

Oral History of Henry F. Schuelke, III
Sixth Interview
May 24, 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 (attorney from Blank Rome LLP). The interviewer is Louis R. Cohen. The interview is taking place at 3:10 P.M. on May 24, 2012.

MR. COHEN: Welcome back.

MR. SCHUELKE: Thank you.

MR. COHEN: We thought we would start today talking about your report commissioned by Judge Emmett Sullivan about the conduct of the prosecutors in the prosecution of Senator Ted Stevens, which had both legal and, I guess, political consequences for him. Why don't you start by describing the prosecution itself: what he was charged with, and how the trial went.

MR. SCHUELKE: All right, a task force consisting of the Public Integrity Section at main Justice and the U.S. Attorney's Office in Alaska commenced an investigation which they dubbed "polar pen." And sometime in 2004 and until 2006, the focus was exclusively on Alaska state legislators and allegations of bribery in exchange for official acts in the Alaska legislature. In the summer of 2006, the government confronted a man whose name is Bill Allen who was the proprietor CEO and, effectively, sole proprietor of a privately held oil field services and construction company in Alaska called VECO. They had had him under surveillance for some time. Had video and audio tapes. They gave him a presentation on what they had and without further ado, he agreed to plead and to

cooperate. With his cooperation and testimony, in the fall of 2007, they prosecuted two state legislators: Victor Kohring and Kott. I'm drawing a blank on his first name. They tried them to guilty verdicts and judgments of conviction and they were both sentenced to terms of imprisonment and shortly thereafter commenced service of their sentences in two different federal penitentiaries. On the 29th of July of 2008, just short of a year later, a grand jury here in Washington indicted Senator Stevens. And nine counts alleging a conspiracy to conceal from the Senate Ethics Committee and substantive counts alleging false statements in annual financial disclosure forms for each successive year from 2001 through 2008. There were allegations of assorted, fairly minor, alleged gifts which he had received which had not been reported, and none of that amounted to a great deal. So the heart of the government's case was the allegation that he had received \$250,000 worth of labor and materials which allegedly had been supplied by Allen's company, VECO, on the renovation of a small rustic cabin which Stevens owned in the town of Girdwood, Alaska which is sort of a little ski town not too far from Anchorage.

MR. SCHUELKE: Allen was the government's principal witness, as he had been in the Kott and Kohring trials. The government adduced evidence in the form of VECO business records which purported to establish that, indeed, they had spent \$250,000 on this project. During the course of the trial, it became apparent and the Government ultimately conceded that those records were insignificant part false because one of the VECO employees whose time,

according to those records, amounted to a substantial part of the \$250,000, had not even been in Alaska for several months during the period that his time was charged. And another, who was the functional foreman on the job, whose name was Rocky Williams, worked sporadically, maybe showed up on the site for a couple hours a day, and, yet, the records showed that he worked 8 hours a day, 5 days a week, month after month. The Government took the position, well, you know, Judge, it really doesn't matter that these records are just a placeholder because depending on the year in question, the Senate rules required a disclosure of a gift or a liability in excess of only a couple hundred dollars. And so, you know, we got him coming and going. The Senator's principal defense to which both he and his wife, Catherine, testified was that he had insisted from the very beginning that while Allen and his company might provide some labor and, perhaps, material to the project, he wanted an independent third party contractor who was equipped in terms of carpentry and drywall and plumbing and HVAC to do the job and he wanted to pay for all of it and because the VECO company, an oil platform construction firm, basically had none of those qualities that I just described. And so they had contractor, Christensen Builders, who regularly monthly billed Senator Stevens, although the bills were sent to his wife Catherine because he was here in Washington and she was more often than he in Anchorage and so she was the one who was charged with paying the bills, which she did religiously. And they paid Christensen a total of \$160,000. When all was

said and done and the cabin was appraised subsequent to the renovations, it was assessed at \$152,000. Both

MR. COHEN: This is for tax purposes or something like that?

MR. SCHUELKE: For tax purposes but they had local real estate appraiser who also appraised it. And so, their testimony was that while they knew that Allen and VECO had made some contributions to it, and while *late* in the process he believed that he owed something to VECO, he and she both understood that whatever work that VECO had done but for this little bit at the tail end was included in the Christensen Builders invoices which they paid in their entirety. That testimony was ridiculed by the prosecutors in the course of cross-examination and in the course of summations.

MR. COHEN: This is in a trial where and before whom?

MR. SCHUELKE: Before Emmett G. Sullivan of the U.S. District Court for the District of Columbia. As I said, the indictment was returned on the 29th of July of 2008. Senator Stevens was up for reelection in November and sought a speedy trial so that he could, "clear his name" before the election. The Government agreed and the trial commenced on September 22nd and was concluded in the middle of, no, it was concluded before the election at the very end of October. In terms of the political consequences, he lost the election by a very small margin and I rather doubt as does most of the political punditry that he would have lost had he not been charged, tried, and found guilty. It also had the political consequence of altering the

balance in the Senate so that the Democrats took control of the Senate as a result.

MR. COHEN: Or, you know, I remember the Democrats actually got a so-called veto-proof majority or so-called supermajority.

MR. SCHUELKE: A supermajority.

MR. COHEN: Sufficient to stop a filibuster.

MR. SCHUELKE: Right.

MR. COHEN: So, back to the trial.

MR. SCHUELKE: Allen

MR. COHEN: They're accusing, if I'm understanding this, the prosecutors, an indictment has charged Stevens with receiving and concealing gifts above the limit from VECO because

MR. SCHUELKE: Or, if not gifts, liabilities. Because the disclosure form requires the disclosure of gifts above a certain threshold and/or liabilities owed to some third party.

MR. COHEN: Okay. In any event, it charges that he owed money to VECO for these services and didn't disclose *that*

MR. SCHUELKE: Mm hm. Correct.

MR. COHEN: And he says, I thought the principal contractor doing this was Christensen which sent its bills to my wife who paid them and that whatever VECO did was included in Christensen's bill.

MR. SCHUELKE: Yes, and, to the extent that I recognized late in the process in 2002, that Allen and VECO had done some work *after* the Christensen Builders had

concluded their work, I told him both orally and in writing and repeatedly that I wanted him to send me a bill, which he never did. And one of the principal items of evidence in that regard was a handwritten note that Senator Stevens sent to Allen in October of 2002 which read:

“Dear Bill:

When I think of the many ways you have been helpful, I lose count. Friendship is one thing though these ethics rules are something else entirely, so you must send me a bill. Remember Torricelli, my friend.

P.S. I spoke to Bob P. about this who will follow up so don't get POd at him.

