

Oral History of Henry F. Schuelke, III
Fifth Interview
May 10, 2012

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Henry F. Schuelke, III, Esquire, and the interviewer is Louis R. Cohen, Esquire. The interview took place on May 10, 2012. This is the fifth interview.

MR. COHEN: We're beginning a session five of the oral history of Hank Schuelke. It's May 10, and we're starting about 2:20 p.m.

MR. SCHUELKE: So let me describe to you a rather interesting matter that I had in which I represented the Government of South Africa. I think my engagement began in 1995 at a time when Nelson Mandela was the President, Thabo Mbeki was the Deputy President, and Thabo Mbeki was my principal client contact on behalf of the South African Government, although for much of it I worked through the good offices of the South African Ambassador to the United States whose name was Franklin Sonn, SONN.

The matter originated when some seven or eight years before – that is in the late 1980s – the U.S. Attorney in Philadelphia returned an indictment of several U.S. businessmen who were in the arms business as well as two South African defense contractors wholly owned by the government of South Africa. One of them was called Denel, and the other one was Armscor, and they were the equivalent of a Boeing or a General Dynamics but owned by the government. They and the U.S. individual defendants were indicted for having violated the antiapartheid arms control regime in the United States. Now this was, I suppose, reasonably

sensible when the government of South Africa was the de Klerk apartheid government. When, of course Nelson Mandela was elected and he and the ANC were the controlling entities of the South African government they inherited Denel and Armscor which remained wholly owned by the government, it made very little sense in my view for the United States to maintain this prosecution because it would have required either that the government of South Africa default, or notwithstanding its sovereignty, enter an appearance in the courts of the United States to defend itself.

And so I was engaged

MR. COHEN: Excuse me, this was a prosecution that started in the apartheid era?

MR. SCHUELKE: Yes.

MR. COHEN: And it was a prosecution of these persons for dealing with the government of South Africa

MR. SCHUELKE: For shipping arms to the apartheid government of South Africa. And since they were shipping them through the intermediaries, these two wholly owned South African companies, they were indicted as well. So the case was on the one hand a criminal case albeit implicating issues of foreign sovereign immunity, depending on how one interpreted the sovereign immunity doctrine as it applied to government-owned entities which were commercial enterprises, which is a bit of a grey area. But it also had obvious political implications both for the United States and for the new government of South Africa. On the one hand, we, the United States, provided a great deal of economic support to the government of South

Africa and touted our relationship as that of allies. Nevertheless, the Justice Department was insisting that the South African government must accede to the jurisdiction of the courts of the United States if it wanted to resolve this problem.

And so while I was dealing with the Justice Department, the two governments were engaged in bilateral discussions between Vice President Al Gore and the Deputy President of South Africa, Thabo Mbeki, who represented their respective governments in this bilateral relationship. And I was of the view that we ought to – we, that is, the South African government – ought to move to dismiss the indictment on the basis of sovereign immunity, and I thought we had a strong argument and I thought that we would likely prevail before the District Court, and I thought that for political reasons the U.S. government was going to have a hard time litigating beyond that point in the Third Circuit with the Mandela government with us.

MR. COHEN: Just to get the situation straight in my mind, had the apartheid government had an opportunity to move to dismiss on the same ground before that government fell?

MR. SCHUELKE: They did. They did, but they took the position that they were simply not going to appear.

MR. COHEN: At all?

MR. SCHUELKE: Yeah. And I mean I felt reasonably confident that the District Court would permit us to make a limited appearance for purposes of litigating

our motion to dismiss and not exposing the government of South Africa to the court's ultimate jurisdiction. My client, however, simply did not have the stomach to take on the U.S. government. It's as simple as that, which I thought was a huge mistake. I don't think in the last analysis however vigorously we litigated the matter it would have done significant harm to the relationship between the two governments given the politics of the situation. But they were simply not willing to do that and so worked out an accommodation which was worked out at the Gore/Mbeki level and agreed to submit to the jurisdiction of the U.S. court, and they resolved it on what ultimately was a relatively insignificant financial basis.

But I will never forget I met with Vice President Gore, Mbeki, Franklin Sonn and a couple of other South African ambassador's representatives at the White House and Gore and his entourage kept them waiting for about two hours, and Gore strode into the room, walked up to Mbeki thrusting his hand toward him repeatedly saying, "Thabo, Thabo, do we have a deal." And Mbeki turned to me and invited me to raise an issue or two with Vice President Gore, and so I introduced myself. He knew full well who I was and what my role was. But he said, "Sir, I don't believe we've ever met, and who is it that you represent." And they basically struck this handshake deal whereupon Gore and his entourage turned on their backs and walked out, left Thabo Mbeki and the rest of the South African delegation to find their own way out of the White House. I

was appalled, embarrassed for my country's government and just thoroughly offended. But it was interesting, and I had

MR. COHEN: I had a similar personal encounter with Gore in the White House which I will tell you about off the record since this is about you and not about me.

MR. SCHUELKE: But I had a wonderful time. I made, I don't know, four or five trips to South Africa. I formed a close and lasting friendship with a South African lawyer whose name is Christo Stockenstrom who represented Denel and Armscor, and he's a former Special Forces officer in the South African Army who fought in Angola. And he and a bunch of his former colleagues are avid four-wheel-drive individually organized safari guys. And so I went over there for one of their safaris, and we took their four-wheel-drive vehicles, about ten of them, into Mozambique and camped on the beaches in Mozambique for about a week which was just great. And I want to tell you that is – the Mozambiquean coast of the Indian Ocean is absolutely beautiful. And while the country inland is among the poorest in the world and still when you drive from the South African border up to Maputo, the capital of Mozambique, the road which is a little two-lane black topped road is still littered with burned out hulks of armored personnel carriers and tanks and what not the place is a mess. But the beaches are spectacular, and you cross these massive very beautiful dunes onto the beach anywhere along the coast, and you're like on a desert island, there's not a soul there. It's completely pristine, remarkable. So it was great fun personally as a result of that.

MR. COHEN: That was beautiful. Back on the legal question – the sovereign immunity question – I’m surprised that the United States was resisting a claim of sovereign immunity when this sounds like the kind of issue where the United States would be, would go to great lengths to protect its own sovereign immunity or the sovereign immunity of its instrumentalities.

MR. SCHUELKE: Of course.

MR. COHEN: Or the sovereign immunity of, say, to take a country at random, Israel’s instrumentalities.

MR. SCHUELKE: Of course, of course it made no sense, and the Justice Department just had its heels dug in. And while this was completely and transparently false, the White House, which was intimately engaged as I’ve told you in this matter and its ultimate resolution, took the position, oh, this was a matter for the Justice Department; we in the White House can’t tell the Justice Department what to do, which was bizarre. But, yeah, I agree with you. For the U.S. to take that position, it had the potential to expose itself to similar claims elsewhere. You know, it’s the same argument that’s made about the use of torture in the course of interrogating terrorist detainees, you know. Putting aside whether or not it’s effective and putting aside whether or not it’s legally and morally acceptable, if we engage in these practices, we put our own people upon their capture at risk of the same.

MR. COHEN: Sure.

MR. SCHUELKE: So the principle was similar. Never made any sense whatsoever to me, and I – I wish to this day that I’d had the authority from the South African

government to litigate with them because I think (a) I think we would have prevailed on the merits, and (b) I don't think that the U.S. government would have had the temerity to pursue this beyond the District Court.

