Department under William French Smith, so there were people who did return, and that's a natural thing.

**Perry:** Nancy, you had a question about transition, I believe.

**Kassop:** Actually, yes.

**Perry:** And Sarah, about OLC [Office of Legal Counsel].

**Wilson:** I was wondering if following the *Bush v. Gore* efforts, were you involved—or during—Were you involved in President-elect transition efforts?

**Olson:** No. I wasn't asked to be and I didn't. Since I was going to be a nominee, it may have crossed their mind that they didn't need that from me. I don't know. I just wasn't involved.

**Kassop:** Did you have conversations with Seth Waxman before you took office?

**Olson:** Yes. I sat down with every person who had ever been Solicitor General who was still alive. I spoke to Drew Days, I spoke to Walter Dellinger, who was a terrific help, Seth Waxman was a great help, Ken Starr, Bob Bork. If I'm missing somebody, I talked to them.

**Wilson:** Am I remembering correctly that there was a letter of all living Solicitors General supporting your nomination?

**Olson:** Yes, yes.

**Wilson:** And who organized that?

**Perry:** Barbara.

**Olson:** I wouldn't have been surprised, but I'm not sure who helped put that together. It's a tradition. We had done that for Seth, I think, and we've done it for other Solicitors General. Who did put it together? I can't remember.

**Wilson:** There was some discussion during your confirmation process about your activities as the head of the Office of Legal Counsel. Do you recall what steps you took to respond to questions about decisions or activities in which you were involved? There was a little flap over EPA [Environmental Protection Agency] issues.

**Olson:** Oh, yes. Well, see—when I was Assistant Attorney General for the Office of Legal Counsel, I had advised President Reagan with respect to the claim of executive privilege, with respect to internal EPA deliberative documents, putting cases together. It became extremely controversial.

The Democrats controlled the House of Representatives at that time, during the early '80s. The Republicans controlled the Senate. The House of Representatives, two committees: one was John Dingell's committee, the Energy and Commerce Committee, and Elliott Levitas was in charge of another committee, and so forth. Anyway, the Democrats were very exercised about the fact that documents were being withheld from them. This is pretty much a bipartisan effort by each party, when the other side is in the White House and so forth, but this was particularly fierce and it resulted in my testifying—I'm going to summarize this because I think you all know it, or people know it.

One of the events that occurred during that period of time was testimony that I gave before a subcommittee of Congress. I was accused of having misled the Members of Congress in connection with whether certain documents existed or not. Those were the days of independent counsel, and an independent counsel was appointed to investigate me. That went on a couple of years and included a challenge to the constitutionality of the independent counsel law, and a final report by the independent counsel saying that my testimony, which had not been under oath, was literally true, although it was not very forthcoming.

As a litigator, you know, and lots of litigators know, that when you're being asked questions in a deposition, you answer the questions and you don't volunteer lots of other things that they didn't ask. I think that one of the things that this was a predicate for is that I guess I didn't volunteer enough or something. At any rate, the independent counsel, after four years of whatever this was, decided that everything I had said was true, but it could have been more forthcoming. It was basically an exoneration at the end of the day, but that was brought up. You've been accused of misleading Congress, and therefore you're not fit to be Solicitor General. That was one of the things that kept coming up in the confirmation process, and there was not much I could do about that.

I always insisted that everything I had said was true, that they were asking me questions for which there was no answer. Lots of the questions during those kinds of things are rather argumentative, as you know. Some of them are not intended to elicit answers but to provide a platform for giving speeches, and I think I wasn't as humble in my testimony before that committee as I probably could have been. If you advise people about testifying before Congress, you're supposed to be a bit more submissive than I think I was at the time.

**Kassop:** What did you do to prepare for being SG?

**Olson:** To be SG or for the confirmation?

**Kassop:** No. Actually, I'm moving beyond the confirmation.

**Olson:** To prepare to be SG, I did talk to all my predecessors, and I talked to other people who had served in the office. I read as much as I could. There's a lot of literature, not too much, but there's a lot of literature out there about what being Solicitor General means. I had been very close, when I was head of the Office of Legal Counsel, with Rex Lee. Rex is deceased, but he had been Solicitor General during that period of time. We were very close personal friends, and I spent a lot of time with Rex, so I knew what that was like. And having been in the Justice Department, I had great respect for the professional people in the Justice Department, and I do to this day. So I knew a couple of the people that were in the SG's office; Ed [Edwin] Kneedler, who started there shortly before I became head of OLC, and Larry Wallace, who was there since the [Lyndon B.] Johnson administration. He told me I was his tenth Solicitor General. So I did as much as I could to do my homework.

**Kassop:** What did they tell you, the former SGs?

**Olson:** They told me a lot about the process. A big part of the job of being Solicitor General is deciding whether the United States shall appeal an adverse decision in a lower federal court. When you decide to file cert petitions, when you don't. How the process works of collaborating with the other agencies in the executive branch when briefs get filed or cert petitions get filed. I learned a little bit about the people in the office, many of whom I knew, some of whom I knew really well and a couple I knew for other reasons. And I had studied the relationship of the Solicitor General to the Presidency and to the Attorney General.

When I was Assistant Attorney General, there were a couple of Office of Legal Counsel opinions about the role of the Solicitor General and the so-called independence issue with respect to both the Attorney General and the Solicitor General. So I was pretty well qualified. I had argued by then 15 cases or so in the Supreme Court, and I had spent four years at the Office of Legal Counsel and so forth. When you walk into that office, you have the institutional memory of some really brilliant, wonderful people. So it was a delight to walk in the door and be a part of that.

**Perry:** Could I circle back to—you mentioned you had already argued 15 cases before the Supreme Court. Before we started recording after our break, you mentioned briefly the process that you used to prepare. First of all, if you could perhaps just repeat that for the record, and second, did you prepare any differently from being a private counsel to being SG for your cases before the Supreme Court?

**Olson:** I spent an enormous amount of time—and I didn't change this. I tried to read every brief and every pertinent case, and I tried to summarize, in my own handwriting, the cases and the questions that might be presented, arguments that I might want to make, key quotes or key points in the factual record, things from the appendix and so forth. So I have it all written out and I put tabs in a binder. Then I'll have my secretary type that up, and then I go back through it and revise it and add to it and subtract from it and edit it and so forth. So I'm learning as much as I can, because once you're up there arguing a case in the Supreme Court, it's very fast paced. You

have typically half an hour. You might get asked 50 to 60 questions or more during that half-hour period of time, and you'll be interrupted and you'll have to figure out a way to answer their questions and stay on message and get your points across.

In the Solicitor General's office—and I always did moot courts. I would try to do three moot courts if it was a Supreme Court case. In the Solicitor General's office, there's so much going on that we basically all did two moot courts for each argument. In the Solicitor General's office they videotaped the second one. I have never watched myself on videotape, because I was very much worried that it would destroy all my confidence if I actually saw myself argue.

**Perry:** We'd like to correct you and say that you wouldn't hurt your confidence because you would be brilliant and you have a great voice. But we understand.

**Olson:** The other thing that you have to do as Solicitor General, which is a little different, is that when you say anything in the United States Supreme Court, you are stating the position of the United States, and you can't take it back very well, if at all. Let's say it was—one of the first cases I argued was a case involving telecommunications, and there were implications, under the antitrust laws.

It was a difficult argument because it was only three weeks after September 11 and I had been through a very difficult time because of that, but in each of those cases I would want to know what the position of the government historically had been on antitrust issues, federal communications issues, the interrelationship between the two, from the Federal Trade Commission to the Antitrust Division to the FCC, to other positions in government and so forth, and each case is a little different. It might be from the U.S. attorney's office and guilty pleas or Miranda warnings, or it might be commerce issues, EPA issues, and so forth.

You'd try to learn as much as you possibly could from the agencies, and they would participate in the moot courts and write memos and things like that, so that when you were asked a question by a Justice that had to do with the policy of the government or the practices of the government, then you'd try to get it right, because if you didn't get it right you'd be embarrassed and you could be setting a bad precedent in the Court. So that was an additional burden.

The other thing is that however honest and forthright and forthcoming we all try to be before the Supreme Court, it's particularly important if it's the United States. You must not make a mistake. You must not overstate a case or fail to disclose an adverse precedent or anything like that. We all try to do that conscientiously as private practitioners, but when I was sworn in as Solicitor General I had been and Barbara had been very close with Clarence Thomas. As soon as I could, after the vote finally came, I went over there to be sworn in. You go through a ceremonial swearing in later on, but I wanted to get sworn in so I'd be able to say, if I was hit by a truck on the way home, "He was Solicitor General," however briefly. *[laughter]*

**Perry:** You say you went over—

**Olson:** I went over to the Court and Justice Thomas administered the oath, and then he gave me some advice. The thing that I remember the most is he said, "Never lose your credibility with this Court. Some of your predecessors have been less than perfect in that respect, and every day that you come in here, everything that ever happens, don't ever lose your credibility with the

Justices of this Court or with this Court. Think about that all the time.”

**Perry:** Did that dovetail with what you already have said to us about getting it right, never overstating, being accurate? You already knew that, and I presume he was just layering this one last point on top of that.

**Olson:** Yes. It’s something that I think we all know and that everybody would know if you were going to be arguing a case in the Supreme Court, especially on behalf of the government, but it was particularly memorable to me. It stuck. Not that it wouldn’t have. I think your point is right. It just reinforced what I did know and it stayed with me.

**Wilson:** Did you have a sense of who he was referring to in making an allusion to predecessors?

**Olson:** I didn’t want to get into that and I didn’t ask.

**Kassop:** I think the first thing you said about being Solicitor General is it’s a privilege to be the lawyer for the people of the United States. How did you define your client or conceive of your client as the Solicitor General?

**Olson:** People have written a lot about that. You represent the government of the United States, which means the executive branch. You also represent the government as exemplified by Congress when you’re defending acts of Congress. You’re also representing the Constitution and the history of this country and the Constitution and the people of the United States. And of course a little bit once in a while, the Presidential decisions, executive branch decisions, but it’s all of those things, and you need to keep all of that in mind, that you are not just a lawyer or just an official. There’s something very special about being in the Supreme Court, particularly, as a representative of the other two branches of government and the people and the Constitution, and people watching, whether they’re watching at a particular moment, but everything that you do has to be perceived in that light.