As ever,
Ted

MR. COHEN: Torricelli is Senator Robert Torricelli of New Jersey

MR. SCHUELKE: Who only a matter of weeks before this note was penned, resigned from the Senate in the face of allegations that he had accepted things of value from somebody I don't remember who.

MR. COHEN: And Bob P.?

MR. SCHUELKE: Bob P. was a man whose name is Bob Persons who lived in Girdwood, Alaska and owned and operated a restaurant there called the Double Muskie, which was kind of a local hangout. And he was a friend of both Stevens and Allen and he kind of volunteered to keep his eye on the project and, you know, report from time to time to Senator Stevens who was not there because he was, for the most part, in Washington. Allen ultimately testified on direct examination that, yes, he remembered getting this note from Senator Stevens. Yes, he remembered speaking to Bob

Persons and that Persons said to him, oh, don't worry about that, that's just Ted covering his ass. Which was a rather dramatic piece of evidence which came as a complete surprise to the defense and it was admitted, notwithstanding some sort of obvious issues about its hearsay character and/or its opinion character. But it was admitted to devastating effect because Brendan Sullivan, who represented Senator Stevens, from his opening statement and through the trial, whenever the opportunity arose, made much of this handwritten note because he thought it gave the jury a window into the Senator's mind and his intent that he wanted to pay for everything. And, after all, the offenses with which he was charged are specific intent offenses. And so this utterly undermined that defense. Sullivan, in the course of this cross-examination of Allen, quite effectively through his cross, made the argument that this claimed recollection of Allen six years after the event was a recent fabrication. And Allen, of course, like most cooperating witnesses, had an enormous incentive to make the Government satisfied with his cooperation. So, he had already entered pleas of guilty in Alaska to two felony bribery accounts, was awaiting sentencing, sought a 5K1 departure letter under the federal sentencing guidelines which is entirely within the discretion of the prosecution and which would permit the sentencing judge to depart altogether from the guidelines. And under the guidelines he was looking at quite a substantial term of imprisonment, but, also, he had shortly before the trial, entered into a contract to sell his company, VECO, to a

major corporation for several hundred millions of dollars. And apart from Allen's largesse in distributing some of the money to longtime employees, he was the beneficiary, the recipient, of about a quarter of a billion dollars in the sale of this property. Now, under the principles of *respondiat superior* in the criminal law, the Government could well have charged VECO, the corporation as well. And had they done so, CH2M Hill, which was the buyer of the company, would have walked away from the deal. And so part of Allen's cooperation agreement was that they weren't going to charge the company. So, not only was his liberty at issue, but, effectively, a quarter of a billion dollars rode on him satisfying the Government that he was, indeed, cooperative. And one of the vices, in my judgment, of this whole sentencing guideline regime with respect to the 5K1 departure [letter], is, not only is it exclusively within the authority of the Justice Department whether to grant it or whether not to, but, by the terms of that provision of the sentencing guidelines, the cooperation, in order to qualify, must have been substantial and *effective*. So, merely *trying* to cooperate doesn't count.

MR. COHEN: "Effective" meaning you have to succeed in the prosecution of the Government has to succeed in the prosecution of

MR. SCHUELKE: Well, that's clearly the simplest and most direct way to accomplish that. I mean, there have been cases in which the Government has employed a cooperator as a witness and the defendant has been acquitted but out of the

goodness of their heart they gave him a 5K1 letter anyway. But, by its terms, it requires substantial assistance. So,

MR. COHEN: I assume Brendan Sullivan brought out for the jury these motives that Mr. Allen might have had.

MR. SCHUELKE: He did, indeed. And he banged away at Allen on cross: “When did you first tell the Government that you remembered this conversation with Bob Persons? It was only just *recently*, wasn’t it? Because, the Government tells us that it was only September the 9th when they gave us one of these so-called *Brady* disclosure letters. And they listed four reasons why you didn’t send Senator Stevens a bill and that wasn’t one of them. So, you only came up with this recently, didn’t you?” “No! Not recently.” Now the record makes it clear that the witness Allen was somewhat confused at points. At some point, it appears that he thought Sullivan was asking him whether he had the conversation with Persons only recently. But Sullivan banged away on this to the point that it was abundantly clear that he wanted to know when did you first tell the prosecutors about this recollection. And his ultimate testimony in response, was, “No, not recently.” In fact, he had first told the Government about this recollection on the 14th of September, one week before the trial started. And while, at times, Allen may have been confused during that cross-examination, the prosecutor sitting at counsel table who had put him on the stand and who was there taking notes during the cross-examination, knew full well that he had relayed this story for the first time only recently, namely on

September the 14th because it was that prosecutor to whom Allen recounted that recollection on September the 14th. There's a Supreme Court case *Napue v. Illinois* decided years ago

MR. COHEN: Spell it.

MR. SCHUELKE: NAPUE. Which requires the Government to correct false testimony. The prosecutor said not a word which, in my view, and as I concluded in our report, constituted another example of a *Brady* violation because the fact that he had, indeed, come up with this recollection only a week before the trial was inconsistent with his trial testimony that it had not been recent. And, you know, there are a couple of ways a prosecutor could deal with that. The simplest way is to get up on redirect and say, "Now [blank] just asked you, 'Did you tell us about this only recently?'" and you said, "No," well, you did tell only on September the 14th. You remember that?" And Allen might have said, "Well, I don't know what day it was but, you know, whatever you say." And that would have solved the problem. Or the prosecution could have approached the bench and made some kind of disclosure to the court and to counsel. He could have taken Brendan Sullivan aside and told him what the facts were so that he could continue with his cross. He did none of that. Now

MR. COHEN: Did the Government argue that all this didn't make any difference because, as I think you said earlier, you'd have to disclose not only gifts but also liabilities? So that even if a bill had been sent there would have been a disclosure required?

MR. SCHUELKE: Yeah, I mean, it's clear from the internal prosecution deliberations, prior to the return of the indictment, to which I had access, that the prosecution, early on, identified what Stevens' likely defense was and analyzed it in terms of helpful, harmful, for the benefit of the Criminal Division front office, that is, the Assistant Attorney General from the Criminal Division *before* they returned the indictment. And they say, well, we got this handwritten note Stevens sent to Allen, which Williams & Connolly had produced to the Government. This is both good and bad. It's bad in the sense that, you know, he's going to testify that he intended to pay for everything and this note corroborates that. It's good for us in the sense that since we can rely either on gifts or liabilities, you know, this amounts to an acknowledgment on his part that he had a liability.

MR. SCHUELKE: And they did argue to the jury alternatively.