MR. COHEN: Go back to the U.S. connection with the arms trafficking in the first place. Are these, is this stuff that's being manufactured in the United States and sold to these South African

MR. SCHUELKE: Some of it was. Some of it was. Some of it was acquired abroad by U.S. persons and transshipped to South Africa which was the end user. And while this aspect of the case was never of any great significance to me and to my client, as is true in most of those cases, there was evidence of false end user certificates. They claimed it was going somewhere other than South Africa when in fact it went to South Africa.

MR. COHEN: Well, you can understand why the – maybe understand why the Justice Department wanted to continue the prosecution of people who had broken U.S. law.

MR. SCHUELKE: Oh, to be sure, to be sure, to be sure. And it made sense on the fundamental criminal law principles of conspiracy and aiding and abetting to have indicted Armscor and Denel when they were owned by the apartheid government of South Africa. It made no sense to continue that prosecution when they were instrumentalities of Mandela's government.

MR. COHEN: Okay.

MR. SCHUELKE: But interesting.

MR. COHEN: Well, let's jump to the list of topics that we had agreed on and take them up on chronological order.

MR. SCHUELKE: Okay.

MR. COHEN: Starting with your role as general counsel for the Autism Society from 1980 to 1990.

MR. SCHUELKE: Right, and this is one of those things that sort of came about as happenstance. My firm had an accountant who had done our firm's books for a number of years who happened to have had an autistic son, and he became interested in and active in the Autism Society which is basically an organization composed of the parents of autistic children and it's both a lobbying organization – sort of not dissimilar from a trade association and it's also or at least was then a kind of clearinghouse for parents of autistic children to learn about available treatment modalities about which there was a tremendous amount of dispute and discord.

And our then accountant whose name is Roger Heymann asked me if I would represent the Society with respect to a particular matter then in litigation which I agreed to do on a *pro bono* basis, and that matter was successfully resolved. And then the board of the Society engaged me to serve as its general counsel, a position new to the organization and I did that for the best part of ten years. I thought it was worthy *pro bono* activity, although if I remember correctly they did pay my expenses incurred on various matters. But it was very, very difficult because the

principal energizing issue for all of them were these competing treatment modalities.

There was a school of thought supported by substantial academics and practitioners that for the kids with severe autism – these are the kids who bang their heads against the wall and tear their hair out and that sort of thing – that the only effective treatment was what they call aversive treatment which means punishment. It's sort of like if you're trying to train a puppy with basic obedience training. Some people think that because dogs ultimately want to please you, the way to train them effectively is through a system of rewards, not punishment. So when the dog doesn't do what you tell it to do, you don't smack him across the top of the head. Well, not so with the so-called aversive treatment techniques for these autistic kids. They would put them in restraints like straightjackets basically, or they would confine them to a crib that was more like a cage. And if they ceased some of their self-destructive behavior, they would give them a little reprieve by way of a reward.

And, of course, these poor parents who did not have the expertise and who were desperate to come up with some effective treatment despite the pain and the heartache that observing some of this aversive treatment occasioned, believed that they had no other choice. And then there were schools of thought that this was inhumane, this was barbaric, and there were practitioners and academics on the other side of the argument who thought this was terrible, and this ended up with these raging disputes

within the organization which were difficult, if not impossible, for one such as I as kind of a nonparent outsider to mediate.

MR. COHEN: Did you try? Was that part of ...

MR. SCHUELKE: Oh yeah, oh yeah, I tried. But it was like – in some respects, it was like high school student government. You know you had these warring factions within the organization animated by these raw emotions over the conditions of their children. So it was sort of a combination of high school student politics on the one hand and the anger and emotion that one sees in domestic relations court, you know, with spouses fighting over divorce and child custody and what not, and it was very, very difficult. They eventually had a change in the organization. They got some professional managers in to run the organization. They broadened their mandate to include various forms of disabilities in addition to the standard DSM definition of autism which of course has changed radically over the years, and that provided to me an opportunity to conclude that I had done my part.

MR. COHEN: Were the disputes based on different conceptions of the source of autism? I mean in 1980 we had much less understanding of a lot of genetic matters than we do now.

MR. SCHUELKE: Well, I think there was always even in 1980 a debate as to whether or not autism had genetics as a root cause or whether there were environmental factors, sort of like the nature/nurturing debate. I think there was a lot less information available then, although I recently had occasion to listen to a

program on PBS about a week or ten days ago, and that debate continues unabated and I don't know that there's any real consensus. And it becomes more and more difficult in some respects because one reads that the number of autism diagnoses has skyrocketed in the last ten years. Whether that is the function of greater detection or a broadening of definition is the subject of considerable debate. I think it's probably the latter. And so now you have included in the professional, that is, the psychiatric diagnostic category forms of autism which are far less severe than most of what we were dealing with back in the 1980s.

MR. COHEN: One hears the term autism spectrum.

MR. SCHUELKE: Yes, yes, yes, and the spectrum has broadened considerably.

MR. COHEN: As it happens, just last night I went to the gala for the Levine School of Music, and one of the things they described was a new music therapy program at the school with a trained therapist. And there was some film, some heartwarming film actually, although I'm sure heartbreaking for the parents, of her working with a couple of autistic or autism spectrum kids and reaching them with musical activities.

MR. SCHUELKE: Hmmmm. It's interesting. A lot of those kids are what they refer to as idiot savant. There were kids and I saw some of them who were let's say five or six years old who were totally non-communicative but who could sit at a piano and play whatever they heard. No training, no sheet music, hear it, play it, and I don't think that that ability or putting that ability into practice was at all effective in terms of treating the underlying disorder. It

was just sort of part of the disorder. It's like *Rain Man*. You remember Dustin Hoffman?

MR. COHEN: Yes, yes. How did the debates about treatment play out – were they simply internal debates among people who got together in the Autism Society, or did they affect the Society's programs?

MR. SCHUELKE: Well, they started out with these internal debates. But the debate ultimately turned on whether or not the Society was going to lend its support and its imprimatur, if you will, to a one or the other of these forms of treatment, and that's where the fights occurred.

MR. COHEN: Was the Society involved in issues about mainstreaming kids, putting them in regular school for education?

MR. SCHUELKE: Yes, yes, and this was well before there was state and federal funding for Special Ed in the public schools. So for most of these families, that really wasn't an option. And there were some apparently very good private schools who were dedicated entirely to teaching these disabled kids, but they were enormously expensive and prohibitively so for lots of these people. But, yeah, there were raging debates about all of that.

MR. COHEN: When did the policy – do you remember when the policy come in that the public schools, for example, in the District of Columbia have to fund out of their own budgets alternative schooling?

MR. SCHUELKE: I don't know precisely, but I would think ten years ago, maybe fifteen.

MR. COHEN: And the Autism Society still exists?

MR. SCHUELKE: It still exists.

MR. COHEN: Does it compete with other organizations? There must be a variety of

MR. SCHUELKE: It does. It competes for grant funding with several other organizations, and what was then the Autism Society expanded and incorporated a couple of other similar organizations and underwent a sort of a structural change and a name change. So it's now I think it's now called the National Society for Children and Adults with Autism because that was another part of this debate. There were those who wanted to focus exclusively on children, that is, younger than high school age, and then there was a camp that said no, you know, I have a son who's 15 or 16 and this is discriminatory and so then big fights about that. And now they have a larger umbrella, as it were.

MR. COHEN: So indeed I gather the problem – one problem these days is that fairly large numbers of autistic people who have been covered by various public programs as long as they were school age graduate into the general population, and there's no such

MR. SCHUELKE: That's right.