**Wilson:** You also made a reference to OLC decisions on the role of the Solicitor General. Did you write any of those decisions when you were head of OLC?

**Olson:** I don’t think so. I can’t remember. I may have written one about defending acts of Congress, but I’m not sure now. I do remember specifically reading those, because during the confirmation process the Senators ask you about that. At that time, [John] McCain-[Russell] Feingold was being debated and I was asked by Senators in that process, if McCain-Feingold is enacted, will you defend it? I was asked that by Senator McCain [*laughter*] and I was asked that by Senator Feingold, and I was asked that by other Senators on the side of the supporters of McCain-Feingold, and I said that absolutely I would, that the Solicitor General has a responsibility to do that unless it is in a very narrow band of cases where there is a question of Executive power or where a statute is manifestly unconstitutional or clearly unconstitutional.

In the Reagan administration the Solicitor General finally got to the point where he would no longer defend provisions in the Social Security Act that were discriminatory on a gender basis, because there are a lot of statutes there that gave benefits differently for men and women or surviving spouses if there’s a widow or a widower, and the Supreme Court has struck those down and struck those down, and finally the SG says we’re not defending those anymore, which

was entirely appropriate and understandable. You have to send a note to Congress saying that you're not going to do that. I never had to do that.

During the confirmation process I was also asked by Senator [Addison Mitchell] McConnell, if McCain-Feingold passed, whether I would defend it, and I said I would. He said, "I'm disappointed to hear that. But send your worst lawyer." [*laughter*] I subsequently told him that I did, that I was the worst lawyer.

**Abraham:** Would you address the concept, the notion of the Solicitor General being the tenth justice?

**Olson:** One of the books that I read by Lincoln Caplan—

**Perry:** Yes.

**Olson:** It's called, *The Tenth Justice*. I joke about that a little bit in speeches, that I've checked with the nine justices and they don't think there's ten. What I think he meant is that aside from a tenth justice, you're listed as an officer of the Court. In the front of the U.S. reports, the Solicitor General is listed, and you have a ceremonial office in the Court. The Court doesn't think that you're the tenth justice, but they do think that the Solicitor General's office is a place that they rely on for thoughtful, thorough, extremely forthright and extremely forthcoming briefs, high quality, thorough, and honest with them.

The justices expect the very highest from the Solicitor General's office, and as far as I know they get it. But I thought that means that you have a special responsibility to that Court. If they're getting something wrong because they misunderstand something that hasn't been fully explained, then you have to go out of your way to say well, even if that's in my favor, I have to correct that.

One of the other things I did, which was a little bit of a departure, is that I went to every argument that our office made in the Court. My predecessors had not done that. You have an awful lot to do in that office, preparing for arguments, doing appeal recommendations and that sort of thing, but I started off thinking I wanted to get to know who does what, how each of the lawyers in the office handles the arguments and who has what strengths and so forth. It became addictive. You've done this. It's so much of a thrill to be there in Court while arguments are being made, even in the most arcane case about bankruptcy law or Social Security, no offense.

**Perry:** No offense to the lawyers.

**Olson:** Some of these things can be very obscure provisions of statute, but some of those are the most exciting and interesting arguments, and I pretty soon got to the point where you couldn't keep me away. I found that the lawyers in the office loved the fact that the Solicitor General was watching them do the thing that they had spent so much time to do, and that the justices were really happy to see me there, because they then saw that I was paying attention to what was happening, what was being presented to them. And so it was a win-win-win situation to do that. I feel bad now that I'm not there for arguments all the time.

**Abraham:** To what extent, if any, was there cooperation between you and the Attorney General? Was there any effort on the part of the Attorney General to guide your work?

**Olson:** This Attorney General, General [John] Ashcroft, told me early on—he had been attorney general in Missouri. He had been in the United States Senate, he'd been on the Judiciary Committee, he had been Governor, I think, of Missouri also. He had argued two cases in the Supreme Court and he told me, "You and your people know more about this than I ever will, so if you ever need my help let me know, but I'm going to leave you alone."

I had him down once in a while to have brown bag lunches with the people in the office, and I would report to him from time to time. If I thought there was anything he ought to be warned about, what was coming down the pike, you know no one likes to be surprised. And then once in a while I would come in and I'd just let him know what's going on or how we had done, or something like that, but he basically was a very hands-off Attorney General. There were a couple of instances where we communicated a little bit more.

Early on he wanted all of the terrorism cases coordinated. The Justice Department was going to be participating in terrorism cases at the U.S. attorney level in various different parts of the country. It was somewhat unforeseeable where those cases were going to come up, but they were going to come up in different districts or in different courts of appeals, and he wanted and the White House wanted those coordinated so that there would be continuity of points of view and that there would be consistency, there wouldn't be someone expressing a point of view in one district court different from another point of view in another district court. So he asked me as Solicitor General to coordinate all those cases, and I, with the help of my Deputy, Paul Clement, and other people in the office, saw that those cases were being managed consistently and at the highest quality level.

We'd have meetings from time to time with people from the State Department, the Defense Department, the White House, the Vice President's office, the CIA [Central Intelligence Agency], everything, just to talk about what's going on in the courts with respect to dealing with terrorism. That was one thing that he specifically asked me to do, but by and large he basically said, "You guys can do it."

And I asked him—it's a tradition that the Attorney General, if he wishes, argues one case in the Supreme Court, and he said, "I've done that. I don't need to do it. I've got other things that I should be doing and I can't do it as well as your people."

**Kassop:** Can I ask what was the breakdown in terms of the political appointees in the SG's office and the career attorneys?

**Olson:** The only noncareer person was Paul Clement.

**Kassop:** Oh, so just the two of you then. Okay. Could you speak a little bit about when you were asked for calls for the views of the Solicitor General by the Court.

**Olson:** About ten or fifteen times a year the Supreme Court will call for the views of the Solicitor General, CVSG. That usually is when there's a petition pending between typically private parties, having to do with the antitrust laws or the bankruptcy code or statutory provisions typically, sometimes a constitutional question, where the Court wants the views of the Solicitor General as to whether it's a case that the Court should take. Sometimes that helps the Supreme Court, because the Solicitor General will possibly find reasons why this is not a suitable vehicle

to deal with this issue, or what is the government's position as to whether or not this issue needs to be clarified or not. The responsibility is taken very seriously. It's called an invitation, but it's not an invitation.

**Kassop:** It's an order.

**Olson:** It's a command. And so we would do the very best we could. The other part of this tenth justice thing is that—and I don't mean it literally as a tenth justice thing, but one of the things is that everybody who ever loses a case in the federal government thinks it should go all the way to the Supreme Court. So that's why the Solicitor General decides what cases to appeal or not.

I don't mean what I just said literally, but lots of times agencies will want the Supreme Court to be petitioned on a cert position, to take a case. You know what the burden is on the Supreme Court; they can only take so many cases. If you ask too many times, you will lose credibility in terms of is it really important, so one of the things that the Solicitor General does is to be very mindful of the considerations that the Court has articulated, as to when they should take a case or when they will take a case, and to be very careful to offer them a case only when it is the kind of case that they have already decided historically that should be before that Court, and to use their resources and be very careful not to try to push too many things onto the Court for fear that your percentage will start dropping if the Court doesn't look at this and say, "The Solicitor General thinks we should take this case." That should be taken seriously.

**Wilson:** When you were in private practice before being involved in your position in the government, first at OLC and then as the SG, had you been much involved in criminal law issues, or were you primarily involved in complex civil litigation?

**Olson:** Mostly civil. Before I was head of the Office of Legal Counsel, one or two or three occasions where we'd go off and do something pro bono for some defendant in a drug case or something. Young lawyers do that from time to time. After OLC I did a few appellate cases involving criminal law or criminal cases, but very few.

**Wilson:** What areas of law if any, or parts of the government, did you find yourself exposed to as Solicitor General that you might not have known before that you found were interesting?

**Olson:** When you're in the private sector, you don't have very much to do with national security issues, for one thing. That's the thing that comes immediately to my mind. I will explain that when I was at OLC—I'll go back even one step before that. I was asked by William French Smith—we had represented Ronald Reagan as a private citizen. I wrote his blind trust. Bill Smith and I were partners. He became Attorney General. He wanted me to come back, and I thought at first, *Why do I want to do this? I'm making a good living, living in sight of the Pacific Ocean, representing really interesting people. Why do I want to go back to Washington, D.C.?*

But the more I thought about it and the more we talked about it, I thought this was crazy, that one of my partners is going to be Attorney General and one of my clients was going to be President of the United States. I had worked on the campaign and I had done all these other things. Then I thought about what I wanted to do.

I had never heard of the Office of Legal Counsel. Someone tipped me off. They were thinking



about me for the civil division because I had been a civil lawyer. Then I stumbled upon the Office of Legal Counsel. It's 20 lawyers and it deals with the most difficult, complicated, fascinating legal questions that the government has to deal with. The more I thought about it, the more I thought for someone who loves the law, and I do, and loves the intellectual rigor of the law—I'm looking at Henry because I know he is such a scholar of law and history and so forth, that sort of thing. I love that stuff, and in the Office of Legal Counsel, that's a regular diet. Wonderful lawyers in that office, and you're looking up the Federalist Papers and Magna Carta and the Virginia Bill of Rights and all of those things all the time.

I talked them into letting me have that position, and during the time I was there people said, "You really made a mistake. You could be head of the civil division or the antitrust division, and you would have a very lucrative practice when you come out. You can have no practice at all specializing in separation of powers."

So I thought, *I'm going to prove them wrong. I'm going to create a law practice that has the best of the Office of Legal Counsel and the Solicitor General's office.* And so I created something here called the appellate and constitutional law group. There wasn't anything like it at the time. I tried to find really, really smart lawyers, and we would try to get cases involving the intersection of the Constitution, federal law, and things like that. So the clients would come to us to solve really difficult problems involving the Constitution or federal statutes and so forth.

My practice turned out pretty well. My practice was a lot of those things and it was pretty much across the board of all kinds of equal protection cases, First Amendment cases, takings cases. There were a couple of criminal cases and various different provisions of the commerce clause, the whole works. By the time I became Solicitor General I had done a lot of things on a lot of different constitutional and federal statutory questions.