MR. SCHUELKE: The jury found Senator Stevens guilty of all counts in late October of 2008. Shortly thereafter, well before the case was scheduled for sentencing, and, therefore, the entry of a judgment against him, a young FBI agent whose name was Chad Joy who had worked on the case and was essentially the deputy case agent. The principal case agent was a woman whose name is Mary Beth Kepner

MR. SCHUELKE: Joy, shortly after the trial, wrote what's been called a whistleblower letter which is a fair characterization, in which he made sordid complaints about the conduct of agent Kepner: too close to the cooperating witnesses, playing golf with the cooperating witness, not keeping files according to

FBI protocol and so on. And also claimed that the prosecutors, one in particular, the now-late Nicholas Marsh, had come up with a scheme to send the VECO foreman, Rocky Williams, back to Alaska just before the trial even though he was under defense subpoena as well as the Government subpoena because he had not done well on a mock cross-examination. And the scheme was that, well, he's got some significant health problem so we need to send him back to Alaska where he can get treatment. More on that to come. This whistleblower complaint triggered a series of post-trial motions for a new trial. And the Government, through the same prosecution team as had tried the case and the same set of supervisors, were in the process of responding to these new trial motions when Judge Sullivan held three of them in civil contempt: Bill Welch, who was the chief of the Public Integrity Section; Brenda Morris, who was the deputy chief and had been the lead trial lawyer in the Stevens trial. And a DOJ appellate lawyer, Patty Stemmler, STEMMI think it is LER, for having failed in a timely fashion to comply with an order that Judge Sullivan had issued that they were to produce by a time certain a set of documents that were related to the Joy whistleblower complaint. That's of significance to me only because once they, the three of them, were held in contempt, the Department replaced them as the Justice Department team to handle the post-trial motions and appointed three seasoned prosecutors to take over. And one of them

MR. COHEN: Who were they?

MR. SCHUELKE: Bill Stuckwisch, who at the time was a senior guy in the fraud section at main Justice who left the Department only very recently and has joined Kirkland & Ellis

MR. COHEN: How do you spell him?

MR. SCHUELKE: STUCKWISCH. Paul O'Brien, longtime career prosecutor who was in the organized crime section of the Department. And Jaffe, JAFFE, his first name I cannot recall. And Stuckwisch early in the process of trying to figure out what transpired and what the relevant facts were was reviewing some internal email by, between and among, the original prosecution team, without any particular focus, I don't think. And he came upon a series of emails which were contemporaneous with an interview of Bill Allen in April of 2008 – 5 months before the trial. I say contemporaneous meaning it's evident that they were emailing back and forth while the interview was in progress because the interview took place in Anchorage and the two Alaska prosecutors were physically present and Marsh and Ed Sullivan, both of Public Integrity, were participating by telephone from here in Washington. And one of Marsh's e-mails, the one that started out this e-mail chain was, "Am I pushing too hard?" Whereupon somebody responded, "Mm, maybe we should shut it down for now." And Stuckwisch was just curious about what were they "pushing" Allen about? To make a long story somewhat shorter, the handwritten notes of first two of the four prosecutors who participated in this interview were found ultimately after a matter of some several weeks,

one of the other lawyer's notes were found as were the notes of the FBI agent, Kepner, who was present at this interview. And the notes make it clear and are consistent one set with the other that the purpose of this interview was to ask Allen about the set of documents that Williams & Connolly had just then produced to the Government, including the now-famous Torricelli note, as it came to be called. They were so interested and concerned about this that it's the day that they got this package of material from Williams & Connolly the prosecutors had asked their lead agent in Alaska to get ahold of Allen's lawyer and set up an interview as quickly as they could. And the interview was conducted one week after the receipt of the Torricelli note. And the notes make it clear, because they list a series of exhibits they were asking about that they were asking him about the Torricelli note, among others. The notes all reflect him being asked:

“Do you remember getting this note from Ted Stevens?”

“Yes, I think so.”

“Do you remember talking with Persons?”

“Nope.”

“Was this disclosed to the defense?”

“No.”

“Was there an FBI 302 of this interview? “

“No.”

MR. COHEN: Was there ever a disclosure to the defense

MR. SCHUELKE: Correct.

MR. COHEN: that Allen had said, at that point, that he didn't have any such recollection.

MR. SCHUELKE: No, there was not, which disclosure is required as a matter of law by a Supreme Court case called *Giglio v. The United States* GIGLIO which requires that impeachment material be disclosed to the defense—prior inconsistent statements being impeachment material, along with a few other things. And, had it been disclosed, I suppose one would first wonder whether the Government would have elicited the cover-your-ass testimony from him at all. They may have. But it certainly would have gone a long way to supporting Brendan Sullivan's claim that this was a recent fabrication. I mean, if not a fabrication, at least, it was abundantly clear that it was a recently claimed recollection. The Justice Department, once this was discovered, concluded that it was of the sort of *Brady/Giglio* nondisclosure that likely would have affected the outcome and, in the formulation the Supreme Court has consistently used, would have left one without confidence in the verdict and so they moved to dismiss the indictment with prejudice which motion Judge Sullivan granted.

MR. SCHUELKE: And appointed *me* on that very day.

MR. COHEN: This is all *after* the elections ____ ____.

MR. SCHUELKE: This was in April of 2009. Stevens lost the election in November of 2008. So that was the discovery which occurred before my appointment which led to the dismissal of the case.

MR. COHEN: If I'm understanding it, it would have been logically possible for the jury to convict based on the notion that there was, even on Stevens' version, a liability that should have been disclosed.

MR. SCHUELKE: Yeah, that's true.

MR. COHEN: But this created a doubt that it would have convicted him under the circumstances.

MR. SCHUELKE: Yeah, particularly when the jury might have concluded that the liability he had to VECO was measured in the hundreds rather in the tens or hundreds of thousands of dollars. And, in large measure, the Government's case depended upon the testimony of Bill Allen who came, as we've already discussed, burdened with lots of reasons for doubt about his credibility and this, of course, would have been an exclamation point with respect to that. So, Judge Sullivan, of course, granted the Government's motion to dismiss, but he had increasingly throughout the trial become concerned about the Government's credibility in representations to him that they had met their *Brady* and *Giglio* obligations, because there were several episodes during the course of the trial when it became clear that they had not, but they were remediable at that point. And even though the defense wanted a mistrial on several different occasions, Judge Sullivan denied those motions, and granted some less drastic relief like limiting what the Government was permitted to establish with respect to a particular claim, and so on. But they had repeatedly failed to make disclosures and were effectively caught.