MR. COHEN: And nor can they care for themselves.

MR. SCHUELKE: Right. But they're seeking money in the form of grants and some government funding for targeted employment programs for such young people suffering from autism, and I think they've made some progress in that regard. But it's a terrible, terrible situation because to my knowledge to this day no one understands the causes or the mechanism. And unaware of the causes and the mechanisms, I don't think they've ever actually

devised effective treatments. Like many situations with disabled people, it's my observation that the success comes from the devoted near constant attention of the families, and that's very difficult to do particularly if you have four kids and the other three of them are perfectly healthy. And how can the mother afford to spend virtually all of her time with the one. It's very difficult.

MR. COHEN: I am going to put a little anecdote on the tape here. We can strike it later if we want.

MR. SCHUELKE: Please.

MR. COHEN: I teach constitutional law at St. Albans School. One of the things I do is prepare the students to make arguments in most years to a federal judge downtown. I had a student – a terrific student – I'll call "George" – a few years ago who was somewhere on the autism spectrum, and I was trying to prepare him to make his argument. And George stood up and started to mumble, "May it please the Court, my name is George." And I said, "George, look at me and say it to me as if you want me to understand it." And he said, "How do I do that, sir," and I said, "George, pretend you're in church and you're reading the Bible." Well, one of the characteristics of at least some spectrum kids is they're very literal in their understanding of things. And George looked back at me and he said, "I'm a Catholic. We don't let kids read the Bible." And I said, "George, pretend you're the priest," and he responded, "I thought about being a priest, but I don't think I want to." And I decided I should leave it there – end of story.

MR. SCHUELKE: Fascinating, fascinating. And now

MR. COHEN: He was obviously not a severe sufferer, although he was somebody who, for example, would interrupt in class, speak up inappropriately including sometimes saying to me when I was deliberately repeating myself, "You already said that, sir," and there was no way that I could say, yes, George, but there are other kids in this class who didn't get it the first time.

MR. SCHUELKE: Yeah, he sounds like a high functioning

MR. COHEN: He was, and I think he's now in college.

MR. SCHUELKE: Well, good.

MR. COHEN: But not away from home. But I think I shouldn't say anything more because I don't want to identify him.

MR. SCHUELKE: Sure. So that was my Autism Society.

MR. COHEN: Okay. We'll make a small jump to your work as special counsel to the Senate Committee on Foreign Relations in 1980 and 1981. Was that about Alexander Haig?

MR. SCHUELKE: Yes. Yeah, I had just left the U.S. Attorney's Office. As I think I'm pretty sure we discussed in connection with the Bert Lance case, I became acquainted with Clark Clifford through my friendship with Bob Altman, and Clifford of course remained then as the *eminence grise* of most of the Democrats. And so when newly elected President Reagan nominated Al Haig to be the Secretary of State, the Democrats in the minority on the Foreign Relations Committee for that brief window when the Republicans controlled the Senate, wanted to dispute this nomination. I don't know

that they ever quite figured out exactly on what basis, but as a matter of instinct that's what they wanted to do. And they went to Clifford – I say they, Claiborne Pell was the ranking member of the Democrats of the Foreign Relations Committee – went to Clifford and asked him for advice and suggestions, and he was kind enough to recommend that they engage me to represent them for this purpose. I in turn asked Bob Bennett if he wanted to join me and serve as co-counsel for the minority on the Foreign Relations Committee, which he did.

MR. COHEN: The Democrats were the minority at that point?

MR. SCHUELKE: Yes, because the Republicans took the Senate in the 1980 elections and held it only for one Congress. So Bennett and I, neither of us having had any experience on the Hill, undertook this assignment, and they basically wanted to revisit whatever Al Haig's role had been with respect to the Watergate scandal and his role as the last chief of staff to President Nixon and assorted other matters.

The substance of this engagement has always been to me sort of a minor part of the experience. It was rather the experience of dealing with these United States senators that I found both fascinating, enormously entertaining and somewhat appalling. Claiborne Pell, a patrician from Rhode Island, was about as far removed in my judgment from practical reality as one could possibly be. He once told me, for example, that he thought and recommended that I spend the entire decade of my forties simply reading, and he was serious. I lived at the time in Georgetown, and

his home was about a block from mine. And he used to call me on a regular basis to talk about whatever was on his mind having nothing whatever to do with the Al Haig confirmation hearings or to invite me to go jogging with him and so on, and I always had my doubts about what that was all about. But I, you know, they all have these hideaway offices, the more senior of course the better the location, and he had his little hideaway office in the Capitol, and he would ask Bennett and me to meet him in the morning before the hearing or sometimes late into the evening and we'd go to his little hideaway and he was in there in his stocking feet and padding around.

The day or the night before the hearing was to open, he said to me, "Hank, I should like to have you prepare my opening remarks that I will deliver in the morning."

MR. COHEN: "I should like to have you."

MR. SCHUELKE: And so I said, "All right, Senator, we'll get you something in the morning." So Bob and I drafted up whatever we thought was sensible and appropriate from his point of view, and in the morning we gave it to him. It wasn't terribly long. I think I was given a limit of it couldn't take more than ten minutes or so. He read it, and he said, "Hank, this is excellent, but this is what you think. What do I think?" And I looked, and he had a longtime AA who kind of motioned to me like it's okay, it's okay; don't worry about it, and then the conversation went on to something else. And so when I took the AA aside and said, "What am I supposed to do." He

said, “Oh, oh, just change a couple words here and there.” “Which words?” “It doesn’t matter, just change a couple words.” So we changed a couple words and gave it back to him, and he said, “This is truly excellent.” I think the “what do I think” question was really what do I want the Providence press to report about what I have to say, and am I appropriately thinking of that political aspect of this.

MR. COHEN: Was it in part I don’t want to sound like something my lawyer wrote for me; I want it to sound – to be in my voice?

MR. SCHUELKE: I don’t know, maybe. The other

MR. COHEN: Was he hostile, or did he?

MR. SCHUELKE: No, no, no, no, no, no, absolutely not. He was the most

MR. COHEN: I meant toward Haig.

MR. SCHUELKE: No, no, I don’t think it was – and in the event as the hearing unfolded, it was not hostile. I mean there were questions about his role at Watergate and, but no, it wasn’t – it wasn’t terribly hostile. And it was clear from the outset that Haig had the votes. So it was a typical political play. I mean not only did he have the votes on a strictly party line vote basis, but he had a couple of Democrats as well. So I don’t think anyone ever expected that the outcome was going to be other than he was going to be confirmed, which he was.

Chris Dodd, again a huge kick out of this from current perspective. You know Chris Dodd, although he’s no longer in the Senate, has been for the last I don’t know ten years anyway in the perception of some and I

suppose the general public, one of the senior sort of lions of the U.S. Senate. He was the chairman of the Banking Committee, for example. Well, let me tell you about Chris Dodd, who was a freshman senator, having been first elected in 1980. I used to see Dodd because, as I said, I lived in Georgetown and I lived only a block from the Georgetown campus at 35th and N, and the Tombs and 1789 Restaurant were a block away. One could not walk into the Tombs any night in the week and not see Chris Dodd trolling for local talent, as it were. Much as Pell the night before the hearing wanted us to draft up his statement, Chris Dodd asked us if we couldn't possibly meet with him at eight o'clock on the next morning – the hearing was scheduled to commence at ten, so that we could give him some kind of a primer on what was to transpire. So we said yes, sure. Eight o'clock, no Dodd. Eight thirty, no Dodd. Nine o'clock, nine thirty, ten o'clock, no Dodd. The hearing begins. I would say an hour into it, he sheepishly works his way behind the dais to his seat because he's the most junior of the Democrats and he's at the very end of the dais, hung over. And I look at Bennett and I say this is why the lad who once said the best thing that ever happens around here is when the Congress is in recess is true.