I went on too long; I'm sorry.

**Kassop:** No, no, that's perfect.

**Perry:** We usually begin our interviews with asking how people got to where they are, but we thought with our foreshortened time today we would just start right in. You mentioned of course 9-11, and as you can imagine, we always ask in the George W. Bush interviews about 9-11. We talked among ourselves—we hate to even bring it up in light of your deep personal loss, but we wanted to give you the opportunity, if you did want to speak about it.

**Olson:** I don't object. Obviously, it's an emotional thing, but I have talked about it and I've talked about it publicly, because at the time, I felt that Barbara was the person best known to the American public who was a victim that day. I must have had thousands and thousands of letters from people who identified with her because they had watched her on television or they had bought her book. She was a very visible person in the public world, and when she flashed up on the screen, people said, "Oh, my God, that's someone I know" because of that.

Because of *Bush v. Gore* and the fact that I was Solicitor General, I was a somewhat prominent figure in the administration, and because of Barbara, I had personally suffered an experience that was a little different than everybody else, and I felt a responsibility. Rightly or wrongly, I felt a responsibility to answer questions and to appear to deal with it, because it was so shocking to

everybody. And to also be a symbol of, “We’re going forward. We’re moving on. We’re not going to be defeated or beaten or fatally wounded in some capacity by this. This President, this administration, the American people are going to move forward from this tragedy. We’re going to deal with the emotions that we’ve felt, but we’re also going to survive and we’re going to prevail.”

I thought that I could express that and I felt some kind of responsibility to do that and to move forward, and also to explain that I know that other people have suffered, they’ve lost a loved one too. Maybe they’ve lost a child to cancer or they’ve lost a spouse to an automobile accident or something like that, so that we’re not unique by having suffered something because it happened on September 11. We are going to deal with this.

So I have spoken out and I’ve written what thoughts that I had about this experience, and I talked about Barbara because I thought she was, as I put it in one piece, “a quintessential American.” She was a Texas-born Catholic who had become a ballet dancer and then had gone to a Jewish law school, and had come to Washington and been a prosecutor and a House investigator and a television personality, all at a relatively young age. I thought this is what America is about, and so I thought it was good to convey something like that about someone the American people saw as someone who was killed in one of those airplanes.

The other thing I might say is that what I did is I got back to work as quickly as I could, in four or five days, and I gathered together everybody in the Solicitor General’s office, the lawyers and the secretaries and the clerks and people in the office and I said, “We are going to go forward, we’re going to do our jobs, and I’m going to do my job, and we’re all going to be a family and pull together,” and so forth. I thought that was helpful to me, to tell them “I need you.” That was good for them too. So that’s a little bit about what was going on in my mind. I don’t mind talking about it.

**Wilson:** I believe the first and the only time I ever met Barbara, was at an Attorney General’s office Christmas party, and if memory serves correctly, that it was during the Clinton administration, so it would have been Janet Reno. I knew of her reputation, but how friendly she was and how approachable she was. Do I have my time frame right?

**Olson:** It’s possible. I don’t know who would have invited her but—

**Wilson:** But did she have—obviously, she has a reputation of being a passionate critic and an intelligent critic of the Clinton administration, and Hillary Clinton in particular. Did she have friends across the aisle, personal friends and professional contacts?

**Olson:** She did. The people that she would debate on television respected her. She would always do it in a nice way. She’d smile. She’d try to make her points, but she didn’t take them personally or make them personal. It doesn’t surprise me that she’d wind up at and then get a big kick out of being there in the belly of the beast, so to speak. She would do that sort of thing. She had a lot ofchutzpah.

**Wilson:** Either that or I was there during the Bush administration. That’s what I can’t quite figure out.

**Olson:** It wouldn't have been during the George W. Bush administration because she didn't survive to make it to the first Christmas party.

**Wilson:** Oh, yes, right.

**Olson:** But she could have been in one of the other ones, and she was chief investigator for the House Oversight Committee for a while. That's part of the time she was driving the Clinton administration people a little nuts by one investigation or another. But having her show up at something like that wouldn't surprise me a bit.

**Wilson:** That was one of the reasons I actually went to her memorial service and sat at the very back. Manus Cooney and I, who had been working on judicial nominations, him for Senator [Orrin] Hatch and me in the White House toward the very end. There was a feeling of real bipartisanship that emerged from that.

**Olson:** Yes. And of course everybody felt, at that point in time particularly, that this is a nation and we have to come together.

**Kassop:** And if I recall, you have a lectureship in her honor now with the Federalist Society.

**Olson:** At the Federalist Society.

**Kassop:** And that's an annual lecture.

**Olson:** Yes, every November. Vice President Cheney did it one time. I think Bob Bork did one, Ken Starr did one. I think Justice Scalia did one. Chief Judge Dennis Jacobs did one, from the second circuit, and they've been good.

**Perry:** And they're on C-SPAN [Cable-Satellite Public Affairs Network] as well, which means that they go far and wide.

**Olson:** I did the first one.

**Perry:** I remember that.

**Olson:** I talked about 9-11. I wanted to get it off my chest a little bit and I wanted to talk about 9-11. I wanted to talk about what it meant, in my view what it was all about, and Barbara's involvement in it and so on and so forth. So we got that started then. We also have a scholarship in her name at Cardozo.

**Wilson:** Is that where she attended law school?

**Olson:** She went to law school at Cardozo. This is this blonde, Catholic ballet dancer. She had been a professional ballet dancer for a couple years, but she decided that she wasn't good enough to be a prima ballerina. But she always wanted to be a lawyer, so she saved up money by going to Hollywood and foisting herself off as someone who know how to help produce movies and things like that, and television programs. She worked for Stacy Keach for a while and he called her in after about six months and said, "You didn't know anything, did you, when you came

here?” And she said, “No, but I’m a fast learner.”

She saved up enough money to go to law school and she wound up at Cardozo because she was ready with the right amount of money, it was in the middle of the year, and they would let her start in January or something like that, and she created the first Federalist Society chapter at Cardozo Law School. She was very popular there, not because of her views.

**Perry:** All right, we’ll pause there.

[BREAK]

**Perry:** Just as we finished before our lunch break, we said among ourselves when we came back we’d talk about the terrorism cases. We would appreciate your thoughts on that. I know Nancy particularly has studied those, and I’m sure Sarah knows a lot about them. Henry and I kept up as best we could as political scientists. Just to begin, tell us—linking our topic before we broke for lunch, how did you deal with that, personally? How did you go into those terrorism cases? You were mentioning a bit about the procedure that you had set up at DOJ and the SG’s office, but what was that like to deal with those both as a lawyer and as someone who had been a victim on 9-11?

**Olson:** Well, I stayed out of the case here in Virginia. I can’t remember the defendant’s name who was prosecuted here.

**Perry:** Padilla, José Padilla, or [Yaser Esam] Hamdi?

**Olson:** No. I’m not talking about the ones that got to the Supreme Court. This guy was prosecuted. He was directly involved in September 11. Anyway, I recused myself.

**Kassop:** [Zacarias] Moussaoui?

**Perry:** Yes, Moussaoui.

**Olson:** Yes. I recused myself from any of the cases where it would directly impact on me.

**Perry:** And he was the so-called 19th hijacker.

**Olson:** Something like that, yes. I stayed out of that, and if there was anything that appeared to come close enough to affect me, so that there would be legal questions that were raised, then I recused myself from that. As to the other ones, I looked at them as cases involving constitutional issues. As far as coordinating the ones in the circuit courts and in the district courts, Paul Clement took charge of that. He reported to me and we worked closely together, and Greg Garre, who then became Solicitor General after Paul, was also involved in it. But when they got to the Supreme Court or when they were headed to the Supreme Court, I regarded them as cases involving constitutional questions and so forth, and I felt not uncomfortable handling those

cases.

I took the [Shafiq] Rasul case, which was the habeas case, and we weren't successful in that case. I'm still frustrated by that. The Supreme Court reversed a 6-3 decision from 50 years before, the [Lothar] Eisentrager case, and I was somewhat surprised at the way that came out, but it's very interesting, the history of Justice Stevens. Do you know about this? Justice Stevens's history when he was a clerk, in an early habeas case—it's too long to explain here, but it was a fascinating case and I thought that we had the strongest of the arguments because it was outside the territory of the United States and it was a case on which there was a strong precedent, written by Justice [Robert] Jackson. We weren't successful, but in looking at it with hindsight, we weren't going to win that case given the way the case was presented and the attitude and the history that Justice Stevens brought to the case. Paul did a great job with the other two cases, Hamdi.

**Perry:** Hamdi and Padilla.

**Olson:** And Padilla. Twice we went down to Guantanamo because I didn't want either one of us to be asked a question in the Supreme Court about something having to do with Guantanamo and then answer by saying, "Well, I don't know the answer to that."

**Perry:** Tell us about that trip.

**Olson:** We went down twice and it was a very interesting experience. That did bring it home to me a little bit, to look in the eyes of these people in those cells and to think about what kind of individual engages in the kind of terrorist activity that we were dealing with. My impression of Guantanamo was that the Defense Department was taking very good care of those individuals down there. Most of them had gained weight. They were receiving high quality, or consistent at least, medical care. They were given exercise. The cells in which they were occupied were sort of open-air cells. I can't recall exactly what size, but they were reasonably spacious. There was one person in a cell. There was a breeze flowing through from the ocean. The climate in Guantanamo is pretty much like the climate in Malibu, California. The real estate, if it was in Malibu, would be very expensive.

We were permitted to ask whatever questions we wanted of the people there, so at least we were able to satisfy ourselves by looking at what was going on. You never know when you're not being told. Paul was embarrassed by a question in one of the two cases, by Justice Ginsburg, about torture, and he assured—

**Perry:** You were at that oral argument.

**Kassop:** I was at that oral argument, yes.

**Olson:** He assured Justice Ginsburg, who asked the question. I think it was she.

**Kassop:** "Our executive doesn't do that."

**Olson:** "We don't do that." And then we find out about Abu Ghraib the next day or something. That was very unfortunate. The other thing that I should mention is that Paul and I felt that we

had to do more internally in the administration to provide more due process with respect to the review of the circumstances involving the capture and the background of the people that we had in Guantanamo.