The episode to which I alluded earlier about Rocky Williams' being sent back to Alaska, you know, Chad Joy in his complaint characterizes this as a *scheme*. I deposed him in the course of my investigation. He was a young fellow who had lots of sort of conflicting motivations of his own and he backed away from a lot

MR. SCHUELKE: Joy's ultimate claim, which I ultimately did not credit, was that they had developed *Giglio* information in this mock cross-examination and then had spirited Rocky Williams out of Washington back to Alaska so the defense would not have access to him. One can make a pretty good argument that that's what happened. But it's also true that Rocky Williams was a longtime alcoholic who, by the time of these pretrial interviews, was evidently in a very bad way and exhibiting classic symptoms of cirrhosis of the liver, jaundiced, distended belly. Hot during, you know, August in Washington, he'd be there for a prep session in the office of the Justice Department bundled up in a sweater and jacket and so on. And there's no question that he was very ill. And, in fact, he died in December of 2008. So there's no question that he required medical attention. It's also true that he did a lousy job on the mock cross as one of the prosecutors, Joe Bottini, one of the Alaska guys, eventually testified when I took his deposition.

MR. COHEN: Bottini?

MR. SCHUELKE: Bottini. BOTTINI. He testified that it wasn't just on cross-examination, it was on direct, you know, you could ask him what day of the week it was

and he might say, "I'll have fries with that." That's a direct quote from Bottini.

They did arrange to send him back to see a physician in Alaska who had been treating him. They did tell him, Marsh told him, call Williams & Connolly and let them know once you're back in Alaska. And, I believe, that that was so that without actually obstructing Williams & Connolly's ability to contact the witness, it would make it difficult. And so he did go back to Alaska and he never did testify. Might the defense have called him, nevertheless? Certainly when it was disclosed belatedly by the Government, to the court and defense, that Williams had been sent back to Alaska, Judge Sullivan was very upset about this: "This is this Court's subpoena. The defense has a subpoena issued by this Court. You can just unilaterally decide you're going to ship him out and tell nobody?"

And so, as part of the remedy, Judge Sullivan was prepared to make arrangements for him to be deposed in Alaska if that's what the defense wanted to do. For a variety of tactical reasons, and not to mention the fact that the trial was already underway at that point, they opted not to do that. Would they have, had they known what I discovered? I think so. Because what I discovered was that in August 2008, exactly one month before the trial began, August the 22nd, the two Alaska prosecutors, Bottini and Goeke, which is GOEKE, interviewed Rocky Williams. Now he'd been interviewed many times before. And he testified in the Alaska

grand jury, so this was sort of a one month pretrial reinterview prep session. And both Goeke and Bottini took detailed handwritten notes during the course of this interview. Those notes, consistent one with the other, revealed that Rocky told them, “you know, I remember back at the very beginning, it was 1999, I think, and we were at the Kenai River Classic.” KENAI, which is a big annual fishing tournament on the Kenai River outside of Anchorage which they also use as a big political fundraising event. “And Allen and Senator Stevens and I were talking and Senator Stevens told us how he wanted to do a renovation on the cabin in Girdwood and he wanted to make sure that this was done right because it’s gonna be under a microscope. He wanted to have a contractor who would do the work. He wanted to pay for everything and if we VECO did any work on the project, our time and labor was to be included in the contractor’s bills. And so, in the event, he engaged Christensen Brothers Builders and every month I [Williams] would get their invoice ‘cause I was kinda like acting as the foreman on the job, and I would examine those invoices to make sure they were consistent with what I had observed Christensen to be doing during that month and then I would take him up to the VECO main office to give to Allen or his secretary so that my time, Dave Anderson’s time and anybody else from VECO could be added into the Christensen Brothers bills.”

MR. COHEN: This is what Rocky Williams said to you?

MR. SCHUELKE: No, this is what he told the two prosecutors a month before the trial.

MR. SCHUELKE: Which is entirely consistent with Senator Stevens' and Catherine Stevens' defense.

MR. SCHUELKE: And the original plan was the Government was going to call him in its case, perhaps, as its leadoff witness. Now it's one thing for the defendant and his wife to say we understood we paid for everything through this mechanism, it's quite another to have the Government witness who's the foreman on the job testify that that was his understanding as well, which, in my judgment, is quintessential *Brady* material. And that was never disclosed to the defense. Instead, Chad Joy, the agent who was present at that interview, took virtually no notes of his own and the prosecutors, Goeke and Bottini, *dictated* to him at the conclusion of the interview a two-sentence 302. A 302 is the FBI form on which a memorandum of an interview is transcribed. The interview consumed about 2 hours by their estimate. The 302, which was supposed to be a summary of the interview, two sentences. The first said: "I never told Ted or Catherine Stevens that the VECO time was included in the Christensen Brothers bills." The second sentence said: "Neither of them ever asked me whether the VECO time was included in the Christensen Brothers bills." And the handwritten notes of the prosecutors also recount those two statements, but it's clear from the notes that here's how it went: Rocky tells them this whole story about his understanding about how the VECO time was going to be in the Christensen Brothers bills. They then say, well, okay, but did you ever tell

them that? “Mmmno. That was the understanding from the beginning.”
Right?

MR. SCHUELKE: Goeke testified when I took his deposition, “Yeah, I wanted those two statements recorded so that if Rocky testified at the trial and contradicted that notion somehow, we’d be in a position on redirect to impeach him.” Now, in my view, what this 302 amounted to, selective as it was, was an anti-*Brady* 302. That is, if he comes up with this story because they tumbled to it then, at least, we have him locked in to say, “yeah, but I never directly told them that the VECO time was in the Christensen Brothers bill.” So, in my judgment, you couldn’t possibly have conceived of this plan to deal with this information, which is harmful to the Government’s case, without understanding that it was *Brady* material, because it was harmful to the Government’s case. And they had a clear obligation to disclose it and they did not. Which is why

MR. COHEN: They pile it on by then sending Williams himself out of town?

MR. SCHUELKE: Right. Right. That episode is one of the bases for my conclusion that Goeke and Bottini acted willfully when they failed to disclose *Brady* information. And they are the only two, well, the prosecution team, who were ever aware of this. Their notes, their handwritten notes, never saw the light of day. Nobody else ever had occasion to look at them. We discovered them in the course of our investigation.

MR. COHEN: Can we go back to the start of that, because I haven’t given you a chance to explain how you got into this. The Government has moved and the

Judge has granted a motion to dismiss the indictment. And the same day, he asks you to undertake an investigation.

MR. SCHUELKE: Well, that was a Monday, the 9th of April, no, 7th of April. The Government's motion to dismiss had been filed, I believe, on the 1st of April. So, Judge Sullivan had the motion and it was self-evident that he was going to grant this motion, and he scheduled the hearing at which to do that on Monday the 7th of April. On the previous Friday, in anticipation of that, he called me. I was there minding my own business when Judge Sullivan called.

MR. COHEN: Why did he call you?