Senator Hayakawa, nice old chap. At one point, they're taking a roll call vote of the committee. I don't remember what the issue was. The Democrats are voting nay. So the vote runs through the Republicans. Then we get over to the Democrats. Pell, Nay. Whoever was next to him,

may. Next to him, may, and the next one is Hayakawa who is soundly sleeping. And so his next door neighbor elbows him, wakes him up and he says Aye, elbows him again, may. I mean you wouldn't believe this would happen.

MR. COHEN: No. Well, I've been around Washington for a long time myself.

MR. SCHUELKE: But we, Bennett and I spent more time laughing about these antics than anything else. But, hey, we had a great time doing it. I thought the staff people were good, and you know, that's one of the saving graces for the Republic, I think, is that some of them have got some very good staff people because these guys don't know what they're doing.

MR. COHEN: Who were the Republicans on the committee? Who was the chair? Was that Baker?

MR. SCHUELKE: I think it was Howard Baker. I think that's right.

MR. COHEN: That seems right.

MR. SCHUELKE: I think that's right, and my good friend Mike Madigan served as counsel to the Republicans. He and Fred Thompson had served as co-counsel for the Republicans during the Watergate hearings. And so they were all very energized about how we're not relitigating Watergate here. So we had some fun with that.

MR. COHEN: Did your job include investigating the facts – any set of facts, reading the Watergate record?

MR. SCHUELKE: The record. I mean not investigating in terms of interviewing witnesses and that sort of thing.

MR. COHEN: You didn't interview witnesses?

MR. SCHUELKE: No, no, no, couldn't be conversant with the record and we sought documents from the White House some of which we got, some of which we didn't. And as is often the case, as a political matter the judgment was made that this was not something they were going to take to the mat with the White House, and the White House – the Reagan White House at that point had no interest in – no defensive kind of interest in whatever transpired in the Nixon Administration. It was more positions that they were taking on behalf of the Executive Office.

MR. COHEN: Did you form any particular impression about Haig, who later had his most dramatic moment after the Reagan shooting. I mean that's the moment that people around here remember.

MR. SCHUELKE: And that's my lasting impression of Haig as well. I don't – I don't recall forming any kind of a negative view of Al Haig prior to the Reagan shooting. I thought at the hearings he did a good job. He carried himself well. He's a smart guy, had no difficulty dealing with whatever the Democrats thought were difficult questions. So, no, I thought he was able and fine.

MR. COHEN: The general question about him was that he was a general, and I can't remember whether we thought he had any foreign policy experience.

MR. SCHUELKE: Well, I don't think we did. I don't think we did. But I don't suppose a lot of people thought that about Colin Powell either. So.

MR. COHEN: Fair enough. Bob Bennett hasn't come up before in our conversations, I don't think. Where did you first work with him, and why did you pick him to work with you on this, and what's working with him like.

MR. SCHUELKE: Bob and I never crossed paths in the U.S. Attorneys' Office because he left shortly before I started. But he and Carl Rauh were and remain very close friends as well as law partners now for the last 30

MR. COHEN: At Skadden Arps.

MR. SCHUELKE: Well, first at Dunnells Duvall Bennett & Porter which is where Bob was at this time in early 1981. Bob had started out at Hogan [& Hartson] after a clerkship with Judge Corcoran, spent, I don't know, a couple of years at Hogan and then joined Dick Dunnells, Dick Duvall, Steve Porter, who later went to Arnold & Porter, and they formed this firm, Dunnells Duvall Bennett & Porter. And Bob then brought Carl into the firm when Carl left the U.S. Attorney's office, and they developed a substantial white collar criminal defense practice which they ultimately transported to Skadden Arps.

The rest of the Dunnells firm was absorbed into Holland & Knight with the exception of Steve Porter who ultimately went to Arnold & Porter. [Steve was no relation to name partner Paul Porter.] And I came to know Bob through Carl, and we – they referred me business early on when we formed our firm, and I just got a huge kick out of Bennett and enjoyed working with him, and I knew that he had an interest in getting involved doing something on the Congressional investigations side of

things. So it seemed like an ideal kind of fit, and it was. And indeed that proved to be his entrée to working up in the Senate which ultimately led to his role on behalf of the Senate Ethics Committee in the Keating Five matter which in turn the way these things work led to his recommendation that that committee retain me for the Alphonse D'Amato investigation.

MR. COHEN: New question: These were all paying matters, yes?

MR. SCHUELKE: Yes, yes, yes.

MR. COHEN: Paying rates dictated by the Senate or

MR. SCHUELKE: Yes, yes, but it's, I don't honestly remember now. But I think that it was reasonably commensurate with what our then hourly rates were. You know, these were the days when hourly rates were a fraction of what they are today. Bob Bennett's great fun to work with. He's a very talented guy who has good judgment. But he's got a marvelous sense of humor. He's enormously entertaining, and he and I were like – what's the old nursery rhyme about so and so could eat no fat, his wife could eat no lean.

MR. COHEN: Jack Spratt.

MR. SCHUELKE: Jack Spratt, Jack Spratt because I was then, as I am now – I was probably actually a little thinner than sort of tall and skinny. But

MR. COHEN: So you really are talking literally about lean and fat.

MR. SCHUELKE: Literally, literally and Bob is a very large man who has battled his weight his entire life, as he will tell you. In the course of the many diets he's been on, he has lost 1,872 pounds. The problem is he's gained back 1,947 pounds or something like that, and he was on one of these diets at the time

we did this Foreign Relations Committee assignment, and we'd go have lunch. And I would eat. I have always had a rather good appetite, and I never gained an ounce. I couldn't if I tried. It just drove him crazy. He hated it. He used to give me more grief about that because at this point he was on one of these diets that had been managed by Georgetown Hospital, and he was drinking one of these protein milkshake type things and not eating any solid foods, and he did lose like 75 pounds or something like that. I don't think he got to his target. I think his target was to get down to about 180, and he's only about five foot nine, and at the start when he started on this diet he probably weighed about 260. But he lost enough weight that he had to go out and buy himself an entire new wardrobe, which he thought was an excellent idea because once he made that investment, of course that would be an incentive for him to maintain his new weight.

So what did he do? He reached pretty damned near his target that summer. He and his family go off on vacation up in Maine somewhere. They're having a big barbecue. He ate not one but two eight hotdog packs of hot dogs and drank like half a case of beer to celebrate. And it was only a matter of, I don't know, six months before he was basically back where he started.

But he's great fun, and he's one of the most gregarious people and he's the world's greatest joke teller. He's one of these joke tellers who gets halfway through the joke and he starts uproariously laughing himself

which is of course infectious as well. I was with him and Carl and a couple of others on some case we had in Bermuda, and we're out at one of the finest restaurants in Bermuda having dinner. There were five or six of us. At the adjacent table was another group of four or five people with another very robust gentleman. And so Bennett at somebody's urging, although it doesn't take much urging, launched into one of his favorite jokes, the pretzel joke which I'm not going to try to tell you now. But he's anything but quiet. So everybody in the dining room heard the pretzel joke, and this guy at the next table just loved it. So naturally Bennett has to buy them a round of drinks or send them a bottle of wine, and he ended up as I recall picking up the tab for their dinner for the entire group and everybody in the group just loved it.