We had to have more transparency, we had to have more of a regularized review, and we had to be able to assure the Justices on the Court that given the legal positions that we were taking, the executive didn't have to answer to the judiciary because of the Eisentrager case and other considerations. That they could be assured that the government was doing what it could within that construct as much as possible to make sure that they had the right people and that the people that they had had really done the things that they thought that they had, and so forth. They weren't on their way to a cousin's wedding, which was a frequently invoked story. We didn't get as much satisfaction on that from the rest of the administration, I will say the Defense Department, as we wish we could have. Whether it would have affected the outcome of those cases, I don't know.

**Wilson:** How did those conversations play themselves out? You said Paul and you felt it was important to routinize or be able to explain to the Court that there were some sorts of review or checks, if you will.

**Olson:** Process.

**Wilson:** Yes. What specific conversations do you recall having, or what proposals did you work on?

**Olson:** I don't remember specific conversations, and some of it was related from Paul and me through Paul, to the White House, including the Vice President's office, and to the Defense Department. And I do remember one eight-and-a-half-by-eleven piece of paper where we had written out several recommendations. It wasn't in the form of a memo that was addressed to, from, or anything like that, and I don't know what happened to that. I don't recall anybody saying, "No, we won't do that." But what we were hoping would happen didn't happen, in terms of an announced policy of doing this, this, this, and this. I thought it's one thing to rely on Eisentrager and one thing to rely on the World War II case.

**Perry:** [Richard] Querin.

**Olson:** Yes, Querin. But this Court was going to want to know you're doing more than that, you're doing more than having a trial in the Justice Department and then taking them out and shooting them, or whatever it was. So like I said, I don't know whether it would have changed the outcome of those cases, but you always want the Court to think that you're doing everything you possibly can.

**Wilson:** Did you and Paul have any interaction with the White House counsel's office on those issues, or was this primarily with the Department of Defense?

**Olson:** It was with the White House counsel's office and the counsel to the Vice President and with the Defense Department.

**Kassop:** So the Defense Department would have been with William Haynes?

**Olson:** Jim, yes.

**Wilson:** And Dave Addington from Cheney's office.

**Olson:** And from [Alberto] Gonzales' office. It probably was him and a deputy but I don't know.

**Kassop:** [Timothy] Flanigan or [Bradford] Berenson?

**Olson:** Maybe Flanigan. I'm not sure.

**Kassop:** I just have so many questions, I don't even know where to begin. Some of them are process questions, in the sense of your interactions with the Department of Defense. Did you also interact with the Department of State?

**Olson:** We did. We had a meeting from time to time in a big conference room in the Justice Department, where we had representatives from the State Department, from some of the intelligence agencies, from the FBI [Federal Bureau of Investigation], as I recall. My memory is a little vague on this. From the Vice President's office, from the White House, from the criminal division, some representatives of U.S. attorneys, maybe on the telephone. But I remember these meetings being 30 or 40 people where we would discuss the status and where things were going, what was happening kind of things.

**Kassop:** Okay. On some of the substantive questions, certainly in Hamdi, you argued that there was a very circumscribed role for the courts, and in fact Justice O'Connor's decision came down really quite hard on that. So you're simply saying you just either misjudged or you didn't expect the Court was going to have that kind of a reaction to that argument?

**Olson:** Well, I guess my answer to that is that Paul and I felt that we needed to do more to make her and other members of the Court comfortable, with—yes, you were saying that it's the executive's responsibility and it's pretty much up to the executive, but the executive has in place internal checks that would provide some comfort and some feeling of—efforts are being made to assure ourselves that we don't have the wrong person, or things like that. We weren't able to demonstrate as much as we would have liked to the Court, and it didn't totally surprise me that it didn't come out well.

Rasul surprised me, because I thought that was a jurisdictional question and I thought we should have won that case. Padilla, they decided, was a venue decision.

**Perry:** Right.

**Olson:** So we weren't too surprised about that. Hamdi.

**Kassop:** I guess I'm surprised that there was not a lot of attention in your briefs to Youngstown. It's as if you really bypassed that one, when I would have thought that would have been one of the chief precedents you would have relied on. Obviously, it wouldn't be to your point, but it was such a powerful decision and so relevant to these questions.

**Olson:** You mean the steel seizure cases?

**Kassop:** Yes.

**Olson:** If we didn't have more of that in there—I don't know the answer to that question. I'm not disagreeing with what you're suggesting.

**Kassop:** Well, that would have been a much lesser role for the executive branch, so it wouldn't be to your point, but the point is it was hard to see how you would even ignore it or not spend time at least responding to it.

**Olson:** I just don't remember enough about that brief to answer that question.

**Kassop:** You also used the authorization for the use of military force as one of your sources of support for executive branch actions that were in addition to using military force. In other words, that was the basis for support for military commissions, that was the basis for support for indefinite detention, and also for NSA [National Security Agency] wiretapping. My understanding of an authorization to use military force is that it is literally limited to just identifying the enemy and the time frame in which you are going to be using military force, but it seems as if this administration was using it for other actions in addition to just military actions.

**Olson:** Well, I think you're right as to the latter point, but as to the contents of that resolution—is it a resolution?

**Kassop:** Yes.

**Olson:** It was pretty broad, as I recall, in terms of all necessary this or that. Again, I haven't looked at it for ten years, so I can't remember the specifics, but I thought it was fairly broadly written, and the subsequent administration has used it too.

**Kassop:** They have. They used that actually in place of the President's power as Commander in Chief. They've relied more on the AUMF [authorization for the use of military force] and not on Commander in Chief, whereas the Bush administration essentially used both. Although actually I think that the time that the AUMF passed Congress, or I guess it was when it was passing the Senate, there was that flap, the Tom Daschle sort of flap, right on the floor of the Senate, to take out the words "in the United States." And the fact that those words were taken out from it meant that it should have prohibited any kind of activities such as warrantless wiretapping in the United States.

**Olson:** Well, the whole wiretapping situation, what euphemism was used? The something surveillance program? Is that what you're talking about?

**Kassop:** Domestic.

**Perry:** Yes, domestic.

**Olson:** There was a phrase.

**Kassop:** The TSP, the Terrorist Surveillance Program.



**Olson:** Again, I don't want to get into stuff that I learned or was involved in that is covered by security clearances.

**Perry:** Okay.

**Olson:** Okay? And that was a controversial thing at the time with respect to who has read into it, what it was all about. I was on the Privacy and Civil Liberties Oversight Board subsequent to that, and we were then read into these programs. But we were read into those programs and we had briefings at the NSA and every other place in the government, but it was all highly classified, so I have to be cautious about that, just because I don't know what I'm getting into.

**Kassop:** Actually, my question was more about the constitutional justification for it, not so much the actual program itself.

**Olson:** Well, we weren't making constitutional justifications for it, because people weren't being told about it, at least at that point in time. I don't know when this flap was with Ashcroft in the hospital.

**Perry:** Right.

**Olson:** And when that took place. Was that in 2004?

**Wilson:** That was late.

**Abraham:** Somewhat later.

**Perry:** March of 2004.

**Olson:** I was gone about two, three months after that, and so there was a lot of stuff that played out subsequently. But at that point I think that not very many people were read into the program, and I don't know that people were trying to make constitutional justifications for it, except for themselves. The Solicitor General's office wasn't involved in that. We didn't have to go to court with respect to that program at any time that I remember.

**Kassop:** I think I was perhaps referring, I guess it was the following January of 2005, when Gonzales was Attorney General, and then he—in December of 2004 was when it became public through the *New York Times*, and he was saying that the basis for it was in the AUMF.

**Olson:** Yes, and I was gone.

**Kassop:** Right. And then one other quick question. I know Paul Clement was making the argument in a lot of those cases that the battleground is everywhere, and that that was a very unique argument to be making, in the sense that it gave the authority of the United States to use military force anywhere, including even inside the United States, which still is a controversial issue. Any comments?

**Olson:** Well, that's where they blew up the World Trade Center, in the United States, and it was in the United States when they hijacked the flight that my wife was on. So the problem with

terrorism is that these people aren't wearing uniforms, they're not in a regular army. They're not interested in the Geneva Conventions. They deliberately set out to do things that violate anybody's sense of rules. You can't deal with the concept of there's an orderly way to conduct killing, because they're engaged in killing as many innocent people and helpless people as possible, wherever they can do the most damage and get the most attention.

A lot of these rules and Court decisions and conventions and treaties and so forth were developed when people weren't doing those things; they were fighting with uniforms and they were doing this. So some of the problems that the administration was dealing with, not so much I was dealing with, because most of those issues didn't get to courts, when I was there anyway, but those raised very difficult problems. What do you do about someone who wants to blow up as many babies as possible in the middle of Brooklyn, or wants to bomb a synagogue someplace, or who will use a place of worship to plan terrorism, or will use lawyers' offices to plan terrorism? It's not a simple thing.

**Kassop:** Could you give us some idea of when, or whether, you were in on the discussions as to when the paradigm to use became the military one, rather than a law enforcement one?

**Olson:** As Solicitor General I don't think I was involved in that, and I don't think that it's an either/or necessarily, but that's about the best I can do at this point.

**Wilson:** Why is it not an either/or in your view?

**Olson:** Again, I'm not necessarily talking about anything I was directly involved in, but if it's just military, you're not using the fact that you might be able to arrest somebody and potentially prosecute somebody and have them identify who they're working with. You don't want to abandon those tools and exclusively concentrate on the military side of things, nor do you want to use only law enforcement tools when maybe someone is planning to destroy a city in the United States from someplace in Pakistan, where they're conspiring with people, where you don't have any ability to gather evidence and that sort of thing.

The law enforcement regime doesn't work many times. When someone wants to kill your people, and you're the President of the United States, you're supposed to do something to prevent your people from getting killed by people who want to do it, and you can't use the criminal justice system. It just doesn't work. I don't think any sensible chief executive would say, "I'm only going to do one and not the other." You have to use both of those tools working together.