MR. SCHUELKE: Well, I have known him for many years. I knew him when he was a trial judge in the superior court many years ago. And I have, as we've already discussed, for many years served as the counsel to the Judicial Tenure Commission and Judge Sullivan was a member of that Commission with whom I worked for quite a few years. And so, we knew one another quite well. And beyond that, I can only tell you what he said when he announced my appointment was that I was a former federal prosecutor, I was a defense attorney at that point for many years and had experience doing a variety of investigations for the Senate, for the Tenure Commission, in my private practice, and we thought that for those reasons I was well-equipped to do the job because I understood the prosecution process and the defense function and had the requisite investigative experience.

MR. COHEN: When he appoints you, does that require any formalities other than a court order?

MR. SCHUELKE: No.

MR. COHEN: And how much does the court order spell out about the subjects you're going to cover, your powers, your right to use other people?

MR. SCHUELKE: Well, I can tell you exactly what the order said.

MR. COHEN: Okay.

MR. SCHUELKE: It said that I was appointed to investigate and prosecute for criminal contempt as appropriate the six named prosecutors: William Welch, Brenda Morris, Nicholas Marsh, Joseph Bottini, Jim Goeke and Edward Sullivan who conducted the prosecution of Senator Stevens. That's what the order said.

MR. COHEN: Did you have the power to subpoena people?

MR. SCHUELKE: Well, I think I probably did on the strength of that order but in order to cross the t's and dot the i's, I subsequently made application to him for the express authority to issue subpoenas and conduct depositions, which he granted. The criminal contempt statute is 18 U.S.C. Section 401, which provides in relevant part that one can be convicted of criminal contempt for the willful disobedience of a judicial order. The Federal Rules of Criminal Procedure also spell out a procedural mechanism. And it provides that ordinarily the Justice Department will serve as the prosecutor for a criminal contempt investigation ordered by a federal judge unless the judge concludes that the interest of justice requires that an independent

lawyer be appointed. And, you know, this is the obvious circumstance in which one wouldn't appoint the Justice Department to investigate itself. And so, that's why.

MR. COHEN: Although, the Justice Department had undertaken its own investigation.

MR. SCHUELKE: Well, they hadn't, no, they had, well, they had the O'Brien-Stuckwisch-Jaffe team which only had occasion to "investigate" because they were trying to learn the facts to get up to speed so they could respond to the new trial motions. They weren't directed to conduct an investigation into the conduct of the prosecutors. But it's also true that when the Joy complaint was made public, the Justice Department's Office of Professional Responsibility commenced its own investigation, broadly, into the conduct of the FBI because Joy was complaining about Agent Kepner and the prosecution, to the extent that he raised claims like the so-called scheme to send Rocky Williams back to Alaska. And OPR conducted that investigation in parallel with ours. We cooperated one with the other. So, for example, they made available to me transcripts of interviews that they conducted and I reciprocated. And I had seen a draft of the OPR report and I know they did a good, comprehensive and competent job. That report has not been made public despite a lot of demands emanating from the Congress and, as I understand it, while their report has been completed and conclusions have been drawn about whether or not some or any of the prosecutors committed professional misconduct, which is the OPR

mandate, it remains, as far as I know, in the internal Justice Department appellate process.

MR. COHEN: Well, so you get Judge Sullivan's order, how did you proceed?

MR. SCHUELKE: At the same time that Judge Sullivan appointed me. I told you I was sitting there minding my own business in my office when he called me. Probably, I don't know, 6 or 8 months ago, I was talking to him one day and he said, "Let me ask you this, knowing what you know now, would you have answered the phone when I called you that day?" And I bit my tongue and said, "Of course, Your Honor, I would have." Anyway, a little aside.

The same day he appointed me, he also ordered the Justice Department to cooperate with my investigation. And the Attorney General, Eric Holder, promptly announced that the Department would cooperate. And the Department did cooperate completely. And so the first thing I did was I arranged to have a meeting at the Department with a lot of the Criminal Division brass they probably had eight of them there at the meeting and to give them a preliminary laundry list of what I wanted: I want access to all the email traffic of the prosecution team. I wanted, starting January 1st of 2008, I want all the internal prosecution memos to the front office and I want all the drafts of all those *pro se* memos. I want access to all of the files maintained by Public Integrity, by the FBI, and by the U.S. Attorney's Office in Alaska hard copy files that I will be able go through and select what I want copied. I don't remember whether that

early on I had a specific list of people I wanted to interview. I think not. Shortly after I was appointed, each of the subject lawyers retained separate counsel and so, they were all represented and so with respect to my dealings with them about my intention to take their depositions, I dealt not with the Department but with their individual lawyers. And, of course, they all had a Fifth Amendment privilege. They all could have asserted it and declined. None did. And they all appeared voluntarily and I took depositions of all of them as well as the FBI agents, senior people in the Criminal Division management, including the then Assistant AG for the Criminal Division and his deputy. I took Bill Allen's deposition. I took his lawyer's deposition after we had a litigation over the production of the lawyer's handwritten notes of the series of meetings and interviews and prep sessions that Allen had had with the Government. He made sort of a halfhearted claim through his then new counsel here in Washington that this was work product doctrine protected.

MR. COHEN: So now we're up to seven law firms on the other side of the table from you.

MR. SCHUELKE: Two for Allen. One for each of the subject attorneys, so that's eight. But, Matt Friedrich, the then former Assistant AG for the Criminal Division was represented by separate counsel, as was his then deputy, Rita Glavin, as were both of the FBI agents. So there were, I don't know, a dozen different lawyers and law firms involved in it.

MR. COHEN: Did you talk to Stevens himself in the course of the investigation?

MR. SCHUELKE: No. I did talk to the lawyers from Williams & Connolly and made requests of them for documents and they cooperated completely. But, no, I never had a need to or occasion to speak to Stevens himself. Of course, he knew none of the relevant facts.

But we spent a considerable time, as you might imagine, identifying, finding, and reviewing documents before we started the first of our depositions. And

MR. COHEN: “We,” at that point, is?

MR. SCHUELKE: Bill Shields. Of counsel to my then law firm. And of counsel now to Blank Rome. And it was only the two of us who conducted this investigation. And it was a major undertaking. It took me a lot longer than I had hoped it would. It took me a lot longer than I was comfortable with. And it took us 2½ years or almost 2½ years.

MR. COHEN: You have a sense of how many hours?

MR. SCHUELKE: I don’t remember. I do know that we were paid by the Administrative Office of the U.S. Courts the princely sum of \$200 per hour, both Bill and myself, and that, when all was said and done, they paid us a tad under a million dollars at \$200 per hour. That’s a lot of hours.

MR. COHEN: That’s a lot of hours.