MR. COHEN: I take it the majority side was represented by committee counsel.

MR. SCHUELKE: Mike Madigan, Mike Madigan, right.

MR. COHEN: Did you work with him, or was your assignment primarily to prepare your senators?

MR. SCHUELKE: Well, our assignment was to prepare our senators. But Mike and Bob and I had all known one another for quite some time, and we're friends. So there was nothing acrimonious about it. I mean we had fun with little digs about, you know, this and that, but, no, it wasn't at all acrimonious.

MR. COHEN: Well, let's jump to the Tenure Commission. When did you start?

MR. SCHUELKE: Thirty years ago this month, May of 1982. This is another Bob Bennett connection. The Tenure Commission was formed in 1970 with court

reorganization when the Superior Court was first created as well as the D.C. Court of Appeals. The Commission was then somewhat reorganized and its jurisdiction changed somewhat with the Home Rule Act in 1973. From its inception in 1970 and until I'm guessing now, but I would say '76 or '77, the Commission had no outside counsel. The Commission consisted of those appointed pursuant to the statute by the President, by the U.S. District Court, by the City Council, by the Mayor and by the D.C. Bar, which authorities continue to make the appointments to the Tenure Commission.

MR. COHEN: Did each get to pick one, or did they specify

MR. SCHUELKE: No, no. The President appoints one. The Chief Judge of the U.S. District Court appoints one judge from the District Court. The D.C. Bar has two, the City Council, one and the mayor, two.

MR. SCHUELKE: And two of the appointees, one of the Council and one of the mayoral appointees must not be a lawyer. They must be laypersons, which is a good thing. In any case, comes '76 or '77 the Commission commenced an investigation of then Superior Court Judge Halleck. I don't know if you knew Charlie Halleck.

MR. COHEN: Well, I know the name.

MR. SCHUELKE: I did because I worked before him when I was in the U.S. Attorney's Office, a very interesting character, a smart guy but a passel of psychological problems. He was the son of – I guess he was junior. I guess his father was Charles also, who was the congressman from Indiana

who at some point was the majority leader I believe before my time in Washington, I'm not sure, and Charlie Halleck, through the good offices of his father, was hired by Hogan & Hartson and he did that for a couple of years, and I don't really know the details. But he then got himself appointed to what was then the Court of General Sessions before the reorganization in 1970.

And until from the time of his appointment until '72 or so, he was the prototypical hard ass conservative judge who was intolerant of these kids who came into the courtroom with long hair and would sentence them to get their hair cut in marijuana cases. And then he ends up getting divorced, he marries a younger woman. He did a 180. Now he's Mr. Hip, and "we're not prosecuting these hookers for soliciting prostitution until your office, the U.S. Attorney's Office, starts prosecuting the johns, got it?" and this is an unconstitutionally discriminatory practice. On any manner of issues, he'd be taken up to the Court of Appeals and they'd reverse him routinely.

And so you'd get up in front of him and you'd say like in a search and seizure motion to suppress, "Now, Your Honor, as you well know, our Court of Appeals last Thursday in a case involving these essential facts ruled blah blah blah." He'd say, "Schuelke, that was my case, wasn't it?" "Yes, Your Honor." "And they weren't very kind to me either, were they?" "No, I would say not." "Are you going to cite that case every chance you get?" "Every time it's on point." And he and I developed this

kind of grudging mutual respect, and we had some fun because he enjoyed – he was a smart guy, and he enjoyed engaging with lawyers.

Well, anyway, the Commission – I can't remember now what precisely was the issue – commenced an investigation. He decided that he was going to litigate the Commission's constitutionality, and he brought a lawsuit in the U.S. District Court. I think it started out with a disciplinary investigation alleging violations of the Code of Judicial Conduct. But while it was in progress, if I remember correctly, his initial term expired or was about to expire, and he sought reappointment. The Commission has effectively the ultimate reappointment authority for judges of the Superior Court and the Court of Appeals meaning if the Commission finds a judge well qualified, the judge is automatically without further ado reappointed to a new 15year term.

MR. COHEN: Required to be or that's just the practice?

MR. SCHUELKE: No, no. This is the law. The statute provides that the Commission unilaterally will reappoint if it finds the candidate well qualified. If it finds the candidate unqualified, the judge is not reappointed and there is no review of that decision. If the Commission finds the judge qualified, then it goes back to the White House and the President may renominate or not. If the President renominates, then it goes through the Senate confirmation process the same as the initial nomination.

So Halleck is up for reappointment, and the Commission is clear it is not going to find him to be well qualified or perhaps qualified at all, and

so he instituted this lawsuit. That's when they first engaged Bob Bennett to represent the Commission with respect to this particular litigation which was satisfactorily resolved for the Commission because the court rejected Halleck's claims. Halleck was ultimately then found by the Commission to be merely qualified. It went back to the White House, and he was not renominated. So that was the end of his career.

MR. COHEN: Stay on the lawsuit for just a second. What was his theory? Was it an appointments clause kind of argument?

MR. SCHUELKE: No, no. It was a – it was a due process argument that the Commission in his view without meaningful and testable standards, could deprive him of a property right. That is

MR. COHEN: His job.

MR. SCHUELKE: His job. And this was the only case that has ever litigated an issue arising from the Tenure Commission at the District Court level. It was never appealed. The case is called *Halleck v. Berliner* because Henry Berliner was the chairman of the Tenure Commission at the time concluded that he didn't have a property right. This was like a job interview, and that was the end of that.

So then the Commission retained Bob [Bennett] on a continuing basis to serve as its special counsel, and that was probably '77 or '78. And for whatever reason I don't presently recall, Bob didn't want to continue in that role, and the Commission engaged me and I've been doing it ever since.

MR. COHEN: You still are?

MR. SCHUELKE: And still am. I was there yesterday.

MR. COHEN: How much of your time does it take?

MR. SCHUELKE: The Commission meets once a month basically to entertain whatever complaints have come in over the transom in the past month. And because the Commission has this reappointment authority and because it also has the authority to favorably or not recommend retiring judges for senior status, it's got a docket of both reappointments and senior status. The disciplinary function of course arises from time to time out of complaints that are received from lawyers, litigants, from whatever source. If the Commission learns about some allegation that a judge did A, B and C by reading the Washington Post, the Commission may look into it.

The monthly meetings, yesterday, for example, we had the two judges who were before the Commission for their applications for a senior judge recommendation. One of them is somewhat complicated. That probably took us an hour or so. The other one was kind of *pro forma*, took 20 minutes worth of love-in with the candidate judge, and the Commission then disposed of or at my suggestion made arrangements to get additional information on some 30 complaints maybe.

As you might imagine, the Commission gets lots of complaints from disappointed litigants who are really unhappy about the result. Sometimes the complaints simply make arguments about how the judge admitted inadmissible evidence or the judge, you know, failed to follow

some other principle of law, which complaints are not within the Commission's jurisdiction since these are matters of law to be determined by the Court of Appeals. Some disappointed litigants who are angry because they just are clever enough to couch it in terms of personal bias and animus on the part of the judge and look to find something the judge said that might support that. Some, thankfully not too terribly many because it is a very good bench, identify and raise some legitimate questions, and many of them have to do with temperament. You know, we've had judges who have said to a lawyer whose associate was about to address the Court, "Mr. Cohen, you keep your little dog on a leash," and there are episodes of that. Some of it is understandable in the sense that in a high volume metropolitan court with very heavy dockets, lousy lawyers, unprepared lawyers, *pro se* litigants, one does have to have the patience of Job always to demonstrate a level temperament, and not many people have the patience of Job.