**Kassop:** You sound like the current Attorney General.

**Olson:** I don't know if you're flattering him or—[laughter]

**Perry:** You mentioned earlier about setting up the division here in the law firm regarding separation of powers and federalism. From your experience as SG and having to deal with these issues about fundamental concepts of separation of powers and federalism, but particularly separation of powers, did it change your previous assumptions about that basic principle of American constitutionalism, or did it confirm?

**Olson:** It did neither. Hopefully, you're constantly learning and it all depends upon the context in which you're learning that. I'm a real believer in the separation of powers in the sense that our government structure is, as others have said long before me, and frequently, the structure of our government is one of the things that keeps us the kind of country that we want to be. It's not just the Bill of Rights and it's not just statutes and it's not just a free press, but it's all of those things, including the structure of our government and checks and balances and so forth. I don't think I've changed, but I'm certainly hopefully still learning.

**Perry:** Any particular principle or new item that you added to your mix from these experiences with these cases?

**Olson:** No, nothing particular. I think it depends upon the case. Everything is hopefully cumulative in some way.

**Perry:** Fact-based, case-based.

**Olson:** Well, I try to teach young people here that you're never going to stop learning. The moment that you stop learning, you had better stop—as soon as you stop growing as a lawyer or as a citizen, then, like an airplane, if you're not moving forward, you're going to fall. I hope that all of us keep learning from the experiences that we have, and I learned an enormous amount in the government at OLC and as Solicitor General, but I also learned a lot practicing the law here, so hopefully it all is useful in one way or another, whether you recognize it or not.

**Kassop:** When you were dealing with some of the counterterrorism cases, did you consult with OLC at all, on some of your positions?

**Olson:** I don't think we did very much. Once they're in court, you're not asking OLC opinions. OLC is not supposed to be—or at least when I was at OLC, we were not writing opinions for cases that were in court, because then it was up to the judiciary to decide things. We weren't asking for legal advice that I can recall, from OLC, about the things that we were dealing with in court. I don't remember it anyway. It could be that Paul or others in my office had more of a direct—I suspect at some of these meetings there may have been people from OLC, but I don't remember.

**Perry:** Could I ask about your relationship with the Court as an institution and the individual Justices? You had mentioned earlier that you and Barbara were friends with Clarence Thomas. Did you have friendships with other members of the Court? How did that change, or did it change once you became SG? And then just your professional relationship with them. My last part of this question is over your career, both in private practice and as SG, in arguing before the Court. How has the Court changed? Has it changed fundamentally or in *any* way in oral argument and its style of argumentation?

**Olson:** Well, to get to the first part of that—remember the sequence. I will forget them.

**Perry:** Got a lot of questions.

**Olson:** I have known and had somewhat personal relationships with most of the members on the Court in various different ways and I still do. I was in the Justice Department when Justice

O'Connor was appointed. Ken Starr did the vetting of Justice O'Connor. Earlier in her life, she'd been offered a job by Gibson, Dunn & Crutcher when she was getting out of law school, only she was offered a job as a secretary. She tells that story. She told us later that all is forgiven. I have known her since then and still have enormous admiration and affection for her. She's just a wonderful person. And Justice Scalia because we were Office of Legal Counsel. His son is a partner here, Gene [Scalia] is a partner here. Justice Kennedy came from California and was at McGeorge Law School. McGeorge is a part of where I went to college. And on and on and on. Justice Ginsburg has become a good friend. John Roberts was in the department, his first job after his clerkship with Rehnquist. Anyway, I could go on and on.

I don't think I know Justice [Sonia] Sotomayor very much. I know her a little bit; it's personal but it's also professional. We wouldn't ever talk about cases or anything like that. Lady [Booth Olson] and I spent New Year's Eve with Justice Ginsburg, and it used to be Justice Ginsburg and her husband Marty [Ginsburg], before he died, and Maureen and Nino Scalia and a couple members of their family. That's been going on for a while, but it's still a very proper, professional relationship. If you're going to be appearing before the Court, you're just careful about what you say or what you don't say.

As far as oral argument is concerned, it's much more aggressive and active now, on each Justice's part, except for Justice Thomas, than it was when I first argued a case. Justice [William J.] Brennan didn't say much, Justice [Thurgood] Marshall, not too much. But each change in the personnel of the Court, except for Justice Thomas, has brought a more active questioner. So now you're dealing with a very rare case where they're not really involved.

In fact, I had one conversation with Justice Scalia one time. It was at a lunch. We were sitting together and I had been in Court that day and they had two very obscure APA [Administrative Procedure Acts] cases or something like that, and it was an absolutely fascinating argument. The Justices were all involved in this. I said, "Wow, that was really a fascinating day," and he said, "Wasn't that great?" I said, "We're maybe two of the three people in the United States who would have thought that was interesting." [laughter]

It was really intellectually interesting, but the press would never have covered it kind of thing. But they're exceedingly engaged and exceedingly well prepared. I've never seen the Court not—and I mean all of the Justices—exceedingly well prepared. It's quite a thrill to be there because of it. Now it's very disconcerting if you go into some court someplace.

I did something in the Illinois Supreme Court a couple years ago and I thought, *What am I going to do now?* They're sitting there. I don't know what's on their mind, where are they going, you know.

**Perry:** Did you have—was it 30 minutes?

**Olson:** It was something like that.

**Perry:** Did you have 30 minutes to prepare?

**Olson:** They finally got engaged a little bit, but I never really felt I got traction. But you're sort of used to that now. It's a dialogue and it's really, I think, quite healthy. Justice Thomas does

think that his colleagues are just doing too much of it and they're not letting the lawyers speak. It does bother some people who are over there.

**Perry:** Has he ever talked to you about his choice?

**Olson:** He's told me, "My colleagues talk too much and they're putting—" He said this publicly. I'm not revealing anything secret. "My colleagues are arguing among themselves and they're trying to persuade one another and they're trying to take over the jobs of the advocates. I'd like to hear from the lawyers; that's what you're here for." And he said, "If I have a question that I need to have answered, I'll ask it." But it hasn't happened in a long time. His position on that is not secret.

**Perry:** You're SG in the midst of what turns out to be the 11-year record in the Court's history of having nine Justices and not having any replacements in that nine. So it must be very clear while you're SG that at some point there will probably be a change, in maybe a year or two. Is there discussion that includes you, or within the administration, between the White House counsel's office and DOJ or with the Attorney General or others, about a short list, what that would be like?

**Olson:** There was nothing that I was ever involved in. When did the Chief—

**Perry:** The Chief died in September of '05, over Labor Day.

**Olson:** Okay, so it was only a year after I had left. I'm sure that those things occurred in the—I'm guessing, so I don't know, but I would be very sure that they did have a list at the White House counsel's office and in either the AG [Attorney General]'s office or the Office of Legal Policy, I think it was, that would keep track of things like that. But they didn't involve the Solicitor General's office, and that was just fine with me.

**Wilson:** When you were in the SG's office during the Bush administration, were you or others from your office involved at all in the creation of the Department of Homeland Security or the [USA] PATRIOT [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism] Act, and were you asked to supply opinions?

**Olson:** Did I testify? I did some speaking on that. I attended a few meetings. I participated in a somewhat indirect way with some testimony that General Ashcroft gave before the committee. What was the group?

**Perry:** The 9/11 Commission?

**Olson:** Yes, the 9/11 Commission, but my role was relatively modest.

**Wilson:** During this time frame that you alluded to earlier, where Paul Clement and you were thinking through potential process steps in the context of these national security cases, what was the role, if any, of Republican Members of Congress? Were they voicing views, either privately or publicly, that had an impact on that discussion within the administration?

**Olson:** It may be true, but if it was true, it didn't have anything to do with what we did. I don't

remember ever having a conversation with Republican Members of Congress or Democratic Members of Congress or any Members of Congress, about any of that stuff. If it had occurred, it would have been at the White House level or the legal policy people or legislative affairs. That was another blessing of the Solicitor General's office; you didn't have the privilege of talking to Members of Congress.

**Kassop:** But that gets back to the tension of the role of the office, which has always been this dilemma between are you the spokesperson for an administration and for the institution of the Presidency, versus are you independent of politics. And so, in fact, as you said, the beauty of it is this independence from politics.

**Olson:** Yes, except that I always say the Solicitor General works for the Attorney General. You are a subordinate in the Justice Department and he is the head of the Justice Department, and we both work directly for the President. The chief law enforcement officer of the executive branch is mentioned in Article II, which is the President of the United States, so I never felt that I was independent of the President or the Attorney General. What the Attorney General recognized, and I think the White House did too, there's only one instance, and I suppose you'll get to it, where the White House wanted to specifically have an input on what we were saying in a Supreme Court case.

By and large, the President and the Attorney General, if they're wise, will let the Solicitor General make those decisions and take those positions and so on and so forth, because every time the White House or the Solicitor General, and I'm overgeneralizing, gets involved in things like that—there are no secrets in Washington. It comes out and then it becomes a political embarrassment and something that you wish for them that they would never do, stay out of it. In the one instance—I might as well get to that—were the affirmative action cases.

**Perry:** That was our next topic.

**Olson:** It's in your briefing materials I think too. The President and the counsel to the President, Mr. Gonzales, Judge Gonzales, felt that we shouldn't take the position in the affirmative action cases that I felt that we ought to take, which was that diversity was not a compelling governmental interest. It may be in a remedial sense, that certain decrees would have to be ordered to remedy past acts of discrimination, but looking forward—and I'm oversimplifying—I did not feel that we could defend a position that said diversity itself was a compelling government interest, which is the first part of the "strict scrutiny" standard.

The White House, the President, I will say, as I understand it, felt that he didn't want us to go that far, that he, because of his experiences and personal views, felt that it was important to have diversity. I didn't disagree it was important to have diversity, but I didn't think that was part of a justification for discriminating on the basis of race, using race as a selection process.