MR. SCHUELKE: But one additional and significant issue which consumed a lot of our time, which also would likely have been outcome determinative had it been disclosed to the defense, was the following somewhat convoluted story. In 2004, there was a criminal case indicted in Alaska. The lead

defendant's name was Joseph Boehm, BOEHM. And he was charged with a broad ranging conspiracy to distribute prohibited substances, largely cocaine, and to enlist young women for purposes of prostitution. And most of these young women were cocaine addicts who were basically engaging in prostitution under Boehm's direction for the cocaine. One of them was a woman whose name was Bambi Tyree, TYREE. Bambi was indicted along with Boehm but she ended up cutting a deal and cooperating and was to testify at Boehm's trial. Boehm eventually pled guilty as well. But she was then scheduled to, and did, as a part of her cooperation, testify against Boehm at his sentencing when there was a lengthy sentencing hearing. That occurred in 2005. Before the Boehm scheduled trial, before he had agreed to plead guilty, another Alaska prosecutor who was responsible for this prosecution, his name escapes me at the moment, but I'll think of it, and an FBI agent whose name was John Eckstein, had some concerns about Bambi's credibility and they wanted to pin one thing down with her. And so they went to see her, in the presence of her lawyer, where she was then incarcerated at SeaTac, the Seattle-Tacoma federal correctional institution. And John Eckstein prepared an FBI 302 of this interview. And the 302 reads in pertinent part: "Had sex with Bill Allen when I was fourteen. Gave a sworn statement falsely denying that I had had sex with Allen when I was fourteen. Did so at Allen's request." And that was because, as we learned, Allen had had a sexual liaison with another woman who was jealous about the fact that he

had this relationship with Bambi Tyree. Now, mind you, at this point, Allen was probably 60 years old. And he's got this 14 year old coke addicted hooker who he has this relationship with. So the other woman is going to blackmail him. She wants some money. She's maintaining that she's going to disclose the fact that he's had what amounts to statutory rape with this 14 year old girl. And so Allen engaged a lawyer in Anchorage and took Bambi down to see the lawyer and in an effort to forestall this he has Bambi sign this false affidavit that she never had sex with Allen.

This becomes known to the prosecutors between the Kott trial and Kohring trial in the fall of 2007. They've got Eckstein's 302 which says as simply and as concisely as could be that according to Bambi the affidavit was false and in addition, four days after that interview at SeaTac, the prosecutor in the Boehm case filed a lengthy pleading with the court seeking to, while he was conceding that the fact that she admitted to signing a false sworn statement would be admissible against her to impeach her when she testified, arguing that the underlying subject matter, namely sex with Bill Allen should be excluded because Allen's not in this case, and he wasn't and that would just be prejudicial and inflame the jury, blah, blah, blah. But in the course of filing that motion, he laid out this whole thing, the story I just told you, about how the other woman was trying to blackmail him so Allen takes her to his lawyer and she swears out this false statement. So the Stevens prosecutors have that as well. So

Nick Marsh and Jim Goeke are the two who tried the first of these two cases in September 2007. Joe Bottini and Ed Sullivan, from the Public Integrity, also part of the prosecution team, tried the Kohring case and between the two trials somebody brings to the attention of the group of them this 302 and this pleading that had been filed back in the Boehm case two years earlier and don't we have to disclose this?

MR. COHEN: They have not disclosed any of this to Stevens.

MR. SCHUELKE: No. They didn't disclose it to Kott or Kohring and they didn't disclose it to Stevens. Instead Nick Marsh says, well you know I, and this is all in emails, You know I hear you but you know we didn't disclose it in the Kott trial and I don't think there's really anything to this, I think this is a mistake and I don't think it's true and now if you're going to disclose it to Kohring's lawyers, well that means we're going to have to say we failed to disclose it to Kott. But you know if you insist we can run it up the flag pole at PRAO. PRAO is the Professional Responsibility Advisory Office within the Justice Department. Okay good, let's do that. So Marsh calls one of the lawyers at PRAO and purports to describe the relevant facts and asks for an opinion, do we have to disclose this? He didn't disclose the 302, he didn't disclose the pleading, Frank Russo is the other lawyer in the Boehm case, he didn't disclose the pleading that Frank Russo had filed and he told the PRAO lawyer that this was a mistaken recollection on the part of the lawyer and blah, blah, blah and the PRAO lawyer then says,

well, I mean if that's the case then there is no relevance you don't have anything to disclose. Good. Got nothing to disclose.

MR. SCHUELKE: I told you this was a convoluted story. Frank Russo and Eckstein interview Bambi in July of 2004. Four days after the interview Russo files the pleadings in the district court in Alaska which I have already described. 2005, a little less than a year later, Boehm is now up for sentencing and Bambi is being prepared to testify against him at his sentencing hearing. In addition to Agent Eckstein's 302 and his own handwritten notes in the SeaTac interview, Russo had made his own notes at that interview and his notes are consistent, had sex with Allen when I was 14, falsely denied that I did, did it at Allen's request. His notes, those notes were discovered by the Marsh, Goeke, Bottini, Sullivan team two years later and the line in Russo's notes which originally read, did so at request of BA, okay, Bill Allen; when they found the copy of these notes the BA was crossed out and the marginalia read, Bambi's idea. Okay. So now it says, "Did so at request of, cross out Bambi's idea."

MR. COHEN: So it sounds she made it her idea.

MR. SCHUELKE: It was her idea not "Bill didn't ask me to do this." Right. So, Frank, how did this come about? He says, "You know I've been racking my brain about this and I'm pretty sure this is what happened. I took those notes at the interview in 2004 at the SeaTac's..."

MR. COHEN: This is Russo speaking?

MR. SCHUELKE: Frank Russo, yes. "I took those notes at the interview at the SeaTac Penitentiary. A year later we're prepping her for the sentencing in Boehm. We get around to this subject. She never wanted to say anything negative about Allen; she didn't want to get him in trouble; he for years had been giving her and her extended family lots of money. And so, when this subject came up she said, 'No! No! It was my own idea.' So instead of writing out a new set of notes I had with me in my file the notes I took a year ago so I just crossed that out and wrote, 'Bambi's idea.'" Okay. Now, when between the Kott and Kohring trials, Nick Marsh and company focus on this issue. They go talk to Russo, he's right down the hall from Bottini in the U.S. Attorney's Office in Alaska. So I mean, "Frank, you know you filed this pleading which says Bill Allen had her swear this false statement. Here's a copy of your notes that says, Bambi's idea." And at this point he didn't really remember very well and he says, "I don't know." So, they came to the convenient conclusion that what he wrote in the brief was a mistake and that's what they described to PRAO. The only evidence is a mistaken account in a pleading filed by the government and that's only a pleading, that's not evidence anyway. And the PRAO lawyers never knew that there was an FBI 302, that the FBI agent's own notes were consistent with the 302 of what Frank Russo's notes actually originally said and so they say, nope, nothing to disclose, no evidence.