So occasionally you get those and, you know, while every one of those episodes of intemperate behavior technically constitutes a violation of the Code of Judicial Conduct, which requires that judges at all times treat parties and litigants with respect and dignity and so on, obviously one has to make a judgment about the severity of the episode and measure it against the judge's positive qualities. Sometimes you have a judge who engages in a pattern of that sort of behavior, and the Commission will

address it. The Commission has the power to remove a judge for misconduct.

MR. COHEN: That's what I was going to ask. What are the Commission's powers other than to decide whether a judge up for reappointment is well qualified, qualified or –

MR. SCHUELKE: The primary function of the Commission is the disciplinary function. The statute provides that the Commission has the authority to remove a judge from office for conviction of a felony offense, willful refusal to perform judicial duties, intemperance, substance abuse of some kind, or conduct which brings the judicial office into disrepute. Which you might say as a constitutional lawyer is a pretty vague standard and indeed that was one of Halleck's arguments come to think of it and the court in *Halleck v. Berliner* observed that it was a suspect broad definition but limited to violations of the express provisions of the Code of Judicial Conduct. So you have this broad conduct which is prejudicial, turned constitutional by that limitation.

MR. COHEN: Did the Commission ever remove a judge?

MR. SCHUELKE: No. But this is a complex question. The question's not complex and the answer isn't either but the circumstances are. The court by the way in *Halleck v. Berliner* also concluded that that removal authority embraced the imposition of sanctions short of removal like lesser included sanctions to include reprimands and admonishments, that kind of thing. The statute also provides that the Commission's work is confidential and quite

amazingly, I suppose in this town I don't think there has ever been a claim in the now 40 years of the Commission's existence, 42 years, that there's ever been a leak of information from the Tenure Commission, and so there's much that the Commission does in individual cases about which the public learns nothing. But here's what happens, I'm not going to talk about individual cases, but the process.

Judge A is the subject of a Tenure Commission investigation. The Commission, that is I, myself, conduct an investigation which may, depending on the matter, involve a review of the transcripts of all relevant proceedings, interviews of a number of witnesses and so on, and the Commission tells the judge in a formal document called a notice of proceeding, which is kind of an analog to an indictment in a criminal case, that it's prepared to commence removal proceedings. Much as occurs in the criminal process as well, that results in negotiations and if the judge says I'm prepared to retire, rather than suffer the opprobrium of what will ultimately will become a public removal proceeding and the Commission's only interest is in having the judge removed from the bench, that's fine; it gets resolved and nobody ever knows other than the judge who retired. Now I say nobody ever knows; the court system is a vibrant rumor mill, so people on the inside, a lot of the judges sort of figure out what's going on but there's no public record of that sort of a resolution. Similarly from time to time the Commission might have cause to investigate intemperance on the part of the judge. The judge is

otherwise a good judge and has a long and substantial record of service and perhaps this can be, his career can be salvaged, so the Commission will require, as the statute authorizes it to do, the judge to have physical and/or psychological examinations by independent physicians appointed by the Commission and if it's a

MR. COHEN: The Commission can require that?

MR. SCHUELKE: Yes. And if it's a case of alcohol abuse the Commission can and has required the judge to undergo a treatment program and to sign up to an undertaking that should there be a relapse the judge will resign or if eligible to retire, retire. That's happened on a number of occasions. That's happened also on a number of occasions with judges who retire and seek senior status; and the Commission is not prepared to grant a favorable recommendation for senior status and so there have been cases where judges insisted on litigating it as it were with the Commission, and then there have been others in which the judge has recognized the reality, don't have the votes here, and rather than again suffer the public results of this never mind, I don't need senior status I'm just going to retire.

MR. COHEN: I've seen a judge from time to time hire counsel.

MR. SCHUELKE: Yes, indeed. I think that in virtually every one of the situations which I just described the filing of a notice of proceedings, negotiations over senior status versus retirement, virtually all of those judges have been represented by counsel. Now your question was how much of my time does it take? In a typical month when things are reasonably quiet it

probably consumes 10, 12 hours of my time. At times when we have one of these matters that is in progress it can require substantially more than that.

MR. COHEN: You have no other staff on the Commission?

MR. SCHUELKE: Well, the Commission has an executive director who's been there since the very beginning, who's very good and has great institutional knowledge and is available to me in a staff capacity for administrative matters, but I'm also at liberty to employ associates of mine in the firm, which I've done from time to time.

MR. COHEN: What about just aging and disabilities, as distinct from misconduct? Did you ever have occasion to say "You've lost it."

MR. SCHUELKE: Yes and as you can imagine they can be difficult. The statute was amended now probably 15 or 18 years ago to vest in the Commission this authority to make recommendations to the chief judge with respect to senior status. I mean technically that's what the statute provides. The Commission, if the Commission makes a favorable recommendation, the chief judge is then at liberty to appoint a retired judge as a senior judge and put him or her to work. If the Commission withholds the favorable recommendation that's the end of the matter. The chief judge has no authority, so it's basically a dispositive role that the Commission plays. The statute provides that the Commission, in order to render a favorable recommendation, must find that the judge is physically and mentally fit and able satisfactorily to perform judicial duties. It's clear from the

legislative history that the animating principle is we have judges who are retiring. Presumably they have attained a certain age which in practice has not really been true but having attained a certain age, there may be issues about physical or mental fitness so that's what the Commission is supposed to determine at least first before we get to the broader question of able satisfactorily to perform judicial duties.

And so physical infirmity, if it's of a nature and an extent that would have a negative impact on the ability to perform judicial duties is certainly an issue and certainly as well dementia or incipient dementia is a problem and the Commission has had to deal with this on a number of occasions. One only learns about this with the benefit of information from people close to the judge, usually colleagues, and if you're talking about the Court of Appeals that's certainly the case because other than oral argument at which a judge doesn't have to say anything, witness Justice Thomas, the public, lawyers and litigants may be for a long time unaware that the judge has a problem and particularly if it's really a memory problem rather than full blown Alzheimer's. But his colleagues or her colleagues know, or some of them typically know, as you or I would know about a partner of ours.

MR. COHEN: Or would hope we did.

MR. SCHUELKE: Or would hope we did. And then of course you have the obvious human issue of whether or not you're going to say something to the Tenure Commission. Now under the Code of Judicial Conduct you're required to,

but people violate lots of laws. But a number of these have come to the Commission's attention and have come from colleagues. The judge of course, the respondent judge, he doesn't know he has the problem and if you have the temerity to suggest it you're really off base, and yet the Commission is sensitive to avoid, if possible, a public—because these outcomes are public—a public conclusion that the judge is mentally unfit after, let's say, 35 or 40 years on the bench with a stellar career and so it's fallen to me on a number of occasions on behalf of the Commission to see if we can get the judge's attention informally and sometimes you can and sometimes it's difficult. Sometimes I've gone to colleagues of the judge whom I've known for years and one or more of them is willing to undertake this...

MR. COHEN: You mean other judges?

MR. SCHUELKE: Other judges. They in turn, particularly if they're kind of personally close because they've been colleagues for years, can enlist the services of the judge's wife, who understands and talks some sense to them and on most of those occasions—they haven't been that great in number—it's worked out, the judge retires or withdraws his request for senior status or whatever it is. We had one recently, nope not doin' it. Tim Murphy. You know Tim Murphy?