So there were lots of discussions back and forth, and the Attorney General agreed, had the same view I did, and I think it's fair to say that the Vice President did too. At the end of the day I was told that the President felt that it was important that we not take that position that I wanted to take in those cases, and so I had to decide, *Okay, now what do I do?* And I felt that it was not inconsistent with my own conscience to take the position in court where we're not taking a

position on diversity as a compelling governmental interest; we're taking a position that these programs are not narrowly tailored to accomplish that objective, and that that was perfectly—

**Perry:** These programs—that is, those programs at issue at the University of Michigan.

**Olson:** Yes.

**Perry:** The affirmative action programs and the law school and the undergraduate college.

**Olson:** Right, correct. That those two particular programs were not narrowly tailored to accomplish the interest of diversity, that they were too broad. They were overinclusive, underinclusive, and all of the things that I think turned out into our briefs. And I decided that as Solicitor General, that that was the right of the President to make that decision. He wasn't asking me to make an argument that I thought was unconstitutional or that was inconsistent with statute so it was intellectually dishonest. I thought that was going to be difficult to win and I thought that it was, from a tactical standpoint, very important to stand up and take the position, the tough position, especially with respect to Justice O'Connor, and if we weren't going to take that position, how would we expect her to take that position.

But anyway, I thought that was within the President's prerogative, and it was not an impairment of my integrity as Solicitor General to do that, so that's what we did.

**Perry:** And you mentioned the input from what you thought the Attorney General thought and the Vice President. Were you in meetings with them, or you were getting memos from their office?

**Olson:** There were some meetings. I don't recall memos; there may have been memos. I didn't write memos, I didn't have time to write memos, so I don't remember. We got lots of memos when we were dealing with appeal recommendations. We got memos and memos and memos. But I don't remember memos on that subject. I do recall that from our perspective in the Justice Department it was the Deputy Attorney General. I know it was the Deputy Attorney General because that was Larry Thompson. He agreed.

**Wilson:** Yes.

**Olson:** And who was the head of the civil rights division?

**Perry:** That I don't recall.

**Olson:** I'm drawing a blank, but the head of the civil rights division also agreed. So we were of one mind in the Justice Department, but the President, he's the one that gets elected by the people. He had the right, in my judgment, to take that position, and he felt strongly about it.

**Perry:** I know we want to spend some time on the actual affirmative action cases, but just a process question—when the Solicitor General has briefs, or has opinions going forward in the Court, what's the level of review in the department? Do you go through the Deputy Attorney General and then the Attorney General? Do they review your briefs?

**Olson:** Not mine. The Attorney General didn't want to. If he had wanted to, we would have to figure out a way mechanically to deal with that. It would have been very difficult to do. Neither the Deputy Attorney General nor the Attorney General wanted to. They had no interest in doing it. They felt that we could do it as well as they could do it, so it just didn't happen. Had they wanted to, it would have been very difficult from a standpoint of logistics because those briefs—there are lots and lots of briefs, and they must get filed. We kept tinkering with those briefs.

Some of the people in that office are real perfectionists, God bless them, and so we didn't sign off on briefs. I basically as Solicitor General would look at briefs as often as I could, and review them at a high level. My predecessor, Seth Waxman, and Drew Days, got very involved in the actual words and sentences and footnotes and stuff like that. I didn't feel that I had time to do that, and I felt that I had very competent people. I had some stylistic things that I wanted done, and if there were statements of overarching principle, I would sometimes tinker with the introduction and those preliminary statements and stuff like that, but basically, I wouldn't have the time to do the briefs. There was no process outside the SG's office for our briefs.

**Wilson:** Just on the example you used about the discussion within the administration on whether diversity should be a compelling state interest the government should argue. Would you mediate that discussion through a draft, or would it be in the abstract?

**Olson:** In that case, and that was the only one I can recall, it was both. My memory is potentially imperfect on this, but my memory is that we wrote a draft expressing, as well as we could, what my point of view and Paul's point of view would be, as I've articulated with respect to diversity as a compelling governmental interest. I think we tried to write a brief that was coherent on the narrower grounds, and I think that wound up being the brief that we filed. Whether it was coherent or not I still would dispute a little bit. But yes, I think in that case there was some exchange of, "Let's see how this looks" kind of thing, and maybe an effort to persuade a little bit, but that's the only time I remember that.

There were other times when I would check with the White House. There was one time I recall specifically when we had to make a decision with respect to some federal communications policy. So there was input from the FCC, but I wanted input from the administration too, because it was a matter of what policy were we going to take, because the statute or the question presented admitted to more than one approach. I wanted to know what the White House's position was on that issue, and I can't remember what the issue was as a policy matter. International relations or something like that, but I think it had to do with federal communications. And if there was any international issue, I probably would have wanted someone from the State Department to weigh in.

We would normally get, as a result of the process, inputs from everybody who we thought conceivably would have a point of view. But sometimes we weren't getting something and I'd reach out or Paul would reach out or somebody would reach out and make sure we hear from the White House or from the Commerce Department or whatever, about something. But then basically, it was a SG product.

**Perry:** Could I drill down just briefly on the politics going on in the White House, back to the affirmative action cases. You know the people in the White House who are pushing you in a



direction that at first you don't want to go in. Are you thinking in terms of not only that they are more interested in upholding diversity, but also, they are interested in promoting the Hispanic vote for the Republican ticket in 2004?

**Olson:** I didn't get that impression, and I think it wasn't just the President. I think it was the President and Gonzales. They had had experience in Texas and at the University of Texas with respect to diversity. I had been on the other side of that issue in [*Cheryl J.*] *Hopwood v. Texas*. As I remember it now—I'd forgotten until just now—I think Condoleezza Rice weighed in. She'd been a provost at Stanford and she had views about diversity. And I think somehow Colin Powell expressed his view in some fashion. I don't think it had anything to do with politics. I think it had to do with what they thought was right in terms of this country in education and diversity for the sake of the benefits that it brings.

**Wilson:** Do you think that's a legitimate factor to take into account in developing a legal position?

**Olson:** It certainly is with respect to a constitutional question, and especially in that context. The context was the two programs from the University of Michigan, were they constitutional? They were each devised by the same board of regents or through the same board of regents, but they were significantly different, as the Court ultimately found, and you could easily make the argument that whatever you thought about diversity, those programs would have to be set aside because they weren't narrowly tailored.

We had it earlier in the administration, in a case called *Adarand* [*Adarand Constructors, Inc. v. Peña*], which had come to the Court about three times. I think it was the second argument I made, and I wound up making an argument that really hadn't been done too much in the briefs. There was an issue of ripeness and standing, or whether the issue hadn't been sufficiently raised below in the tenth circuit, or wherever that was coming from. We wound up winning that case, which upheld the program below, but not on the substantive grounds. I guess I'm digressing, but I do think that something like that is certainly appropriate on a constitutional question, what is permissible under the equal protection clause. Is diversity something that is important? You can differ on that as an advocate and you can differ on that as a Justice, but as President I think you're entitled to have views on that.

**Perry:** Could you talk a little bit—

**Olson:** And they have those views—I'm sorry for interrupting.

**Perry:** That's all right.

**Olson:** —have those views presented to the Supreme Court. I think it's probably true on things like abortion or prayer also.

**Perry:** Just talk a little bit about the [Barbara] *Grutter* and [Jennifer] *Gratz* oral arguments and particularly about Justice O'Connor, and gearing perhaps what you were saying toward her or how to deal with her in the oral argument.

**Olson:** I don't think that we tailored the argument to her particularly. I'll tell you this. Justice

O'Connor was typically the first question out of the box from the Supreme Court, and she's a very pragmatic person. She wanted to know how things would work. She did this in *Bush v. Gore* too. She asked, "What should the rule be?" She asked that of both me and David Boies, and David had trouble giving her an answer, which I didn't think helped him. She had been a legislator and she had been an intermediate appellate judge and so forth, and that's the way she is. So we prepared for each of the Justices.

One of the things that I do—I forgot to mention it before—about preparing. I have someone who works for me prepare a Justice-by-Justice analysis, so that the issues in the case—I want someone on the team, usually with my case it's always someone younger, to figure out for me which of the Justices are most likely to be on our side, or least likely to be on our side, and then write an analysis as to how each will vote and why, and what you see in their precedents and their history and so on and so forth that will cause you to come to that conclusion, and then predict the outcome of the case. We'll buy you dinner if it's right. [laughter] I've done this in every case I think I've ever argued in the Supreme Court.

I want a specific analysis so that when I hear a question from a Justice I know where that Justice is coming from and I can anticipate the kinds of questions. I would have done that for every Justice. I wish I had kept all those memos. I may have some of them, but I haven't kept them all. But she certainly would have been someone we would have been very cognizant of in answering questions. I can't recall specifically how it played out.

**Perry:** Let's come then to the decisions. Did you feel that the split decision, as it was—that they upheld the affirmative action policy for the law school, in *Grutter*, but not for the undergraduate program, in *Gratz*—did you feel like even though it was a split decision, that might have been about the best that you could hope for, given O'Connor's position?

**Olson:** Not the way I think about it.

**Perry:** You wanted to win both.

**Olson:** Yes. I always thought that we can and will and we should win both votes. I thought that the fact that there were something like seven different opinions in that case and it covers 160–70 pages—I haven't done this count recently—and that it is, at the end of the day, very, very subjective. Those of you in the academic world would know more than I, but I've been told that if you want to have a certain outcome you can get it, under the rationale articulated in *Grutter*, and I've been told that by people who administer admissions programs in schools. In California it's against the law. They put it in the Constitution that you can't discriminate on the basis of race, and I've basically been told, "Well, don't worry about that. We can get what we want to get." And they do, if you have been sufficiently subjective and you know what you want the outcome to be. There are lots of things that can be surrogates for race.

So yes, I was a little disappointed, and I think that one of the things that I've said is that if you are on a school board someplace and you want to know whether what you're about to do is constitutional or not, if the Supreme Court—and if you add the Louisville and Seattle cases and count up the number of opinions and count up the number of pages, and then you are on a school board and you're responsible for making these decisions and what's constitutional and what's

not. If you can figure that out—it's impossible.

**Abraham:** Do you think of your college days, and that you took Philosophy I?

**Olson:** Pardon?

**Abraham:** Major issues in Philosophy I were rationalization, so if you do that, that's where they go. That case is replete with that.

**Olson:** Yes, and it will all be over in 25 years.

**Abraham:** Of course.

**Perry:** Or next year.

**Kassop:** From 2003.

**Olson:** We figured out that at worst you got the 25 years.

**Perry:** Where?

**Olson:** It was exactly 25 years between *[Allen] Bakke*, and *Grutter* and *Gratz*. I would have to go back, but that's my memory.