MR. COHEN: So all PRAO was told was that Bambi, herself, had the idea of not saying anything to harm Allen.

MR. SCHUELKE: Right, and what they told PRAO was simply false. And all of them Bottini and Goeke, who were not participants in the conversation with PRAO knew what PRAO had been told because the PRAO lawyer dutifully wrote a memo of everything she was told and emailed it to the whole group. And, you know, when I took their depositions, Bottini and Goeke, I said, "well, Mr. Bottini you received this email did you not?" "Apparently I did." "Well now as you read this you would agree with me would you not that this is, this part is false; this part is false and this part is false." "Yeah, I agree with you." So, you didn't say, "Oh wait a minute, wait a minute! Nick you better to back to PRAO or I better, cause this is wrong." "No, I, you know, I don't think I focused on it, I didn't read it or I didn't read it carefully." Uh, So that was not disclosed in the Kott or Kohring trials, which after it came to light, led to the reversal of their convictions and both of them were released from prison, having one of them served a year and a half by that time, the other one ten months or something; and it was not disclosed to Senator Stevens, and had the jury here in Washington been acquainted with evidence that Allen had suborned perjury, in combination with the rest of his problems, uh, and I concluded with respect to Bottini and Goeke that that was a willful nondisclosure as well. You know, they say, "well wait a minute, uh, you know, we made repeated attempts to have some kind of disclosure made,

and we're the two bozos out in Alaska; Public Integrity is running this case, we don't have our normal chain of command, the U.S. Attorney, our boss, is recused from this case and we tried." Oh. They tried by, repeatedly, saying, you know, I think we need to disclose something about this because the press in Anchorage is on to this Bambi Tyree/Bill Allen relationship generally, and they're going to write a story about gifts that he's given her and the family, and we don't know what Williams & Connolly might know about this, and oh, by the way, we just learned that one of Boehm's lawyers in the subsequent civil action up in Anchorage is Ted Stevens' brother-in-law, so they may well know this whole story with that pleading, that Frank Russo filed, because it was under seal and remained under seal until I asked the court in Alaska to lift the seal. So the only ones who presumably would be privy to it would be the lawyers who were involved in the case. And so what Bottini and Goeke were proposing to the group and to management was, we can't afford to get caught not having disclosed this, so we ought to make some kind of disclosure and "smoke out what Williams & Connolly might know about this." Just a pure tactical effort at covering their backs in case they got caught without actually disclosing the relevant facts.

MR. COHEN: You mean by just sort of stating some good intentions.

MR. SCHUELKE: Well, yeah. What they did in response to those suggestions was shortly before the trial began, because they were not disclosing the actual underlying evidence of any *Brady* or *Giglio* material, instead they were

writing these summary letters, Dear Williams & Connolly: This is our summary *Brady* disclosure letter. And they would have a number of topics and on this topic it said, "There was a suggestion," suggestion is the word used, "There was a suggestion that uh an underage female had a sexual relationship with Bill Allen and falsely denied such. We have investigated this thoroughly, there is no evidence to support it." That's the letter they wrote to support this suggestion.

MR. SCHUELKE: Now, you asked me early on about the roles of senior people on the prosecution team by contrast to more junior people. There were six lawyers whom I was ordered to investigate. Welch was the Chief of the Public Integrity Section; Brenda Morris was a Deputy Chief who was appointed at the eleventh hour to be the lead trial lawyer; Marsh, Bottini and Goeke whom I've already described to you, who had been up until the eleventh hour before the Stevens trial, the team, the lead lawyers. And the young guy in Public Integrity whose name was Ed Sullivan who had just recently come from the Civil Division and never seen, let alone, tried a criminal case, who was a scrivener, a smart kid who drafted a lot of the pleadings. Shortly before the case was indicted in July of 2008 the front office Matt, and Friedrich and Rita Glavin called the whole team in, the two guys from Alaska, Marsh, Sullivan to put on a dog and pony show for us so we can see whether we think they're up to this high visibility case taking on a senior United States senator. And they were not overly impressed and so Matt Friedrich wanted Brenda Morris to try the case.

Brenda had been, for a couple of years, the deputy chief of Public Integrity and had some passing familiarity with this whole polar pen investigation but never actively supervised any of it. She resisted but eventually they said no Brenda you need to do this so she did. But as she herself testified, the rest of the team, that is, Marsh, Bottini, Goeke and Sullivan, but mostly Marsh who was the most senior of that four, really had his nose out of joint and basically...

MR. COHEN: Because she had been brought in?

MR. SCHUELKE: Because she had been brought in. "And so in order not to make the morale problem even worse," she said, "I tried to make myself as little as possible, and I'm spending my time getting up to speed, to learn the case, preparing to try it and trying it. I didn't have the time, the interest, or the desire because of those morale reasons to actually play like supervisor over these people." Meanwhile, she and Rita Glavin are very close personal friends. Rita Glavin was a very hard charging Justice Department lawyer who, both because of her position in the front office and because of her relationship with Brenda Morris, aggressively supervised this prosecution. Welch, who was the chief of the Public Integrity Section, as a result felt like he was taken out of the chain of command. And which he was, effectively. And so he didn't really have the opportunity to supervise this on a workaday basis although, as I conclude and as the report says, every time one of these disclosure issues, and they came up repeatedly in the trial, came to his attention, was

brought to his attention, he told them, turn it over. And, according to both him and Brenda Morris, Rita Glavin took the position “Hey, this is Williams & Connolly we need to play this really close to the vest. We’re not going to turn over 302s, except in so far as they are Jencks material.” And so there was this perfect storm of absence of meaningful supervision and improvident judgments about how discovery in the case should be managed. Eventually, before the trial ended but after Allen had testified and left, the Public Integrity Section got this big file from Alaska because the Anchorage Police Department was investigating this sexual misconduct allegation about Allen with minors and they ultimately sent it to the Justice which has here in Washington the Child Exploitation and Obscenity Section and so when, prior to that time, while the senior management in the Criminal Division knew about this APD sexual misconduct investigation, they took the position that “we don’t have that stuff in our possession; we don’t have any obligation to go ask for it so then we’d have to turn it over. We only have to turn over what’s in our custody and control.” This is another ridiculous position to take. Well now they have it so Welch started leafing through it, the night he got this box, spent most of the night reading through it and he sees John Eckstein’s 302 of the Bambi interview in 2004 and he says, that’s not the way they described this to me. And sent it immediately to Williams & Connolly. So my conclusion about Welch was that he didn’t effectively supervise this because he was effectively removed from that role but every time

somebody came to him because he was this leader in the Public Integrity Section he directed them to do the right thing, to his credit. I credit Brenda Morris' account that she basically didn't know anything about any of this because she didn't care to and wasn't engaged in it and there's no evidence to the contrary. I concluded that Ed Sullivan the most junior guy on the team, while he was privy to a lot of this information, made no decisions, and followed the lead of the people who were senior to him, like Marsh and Bottini. So...