MR. COHEN: No.

MR. SCHUELKE: 45 years on the Superior Court bench. Interesting character but a good judge. Old Marine. Ran his courtroom like you would expect an old

Marine to do. Had advanced Parkinson's which had not only mobility issues but cognitive deficits as well and he wouldn't hear about it and so we had to go through the process and have a hearing. I cross-examined his proffered psychologist and the Commission had no choice ultimately but to deny him reappointment to senior status in the form of a public document.

MR. COHEN: A person I do know best, he has long been and remains a good friend of mine, is Rufus King. Who until recently was the Chief Judge. Did...

MR. SCHUELKE: He's doing quite well. I don't know if you've seen him recently. You know he had a terrible bicycle accident.

MR. COHEN: I've seen him within the last week actually but...

MR. SCHUELKE: And I've spoken to him within the last week and I think he's doing well.

MR. COHEN: I do too.

MR. SCHUELKE: Good.

MR. COHEN: The other judge I know personally was an associate at Wilmer Cutler & Pickering a very long time ago, Noel Kramer.

MR. SCHUELKE: Oh yes.

MR. COHEN: I have not seen her in a long time but we were friends.

MR. SCHUELKE: She's retired. She was in the U.S. Attorney's office with me.

MR. COHEN: Oh really. I'd forgotten that.

MR. SCHUELKE: Lovely woman. Delightful, delightful person.

MR. COHEN: Yeah, terrific woman.

MR. SCHUELKE: So that's basically what the Commission does. And you know I've done it for all these years because I enjoy it. I have the luxury of having spent enough time when I was in the U.S. Attorney's office working in the Superior Court that I think I understand it pretty well but I don't practice in the Superior Court. In the 32 years since I left the U.S. Attorney's office I think I may have had two matters in the Superior Court. So I think it's good to have to someone who has the foundation and knowledge of the court but is not in this potentially conflicted situation and early on for I guess reasons that are not surprising, a lot of the judges with the advent of the Tenure Commission thought that this was a big assault on judicial independence and indeed it is by contrast to an Article III Judge. A significant limitation on independence, and has the potential for mischief with respect to curtailment of independence depending on how the Commission operates. This Commission understands the principle and the need for judicial independence well, it always has, and it's always been one of my constant refrains as we get new members of the Commission so the Commission is going to deal with misconduct. The Commission is going to deal with these issues of qualifications when you're talking about reappointments and senior status The Commission is not going to wade into legal issues, the wisdom or propriety of sentencing no matter what. That's what they were afraid of in the early days and you know there are cases where there's a public outcry and there have been very, very good judges who have dismissed charges against defendants in highly

publicized brutal violent crime cases because the government failed to meet its speedy trial act obligations for example, and there's a huge hue and cry and the Commission gets hundreds of letters, this judge ought to be removed, outrageous, or this judge only sentenced this horrible bandit to whatever when he should've gotten life. Not within the Commission's jurisdiction and the Court over the years has learned to understand that that's the way the Commission is going to operate and I believe has confidence that it will do its work fairly and appropriately and I think the fact that while there's been this transition of members of the commission because they serve for fixed terms, I have been a constant for now over 30 years and I think that's been useful to the Commission and to the bench.

MR. COHEN: Are you doing anything to prepare for an eventual transition from you?

MR. SCHUELKE: No, no I thought about the need to do that but I haven't. You know I told, Gladys Kessler is the current chairperson of the commission, and I told her and the rest of the Commission a couple of years ago, that I was thinking of...

MR. COHEN: Kessler's not on the bench anymore?

MR. SCHUELKE: She is. She's senior. She took senior status last year but she's still on the bench.

MR. COHEN: And she chairs the Commission

MR. SCHUELKE: And she chairs the Commission. Which she did before she took senior status. As far as I can tell she's not working any less than she ever did on the bench. So I told them that I was contemplating some way of cutting

back and was importuned to make a commitment, for the first time to sign, because I operate under a personal services contract with the District of Columbia government annually, so I was importuned for the first time to sign a contract for five years. They don't want me retiring so I agreed to do that. And as I said, I enjoy it. I think it's a useful service to the community so I'm happy to do it and hell if I had decided to retire altogether I certainly could've continued to do this for...

MR. COHEN: Until somebody determines that you're no longer capable.

MR. SCHUELKE: Until I'm no longer capable. Right. But the time commitment was such that I could easily have done it.

MR. COHEN: So Judge Kessler is able to do this without, it's not inconsistent with her status as an Article III judge?

R. SCHUELKE: No. As a matter of fact....

MR. COHEN: I guess if Warren could head the Warren Commission.

MR. SCHUELKE: Right. And in fact as I've said the statute requires that there be a federal district judge on the Commission. And the chairperson who's elected annually from among the members of the Commission, so that chair position doesn't come with the district judge appointment. That can be anyone on the Commission.

MR. COHEN: Do state court systems have anything comparable?

MR. SCHUELKE: Yeah, virtually every state has a judicial conduct body of some kind. Some of them as you might imagine are very busy like New York, Chicago, L.A. Now I say, I mean these are all state, but the business

comes out of the major metropolitan areas and you know I've often told the judges of the Superior Court, because we're invited every year to the annual training and have a panel discussion about the Tenure Commission, and I tell them, "Look, you need to understand this is sort of a good news, bad news message that I have for you. This is a terrific bench. That's the good news." I, in my effort to keep abreast of developments in the area, try to know what's going on with these judicial conduct organizations around the country and there's not a day goes by that there isn't a judge is accused of bribery somewhere in the state of New York or the state of Illinois and all means of other fundamentally criminal conduct, we don't have that. We had one in the very early 1970's and that was sort of a two-bit one but it was. Judge was dismissing traffic tickets for some local trucking and hauling company who paved his driveway gratis for him. Well, we don't have that sort of thing. So, the Commission has the arguable luxury of concentrating on other things like your temperament on the bench. The Commission is a strong believer that you, like every other public servant has a constituency that happens to be the people who come through the courthouse and the Commission is bound and determined that they are going to be treated like the consumers of the services you are providing and they are entitled to dignity, respect, diligence and so on. And that's true. That's both the good and the bad I suppose from a judge's perspective.

MR. COHEN: Good. Shall we move on to one more topic?

MR. SCHUELKE: All right.

MR. COHEN: Well the next thing on our list was the Senate Ethics Committee, and I guess that's the D'Amato investigation.

MR. SCHUELKE: Yes, I told you how that assignment came about through the good offices of Bob Bennett because during the Keating Five matter, Warren Rudman, a Republican from New Hampshire, served on the Senate Ethics Committee. By the time of the D'Amato matter he was the cochairman of the Ethics Committee. The Ethics Committee is designed to be a nonpartisan committee so there are three from each side of the aisle and a co-chairperson from each side.

MR. COHEN: It is a standing committee?

MR. SCHUELKE: It is a standing committee. Howell Heflin from Alabama was the Democratic Co-Chair with Rudman when I was engaged for the D'Amato investigation.

MR. COHEN: Which is 1989 I think.