**Perry:** Seventy-eight to '03, yes, 25. Other issues that came before the SG's office, other cases that you argued that you want to talk about or that come to mind?

**Olson:** No. I would just have you dozing off.

**Wilson:** You mentioned school prayer and abortion, so I just wanted to give you an opportunity to talk about that a little bit.

**Olson:** We didn't have an abortion case. The closest we came to establishment clause was that tuition tax credit case out of Ohio.

**Perry:** That was *[Susan Tave] Zelman v. [Doris] Simmons-Harris*.

**Olson:** Yes. And then we had the Pledge of Allegiance case, but that went out on standing.

**Kassop:** What about the executive privilege cases, for example, with Vice President Cheney?

**Olson:** I was asked early on to personally take on that case, because that came up early. It was the energy taskforce or something like that.

**Kassop:** Correct.

**Olson:** And everybody wanted to know who went and what they said and where their notes are and so forth. I was asked personally to pay attention to that case all the way through, and I said this to the Vice President. "Well, okay, you already know my reputation because I went to this

independent counsel thing over executive privilege and I don't want to get involved in this if we're going to go three-fourths of the way into it and then cave in. So I'm not your man on this. We're going to take it all the way." They said, "We understand. That's what we want you for." So we took it all the way. It turned out to be not that hard the way the case finally got structured.

**Kassop:** But it was two separate litigants as well. It was the GAO [General Accounting Office] and then the private group.

**Olson:** Yes. I can't remember the specifics of how it worked out. I know Alan Morrison from Public Citizen—

**Kassop:** Comptroller General, not the GAO.

**Olson:** Yes. I do remember Alan Morrison argued that case, and I had known Alan for a long time. Alan, somewhere during the course of that case, filed the motion to recuse the Vice President because of the hunting trip and so forth. I don't have much more to say about that. That wasn't the hardest case in the world, and I think most executives would say we're entitled to meet with people as long as it's not a violation of the Federal Advisory Committee Act.

**Wilson:** FACA.

**Olson:** FACA. We didn't think it was and no one thought that it was, I think.

**Perry:** How about Internet regulations?

**Olson:** The pornography cases?

**Perry:** Yes. Pornography is not new, but Internet issues are, and how did you deal with that?

**Olson:** We defended the acts of Congress. It came up three times. Child Online Protection Act was one of them, then one of them had to do with libraries. Did I argue all three of those cases? We won the library case and I thought we won the first online case, or maybe it just got sent back to the third circuit or something like that.

**Perry:** I think that's right.

**Olson:** I think we lost the second one. It's almost impossible to win. I do remember this about that, that the material that children can get to online is really awful stuff, and I didn't really know how bad it was. I was reading the briefs and I was looking at the record and so forth, and I thought, *I need to know what this is and I need to know the ways in which you can get past the filters*. But I did not want to do this at home and I did not want to do it on the Solicitor General's computer, so I went over to the criminal division and I went to the people who prosecute these things and I said, "I'm not going to be messing around on my own computer or the government's computer with child pornography." That's not a smart thing to do, it seems to me. "Show me what it's like out there. Show me what you're prosecuting. Show me what children can see." And it's really terrible stuff.

Then we went through the process of, if you typed in the words—I used this during the oral

argument. If you typed in the words “WhiteHouse.com” it was a porn site. If you typed in the words “freeporn.com” you got something like three million sites. And then if you wanted to circumvent the filter that maybe your parents had put on there, you typed in the words “avoid filter” or “evade filter” or “get around filter,” or something really simple like that, and eight systems would come on and it would show you how to get around those things. Any ten year-old could do that better than I could, certainly. This is not pertinent to anything except that we tried to get that point across in the Supreme Court.

**Perry:** But that raises an interesting point, and I’d like to have known what your colleague wrote in the memo about what he or she thought each individual Justice’s view of this was, or you could know what the Justice’s view was, or how he or she had voted on a pornography case, but I remember at the time there were issues of saying that the clerks were having to show some of the Justices what was out there or how children would get to it. Did you have to take that into consideration in your argument?

**Olson:** I think so. Yes. That’s why I used the example of “WhiteHouse.com.” I think it was WhiteHouse.com.

**Perry:** It is. My students have told me that.

**Olson:** And then I wanted to explain how simple it was. All you have to do is type this in, go back and do it. I don’t know whether I said that, but I meant to. See for yourself, you know? But that’s a very difficult area of the First Amendment. God bless the First Amendment. I’m all for it. So those weren’t easy cases.

**Kassop:** If we’re talking about First Amendment, I guess we could then move on to *[Mitch] McConnell v. FEC [Federal Election Commission]*, which of course you’ve been on both sides of as well. It’s fascinating. I was thinking before, you were on both sides of affirmative action, one as a private lawyer and then one as a government lawyer. You’ve been on both sides of the McCain-Feingold.

**Olson:** Well, I was on the same side on affirmative action. In the Hopwood case I was representing the white students.

**Perry:** Okay, I see.

**Olson:** And I had a case called *[Harold] Rice v. [Benjamin] Cayetano* where I was representing a rancher in Hawaii who thought he was a native Hawaiian because he was a fifth-generation Hawaiian, and he didn’t qualify as a native Hawaiian. So I was on the same side on the affirmative action. You’re right about the campaign finance.

**Kassop:** So perhaps just tell us a little bit about—well, as you said, in your confirmation hearings you were asked by both Senators Feingold and McCain whether you would defend the act, and then of course McConnell has been a long-known opponent of campaign finance regulations. But here you found yourself now actually facing that.

**Olson:** We felt that we could, Paul and I—it was a four-hour argument, nothing like this week, but it was the longest one they had had for a while. Paul and I, and then I think we had—oh, Seth

Waxman came in before Common Cause, I think, so he had a piece of the argument. But we felt that it was extremely important to Congress and to the system that we do everything we possibly could to defend the constitutionality of those provisions. The Congress had worked on it long and hard. Senator Feingold and Senator McCain were both sitting in the front row of the audience that day and I went over and said hello to them, and they were actually quite complimentary of the work that we had done in the briefs, and then after the argument. I won't tell you what Senator McCain told me after Citizens United. He's *very* not happy with me.

**Perry:** Senator McConnell and the House?

**Olson:** They are now a little happier with me.

**Perry:** But was he at that?

**Olson:** He was there, yes, he was there.

**Kassop:** But can I ask you—also it sounded as if even though you were defending it because it was an Act of Congress and that's what your job was, was it personally your opinion?

**Olson:** My personal opinion, really honest to God, it's hard for people to believe, did not matter. I wasn't acting as a legislator and I wasn't acting as a Justice. I was acting as an advocate, to put the best case before the Court and to use the precedents in the best way possible. I didn't have the slightest problem doing that. If you've been an advocate your whole life the way I have, you want to win the case, doing it the right way and everything else, but we really worked hard to try to put that case in the best perspective. The district court decision, which was a three-judge district court; two district judges and a circuit judge. It was like fifteen-, sixteen-hundred pages long. It's a full volume in the federal reports. The record was just monstrous. There were four different titles to it and there's this provision and that provision and so on and so forth.

Paul did an absolutely fabulous job. He's a wonderful lawyer. And then I took the Title 1 and he took Title 2. I think that's how it worked out, and we felt that we had to get Justice O'Connor. I thought we even had a chance with Chief Justice Rehnquist, because of the corporation thing. He had never been very sympathetic to the rights of corporations. We didn't get him. But it was complicated because the—[*James L.*] *Buckley v. [Frances R.] Valeo* is a mess, and then there were intervening decisions that were crazy, and then this *Austin [Austin v. Michigan Chamber of Commerce]* case, the corporation case from Michigan, was written by Justice Marshall. It's basically incoherent internally, because he talks about two or three different rationales, none of which are really the rationale. But it was a precedent and so we played that for all it was worth and we won. So when Citizens United came along, we really frontally attacked that *Austin* decision.

One of the rationales in there was this so-called "equalizing rationale," that you don't want people with too much money to have too much influence. We made the argument, I think, that if you're an incumbent that's extra points you get going into an election. If your name is Kennedy, that's extra points. If you are really good-looking and articulate and give great speeches, that's extra points. That's Ronald Reagan, I guess.

**Perry:** It's like the University of Michigan affirmative action plan.

**Olson:** But the First Amendment doesn't tolerate the government deciding to handicap election things and to say someone is really good, we're going to give this other person an advantage, and it's like the Kentucky Derby. When we got around to that, the government was not willing to defend it on that basis, so they couldn't take that position and they got stuck on this corruption provision, which didn't work on the expenditure side of the equation, so it came out the other way.

But I think we worked very hard to defend every Act of Congress that we had an obligation to or an opportunity to defend. I think the only one we didn't succeed on, aside from the terrorism cases, which weren't so much Act of Congress, was the child online protection case. Maybe there were others.

**Abraham:** There were 28 opinions in *Buckley v. Valeo*, and I finally stopped teaching it.

**Perry:** I conveniently put it at the end of my syllabus and we'd run out of time at the end of every semester. So sorry. Other questions about the SG period?

**Kassop:** I don't think so.

**Perry:** We're coming toward the end of our time. Tell us about your decision to leave the SG's position.

**Olson:** Well, I had done it for three years. I had worked my way all the way up to 63 years old or going on 64 years old, and I decided that it was time to get back to the practice of law.

**Abraham:** Young, he says. I was young.

**Olson:** I think that particularly now. I wanted to restore the bank account and so forth. It was a great, exhilarating period, but it was a tough period because of the way it started, with September 11 and that sort of thing. I was a little disappointed with the way the terrorism cases came out and the way that all worked out. I also thought that people tend to stay in these positions, especially if they're really terrific positions, like the Solicitor General's office, and I hoped that Paul would have a chance to do that. So there was sort of an accumulation of things. You don't want a Solicitor General—or you don't want to—unless it's a Presidential election—you don't want to leave in the middle of the term, because it's awkward for the Court to have to deal with the transition. The Court likes consistency, and so it was either leave at the end of that term or wait for another full year. All of those things came together, and I thought it was the right time to go.

**Perry:** Other questions about that? Tell us, as you look back, about the two terms of the Bush administration, particularly the term in which you served. What are your thoughts from 2012, looking backward, about what happened in the administration, the legacy of the administration? How should we remember George W. Bush, his Presidency?