MR. COHEN: And as to the remaining three your conclusions were...

MR. SCHUELKE: I concluded that Bottini and Goeke intentionally withheld *Brady* and *Giglio* material. I made no such conclusion about Marsh simply because he was deceased. Now, so that's one of two elements of the criminal contempt prosecution. Willful disobedience. The first essential element that one has to prove is that there was a clear and unambiguous order which was willfully violated, okay. So I concluded that the two of them willfully failed to disclose *Brady/Giglio* material; had Judge Sullivan issued a clear and unequivocal order that they were to turn over all *Brady* and *Giglio* material I would have prosecuted the two of them for criminal contempt. I concluded that Judge Sullivan had not issued such an order. Long colloquy during pretrial hearings on the defense motion to compel production of *Brady*, *Giglio* and other discovery materials. Judge Sullivan. "We all know the law, we all know *Brady*, we all know *Giglio*, we all know the *Poindexter* case from our Circuit Court, we all know the

Safavian case from Judge Friedman, you know, why shouldn't I order you to follow the law?" "Well, your honor, you're right, we do know the law and you know we're complying with that and we recognize that we have a continuing obligation to do so." Um, "why shouldn't I just say, why shouldn't I just say, follow the laws of *Safavian*, *Poindexter* and so on?" Whereupon one of the Williams & Connolly lawyers says, "well your honor, it would be helpful if you did that." To which Judge Sullivan said, "I just did. I just did." Which in fact he hadn't. He said "Why shouldn't I, right?"

MR. COHEN: Uh huh.

MR. SCHUELKE: At the end of that lengthy colloquy, he summarizes the whole situation and he said, again, "I am not going to issue an order that simply says follow the law. We all know what the law is and I accept that in good faith the government will abide by it and I'm not going to issue an order. Anything else, folks? We done with this?"

MR. COHEN: So if I understand correctly, the statute makes it criminal contempt to willfully violate a court order but doesn't make it a crime at least that statute doesn't make it a crime and to willfully fail to turn over *Brady* material...

MR. SCHUELKE: Right, that's correct. And the only statute that would be the obstruction of justice statute over which I have no authority. The Justice Department does.

MR. COHEN: Because your original order from Judge Sullivan didn't authorize you to look into any other crime.

MR. SCHUELKE: And couldn't, as a matter of separation of powers. This is a judicial function.

MR. COHEN: Thus only a prosecution for a violation of his order?

MR. SCHUELKE: Right. And the Justice Department is the sole authority to bring or not bring an obstruction case. I said in my report, while I was doing this analysis of the contempt statute and concluding that a contempt prosecution would not lie for want of a clear and unambiguous order, I dropped a footnote that says we offer no opinion as to whether a prosecution for obstruction of justice might lie, citing to a case *U.S. v. Convertino* which is very similar...

MR. COHEN: Spell that.

MR. SCHUELKE: CONVERTINO. *Convertino* is an AUSA in Detroit who was the lead prosecutor in a terrorism case and they indicted and tried a couple of, I don't remember the nationality now, Middle Eastern origin, and they'd done a raid of an apartment they had in Detroit and they found these handwritten maps which appeared to be maps of part of Amman, Jordan. But there are a number of military installations and a hospital, Queen Rania hospital. And the government's theory of this case was that they were plotting to somehow to blow up one of these installations in Jordan and they dispatched investigators to Jordan and took photographs of a number of these installations from a helicopter and there is basically no

persuasive similarity between the drawing and the photo. And they went to trial claiming that this drawing was an accurate depiction of this place in Jordan and denied that they had ever taken any photographs. Not only did they not disclose them, they denied that they were ever taken. And so, and the evidence was that Convertino, the AUSA knew about the photographs because they were sent to him electronically and they had the emails and what not. So they indicted Convertino and this agent.

MR. COHEN: For obstruction?

MR. SCHUELKE: For obstruction of justice, for having failed to disclose. That case went to trial, they were acquitted by a jury. It appeared to be a classic case of jury nullification; these are the guys with the white hats who were trying to prosecute the terrorists. But theoretically, to answer your question, yeah, this conduct I found would support an obstruction of justice charge, in my view.

MR. COHEN: Do you think that when the participants asked Judge Sullivan not to issue an order, they were thinking of the possibility of criminal contempt? Was the Justice Department saying, well, you know, let's not turn our Brady judgments into possible contempts?

MR. SCHUELKE: I don't think so. I mean I think the truth of the matter is that by the time the case was in trial, with the exception of the Bambi Tyree issue, I don't think that Bottini or Goeke ever gave one thought to what Rocky Williams had told them a month earlier. I mean I don't think they were consciously saying, "We know we're supposed to turn this over, you know but we're

not going to do it.” They’ve rationalized it. I don’t see how they could possibly do that with Bambi.

MR. COHEN: Are there other significant incidents of misconduct that you haven’t mentioned, or is it the two, primarily the two that you have described?

MR. SCHUELKE: Well, there are three basically, I mean, with respect to the one that originally prompted the dismissal, Allen’s April 2008 interview where he didn’t remember talking to Bob Persons, all five of the participants at that interview, four lawyers and the FBI agent claimed not to have remembered what he said in that interview. The FBI agent testified that she didn’t do a 302 because the interview did not go well. I found that hard to believe, this collective memory failure and I said so in the report. But I also said that I was unable to cite to evidence that any one of them actually did remember and so I didn’t think I could make a contempt case out of that, had there been the requisite order. But I persistently view that’s pretty damn hard to believe that all of them; because, as I said earlier, they knew what the defense was; they knew what Ted Stevens was going to make out of that handwritten note; they had identified that possible defense before they even got that note and as I think I also said, they scrambled to get a hold of Allen as quickly as they could, to ask him about this and yet they forget about it. And you would think that come September 14, when Allen did come up with the recollection, five months later and Bottini and Kepner and company all went to the war room where they all worked and hey, we got a great piece out of Allen today, you

know, this is big news internally. Don't you think one of them might of said, wait a minute, didn't we ever ask him this before, I mean we've had this note since last April.

MR. COHEN: I'd like to stop here.

MR. SCHUELKE: It's 5:00 so you have, as we said, more important things to do.