MR. SCHUELKE: I think that's right. I remember vividly that it was in progress in the spring of 1991 because I was called out of a deposition that I was taking in that the day my father died. Unlike the experience that I described with the Foreign Relations Committee, the ethics committee with maybe one or two minor exceptions, was composed of men of a sense of probity. A couple of them were very good lawyers, Warren Rudman in particular. Heflin was a lawyer. Heflin was the former Chief Justice of the Alabama

Supreme Court. I was not a fan of Heflin's because I thought he was just too political. Surprise, surprise. That's my naiveté, I suppose.

MR. SCHUELKE: Rudman, very good lawyer, former Attorney General in the state of New Hampshire, good practical politician as well and a practitioner of the principle that knowledge is power. He knew more about the merits of this matter than anyone else on the committee because he took an active interest. He attended a number of depositions that I conducted. He was conversant with the record and so it was conducted in a fashion not terribly dissimilar from litigation in a court of law. It had some very entertaining moments, of which I'll be happy to describe one or two.

MR. COHEN: Bipartisan or nonpartisan, were you on one side?

MR. SCHUELKE: No.

MR. COHEN: You were counsel to the whole...

MR. SCHUELKE: Counsel to the whole committee. There were 25 maybe discreet subject matter areas in a complaint that had been made against Al D'Amato by a political opponent in New York, who at the time he filed the complaint was the New York State Public Advocate, I think that's the title, and some of it was a mishmash of stuff that he'd pulled together out of various newspaper articles. Some however, raised some significant questions. One of which will lead me to tell this little anecdote about D'Amato's deposition. D'Amato had and has a brother whose name is Armand D'Amato who is a lawyer as well, who practiced in Long Island and made a fairly lucrative practice out of playing on his brother's name, title, and

position. So he would be engaged as a consultant by one of the major defense contractors situated in Long Island, and his role was to go lobby his brother, and he would crank out letters on his brother's stationery, robo- signed, and the Senator, I ultimately concluded, knew nothing about this although he granted his brother Armand carte blanche to wander around his offices both in Washington and New York and directed his staff and so on. And Armand was himself indicted, tried and found guilty of an honest services fraud (recently limited by the Supreme Court two terms ago) which conviction was reversed by the Second Circuit. And so in the course of....

MR. COHEN: This is post *McNally*.

MR. SCHUELKE: Post *McNally*.

MR. COHEN: Under the amended statute.

MR. SCHUELKE: Right. So we're in the course of deposing Alfonse D'Amato, as you might imagine, a very feisty character, and we got into this issue of Armand's dealings apparently on behalf of Senator Alfonse D'Amato. Senator D'Amato took great umbrage at the suggestion that he had engaged in any sort of impropriety and he said, "Let me tell you about a talk I had with my brother Armand not too long ago. I took him out on the balcony, he's got this condo he lives in right on the beach in Highland Park, and I took him out there one night just the two of us out on the balcony and I said. 'Armand, what the fuck are you doing? What are you doing about this, that and the other thing?' And you know what he said to me? 'Ohhh,'

and he's imitating his brother, 'Ohhh, Al, I didn't mean to. I'm so sorry,' in precisely that language."

MR. COHEN: It's right out of *The Godfather*.

MR. SCHUELKE: Right out of *The Godfather*. He was a piece of work. And we concluded that he had breached the Senate Code of Ethics in a number of particulars and not terribly surprising the Committee ultimately concluded that it would reprimand him or admonish or whatever term they used and so we wrote a lengthy piece recounting the allegations, the facts, the conclusions, and the admonishment. I thoroughly enjoyed working with Warren Rudman. We became quite fast friends as a result of that. He was instrumental in retaining me and my law firm to represent the board of directors of the Boston Scientific Corporation on which he served and served as well as the chairman of that board's litigation committee and I had represented him in his individual capacity on a number of occasions. Terrific, terrific man. A little post script to the D'Amato thing, I represented a couple of Clinton White House folks during the Whitewater investigations including a woman who had been a long time personal secretary and bookkeeper for the Clintons starting when they were in the Governor's mansion in Arkansas and who was the one who famously found the long missing Rose law firm records.

MR. COHEN: This is Carolyn...

MR. SCHUELKE: Carolyn Huber.

MR. COHEN: Whom we're coming to.

MR. SCHUELKE: And the Senate Banking Committee along with other investigating agencies investigated this Whitewater matter, and Al D'Amato at the time was the chairman of the Senate Banking Committee.

MR. SCHUELKE: So she was subpoenaed to appear before D'Amato's committee. I had another commitment on the day in the Eastern District of Virginia and so I called I don't know a few days before and spoke to D'Amato's staff person and said, "Look I've got to be, I got a client that's got to be in the grand jury in Alexandria. Your subpoena calls for Huber's appearance at 10 o'clock in the morning, but I've I got to be in Alexandria then. Can we make it 2 o'clock in the afternoon?" "Oh, I don't, oh I don't think we can do that, I mean Senator D'Amato has organized this schedule in this fashion," and I said, "Well, why don't you do this, do me a favor. Tell him if he'd be so kind that I'm, it's I who represents Ms. Huber, and I've asked as an accommodation in this respect and I'm happy to talk to him." And it was clear that this young fellow was scared to death of D'Amato and couldn't imagine that D'Amato would accede to some request like that from some lawyer but apparently he passed on the request and sure enough D'Amato did. So at the appointed hour...

MR. COHEN: D'Amato at that point has no love for you?

MR. SCHUELKE: No, but I had this sneaking suspicion that for some perverse reason he would want to demonstrate to me that he was fair-minded. So at the appointed hour we appear. Huber testifies and at the conclusion of her testimony the committee goes into recess and I'm getting up from the table

and packing up my stuff. D'Amato comes down from the dais, walks up to me, puts his arm around me, around my shoulders and says, "I know what you've been thinking this whole time, where does he get off questioning somebody else's ethics?" And I said, "No, no Senator, that thought never crossed my mind." But that's the kind of personality he is. He's a very effective pol. He was known as Senator Pothole because of his constituent service efforts. You call up his office and say, "There's a pothole in the front of my house," – boom – somebody's out there.

MR. COHEN: In New York you certainly need somebody like that.

MR. SCHUELKE: So that was the Alfonse D'Amato.

MR. COHEN: What's the basis for the reprimand? Was it not being careful enough about who got the run of his office?

MR. SCHUELKE: Well that was only one. That role of his brother there was but one of the issues so yeah, that was one of them.

MR. COHEN: Well I mean that sounds more like a kind nonfeasance rather than a malfeasance and that's really...

MR. SCHUELKE: Right, right, I think that's right. There were a couple of like situations and some of it was it was all rather politically complicated. Like for example Rudy Giuliani who was contemplating at the time a run for Governor I think, he and D'Amato became sort of political—I don't know if enemies is the right word but competitors within the New York Republican establishment and Rudy went out of his way to tell the New York Times of an episode when he'd been the U.S. Attorney when D'Amato had come

in to make a pitch to him on behalf of some mafioso that they were about to indict and how this was outrageous and blah blah blah. Well by the time, and that was one of the allegations in this complaint, by the time I got around to interviewing Rudy about this, he said, "Oh no, no I mean that person was innocent until proven guilty of course and was a constituent of the Senator's and the Senator did absolutely nothing improper in any way." So you know he had a lot of this crap but it was fascinating and fun and unlike my, the experience I've described dealing with the bozos on the Foreign Relations Committee, this experience largely as a result of Warren Rudman left me with substantial respect for the process and I was happy to have played a part in it.

MR. SCHUELKE: Maybe that's enough for now.

MR. COHEN: I think so, do you?

MR. SCHUELKE: I do.

MR. COHEN: Let's see if I can turn this off.