**Olson:** I had great admiration for George W. Bush. He knew what he stood for. He made it clear what he stood for. I think he could have done some things differently. And I think President [Barack] Obama is a little bit guilty of the same thing, of not getting enough diverse people around him, just to have different views expressed. I don't know much about Obama, but he's

been accused of that a little bit, or that's been a mark against him, contrary to Bill Clinton, who seemed to want to hear from everybody on every subject, God bless him.

But George W. Bush, after 9-11, I think was focused on *This is not going to happen again*. He told John Ashcroft, "Don't ever let this happen again." I think that he believed that his fundamental, the number one responsibility to the American people—he didn't tell me this, I'm not saying anything involving conversations with him or anything—was to keep the American people protected from terrorism, something that we had never seen. Pearl Harbor wasn't terrorism, it was an act of war by another nation. This was something completely different and something that was very scary, because it took 19 people to do that kind of damage with a budget of a few thousand dollars. This is not building an atomic bomb. This is very scary. If it can happen like it did on September 11, it can happen awfully easily. He was very steadfast in that, and I think that in that respect he gets very high marks.

I guess as Solicitor General I can't imagine that his appointments to the Supreme Court could have been better. John Roberts, in my opinion, was the finest person in America to be Chief Justice, and may turn out to be one of the great Chief Justices. I've asked his colleagues on the Court, Justice Ginsburg for example—I will take this out because I wouldn't want to quote her, but I asked her and she said he's going to be one of the great Chief Justices.

He's exceedingly well liked by his colleagues. Chief Justice Rehnquist was too. Chief Justice [Warren] Burger, as you probably know, wasn't so much. But the respect that he has from his colleagues is amazing. I was there the first day he took the bench. I had the second argument that day. We've only had 17 Chief Justices in history—44 Presidents, 17 Chief Justices, so it's really quite a thing to be Chief Justice of the United States, and he seemed like he entered the water like one of those Olympic divers, with no splash. He looked like he belonged as Chief Justice, he was marvelous right from the get-go.

I have great respect for Sam Alito too. They were both in the department when I was there, in the Reagan administration. Sam Alito was in the SG's office, his wife worked in the library. John Roberts was Special Assistant to Bill Smith. So I think those appointments have been very good, and other appointments to the other courts, as far as I know, they've been very good. Other things. I'm not a politician, so I'm not going to get into budgets and spending money and stuff like that, but I think he has been a very good President.

**Perry:** Well, that's very helpful, to hear your thoughts about his legacy to the judiciary, which obviously you know best.

**Wilson:** Do you think that diversity of any stripe has a role on the Supreme Court itself?

**Olson:** I think it's great to have people of different backgrounds on the Supreme Court, but what do you mean by diversity? Let me ask you this question this way, because it's a trick. Are six people from Harvard Law School and three from Yale diverse? Are six Catholics diversity? Are nine people from the northeastern part of the United States diversity?

**Abraham:** Four people from New York City.

**Olson:** Four boroughs of New York City: Brooklyn, Queens, Manhattan, and the Bronx, and



we're still waiting for Staten Island. I know that John Roberts grew up in Indiana, but he went to Harvard Law School. Justices Breyer and Kennedy grew up in California and they went to Harvard Law School. So in that sense we don't have much diversity, but racial diversity, it's a good thing to have. It would be good to have Hispanic. We have nine Justices on the Supreme Court, so at some point what diversity matters and what diversity doesn't matter. So I could go on and on about that. Yes, I think it's healthy from the standpoint of what people perceive, because it's important that the Supreme Court be perceived as an institution that people have respect for. Justice Breyer's latest book about democracy, what's his latest book?

**Perry:** Democracy and something or other.

**Abraham:** I don't know the title of it.

**Perry:** *Active Liberty*.

**Olson:** *Active Liberty*, is that the last one, or was that the one before? But anyway, he talks in his speeches about the Supreme Court, sometimes getting it wrong, terribly wrong. Dred Scott, *Plessy v. Ferguson*, [Fred Toyosaburo] *Korematsu v. United States*. And he said there have been unpopular decisions, and he even mentions *Bush v. Gore*. But he says that at the end of the day, the Court gets it right usually, and it's extremely important for the American people to have respect for the institution, for the Justices, and for the process and so forth. So all of those things I think are important to the Court.

**Wilson:** Both Presidential candidates Reagan and [Jimmy] Carter ran for President making a promise to appoint the first woman to the Supreme Court, and then ultimately, President Reagan got the opportunity. Knowing what you know about the Court and Justice O'Connor's opinions, do you think her gender made a difference to the outcome of, for example, equal protection cases or abortion cases, Planned Parenthood?

**Olson:** I have no idea. I don't think so, but I don't know. I don't think the fact that she's a woman made a difference as to abortion cases any more than Justice Stevens or Justice Souter, who came out on the same side on those abortion cases. But what do I know? They all say that their life experiences and anybody's life experiences are going to have an impact on how they see things. Your life is the cumulative effects of all these experiences, and I'm sure gender is part of it, or race or ethnicity or religion or all of those things have an effect upon how you see things and how you decide things. But who's to say that gender is more important than geography or race or religion, or something like that? It's pretty hard to say. So I don't know.

I do think from the standpoint of perspective of the American people it's probably pretty darn important, as Justice Ginsburg and O'Connor have both said about having women on the Court, so that when people look at the Court, they see that. It's made a lot of difference to Justice Ginsburg. She said that she's not alone. She missed Justice O'Connor when she left and she said that it's very important for her to know that there are other women on the Court.

I think it's interesting now that we have—unfortunately, it was probably healthy that we had Republicans who were voting as liberals. We didn't have a lot of Democrats voting as conservatives, because Democratic Presidents are better at this than Republican Presidents. But I think it will be bad, not good, if this decision on affordable care, or whatever the name is, comes

out 5-4, and it's all Republicans and all Democrats, because now, for the first time in a long time, all the people that are perceived to be on the conservative side are Republican appointees, and all of the people perceived to be on the liberal side are all Democrats. You know every newspaper is going to say all the Republicans voted this way and all the Democrats voted that way. I don't think that's a fact that will go unnoticed by the Justices, or some of them, when they vote on this thing this afternoon.

**Perry:** That's Henry's point.

**Abraham:** Well, we'll have to see. It's unfortunate perhaps, but we're interpreting the Constitution and the law, and on the issue of diversity I'm all for it. I've been affected by discrimination because of minority membership. It isn't such a long distance between discrimination and how diversity is shaping up, especially in the academy. I can see it. We have a vice president for diversity now who has 20 people who are working for him at the University of Virginia. That's a real problem. I don't know how you draw the line. We can go back to Abbott Lawrence Lowell, the Harvard President who decided in 1916 there were too darn many Jews at Harvard. He said, "I could fill Harvard all with Jews because they like education and they're damn smart." That's a big problem, of course, you know.

I asked my class of adults not so long ago, I said, "I have two questions for you. Number one question, How many Protestants are on the Court?" There was a long silence, back from the back row came, "zilch." And I said, "Well, you have a 92, but that's not a good answer." The second question was, "Have you noticed that the three women have all voted together in almost every case? Is that because of gender reasons or is it for different reasons?" They iced that one. They felt ideology, of course. But the issue of affirmative action has been something that has really bothered me and has been a major issue in my own philosophical bent. I think there are many dangers inherent in this in terms of the road it has taken. I see it a lot at the University, especially in the law schools too, and it has affected teaching in some areas, which is very serious.

On the other hand, the country has a record of discrimination, certainly in gender areas, and also in religion areas. I don't know what we can do about it. There's been a lot of progress, but I think we're going over the brink in some instances, and whether that can be reconstituted, I don't know. It does bother me.

**Olson:** They've been worried out in California that too many Asians are going to the University of California.

**Perry:** Yes, the same thing.

**Olson:** It's what you said before. They're very smart, they're dedicated, they have families that insist on discipline and grades and education, and so on and so forth. So there's been discrimination against Asians in this business about diversity. I think you and I probably agree on this.

**Abraham:** Well, the President is certainly alive to it. The latest statistics are that 30 percent of the most recent federal judicial appointees, have been black, 10 percent Asian American, 10 percent Latinos, and 50 percent otherwise. My best students over a period of six decades of teaching were Asian Americans, and second were the Mormons, young married Mormons with

children. They didn't believe in premarital intercourse, so they got married, and they were excellent students and they had families. It was very interesting of course.

**Olson:** This case that I had for the native Hawaiian, they have the land set aside.

**Perry:** *Rice v. Cayetano*.

**Olson:** Yes. They had land set aside for native Hawaiians, and they had a public body for which you could vote who would administer the land and give the gifts and so on and so forth, and you had to be a native Hawaiian to vote. A native Hawaiian was someone who could trace their ancestor to the arrival of [James] Cook, 1785 or '89, I guess it was. So we won that ground on the Fifteenth Amendment, although we could have won it on the Fourteenth Amendment.

The voting thing was the thing that won it, but it was pure racial discrimination and my client was a rancher on the big island, and he was adamant about it. His ancestors had come to Hawaii in the 1840s and he was a fifth-generation Hawaiian, but he was not permitted to call himself a native Hawaiian, and he could not vote in this thing. He was just furious about it, because he said, "I can vote as well as they can and I am a native Hawaiian," and so on and so forth. He wound up taking it all the way to the Supreme Court.

**Perry:** Well, on that note, you had mentioned to us earlier today that we should continue learning, and I think we can all agree here today that we have learned so much from you, and so will generations of scholars, lawyers, historians, political scientists, when they read these—

**Wilson:** And litigators.

**Perry:** And litigators, that's right.

**Olson:** Well, you're very nice. The project is something that's so exceedingly important. It's really great that it's being done, and so good for you for doing it.

**Perry:** Thank you so much for your time and your wisdom.

**Olson:** I'm happy to do it. I wish I had more time sooner.

**Perry:** Well, we're grateful for now and thank you for your service to our country as well.

**Kassop:** Absolutely.

**Wilson:** Thank you.

**Olson:** Thank you, I appreciate that.

**Abraham:** It was a privilege, really.

**Olson:** Thank you all.