

**Oral History of Henry F. Schuelke, III**  
**Seventh Interview**  
**June 21, 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 June 21, 2012. This is the seventh interview.

MR. COHEN: Hank, we talked last time about the Stevens case at some length. One thing we didn't reach because it hadn't happened when we last talked was the Justice Department's own disciplinary actions against the prosecutors and just to complete the record on that, can you describe what the Justice Department did?

MR. SCHUELKE: Yes. As I believe I described on the last occasion, I had concluded that two of the prosecutors who happen to have been Assistant U.S. Attorneys from Alaska had engaged in intentional misconduct in the withholding of two discrete pieces of significant exculpatory evidence which in my judgment may well have proved to be the difference for the jury who heard the case. I concluded from the circumstantial evidence that I believe to be compelling, that their conduct in these instances was indeed willful and intentional. The Justice Department's Office of Professional Responsibility conducted a lengthy, painstaking and comprehensive investigation of the same matter contemporaneous with my investigation. We and OPR agreed early on that we would share information, and because we did so, and also because they favored me with a draft of their report, before the end of last year, I was fully aware of the scope of their investigation and at least the OPR section's conclusions. OPR had

concluded at the time of the draft which I saw that the same two AUSAs from Alaska had engaged in professional misconduct with respect to the self-same matters as to which I had concluded that they acted willfully. OPR and ultimately the Justice Department measures the conduct of its prosecutors against a somewhat different standard. Their focus is on professional responsibility. That is, whether or not the conduct of a prosecutor offends the disciplinary rules and they have a decision framework, as they call it, in an ascending scale which goes from assuming a violation of a disciplinary rule. One, not professional misconduct because it was inadvertent, two, not professional misconduct because it amounted to an error in judgment, three, professional misconduct because it constituted a reckless disregard of a known rule, or four, professional misconduct because it was an intentional violation of a known rule. With respect to these two prosecutors and the two substantive matters on which we found misconduct in common, OPR concluded that the conduct was not intentional as I had, but rather that it constituted recklessness. And because that...

MR. COHEN: You had found it intentional.

MR. SCHUELKE: I had found it intentional. They found it reckless. Because whether reckless or intentional under their framework, it constitutes professional misconduct, a sanction was then appropriate. OPR itself does not impose the disciplinary sanction. Rather, OPR conducts an investigation, writes a report, and then, first, it's shared with the respondent attorneys and their

counsel who have an opportunity to respond which they did in this case. And then it goes to a fairly new unit which was established about a year ago which is called the PMRU, Professional Misconduct Review Unit, and it's that unit which can either accept or reject OPR's findings and conclusions and if accepted, can impose a sanction. The PMRU review was staffed by a man whose name is Terrence Berg, a former United States attorney from Detroit who has recently been nominated to a district court judgeship in Michigan, and he wrote a lengthy piece and concluded that it was unfair and inappropriate to tag these two line prosecutors with misconduct, because he thought that the problems in the Stevens prosecution were pervasive and largely owing to a lack of supervision by senior people both in the Public Integrity section and in the front office of the Criminal Division. Well, the head of the PMRU disagreed with that conclusion and it then went to Scott Schools, who was the principal Deputy Associate Attorney General. And he, like Berg, wrote a fairly lengthy piece, quite well done in my view, in which he concluded, as had OPR in the first place, that in these couple of instances the conduct of these two AUSAs constituted reckless disregard and therefore professional misconduct, and it fell to him to impose the sanction which was a 40day suspension for one of the two and a 15day suspension for the other. They announced this decision together with all of the supporting papers on the first of June; it was well timed as we've come to observe here in Washington. If you fear an adverse media or a public reaction, you

release it when it's apt to get the least attention, and this was the Friday before Memorial Day, and it got little attention.

MR. COHEN: June 1<sup>st</sup> wasn't the Friday before Memorial Day though.

MR. SCHUELKE: Well then the release was the week before that. It was the Friday before Memorial Day.

MR. COHEN: Oh, so it was the twenty...

MR. SCHUELKE: So the 25<sup>th</sup>. Whatever that Friday was. That's right because the Senate Judiciary Committee held a hearing on the 6<sup>th</sup> of June and that was two weeks subsequent to the release.

MR. COHEN: Okay.

MR. SCHUELKE: Now, I persist in my view and I think the evidence compels the view that the conduct of these two prosecutors was willful. But, you know, one's entitled to different view. They, I think to their credit, while they're entitled to a different view, they're not entitled to a different set of facts and they did find essentially the same facts. They construed it differently. I nevertheless was, if not surprised, somewhat distressed at the penalty imposed. And there was a, some similar reaction from the media. "What?" You know you can do this and you can deprive somebody, not only somebody but a senior sitting U.S. senator, of a fair trial, and even if you act recklessly your penalty amounts to in one case like \$15,000 and six weeks' vacation and the other two weeks suspension and \$7,000 loss of pay whatever that amounted to. And it was interesting because Scott Schools when he wrote his analysis identified a set of factors he

considered both aggravating and mitigating. One of the aggravating factors was whether or not the conduct had a great deal of public visibility and if so, whether the Department suffered a loss of confidence on the part of the bench, the bar, and the public; and he concluded that because the Stevens case was a very public matter, as was the reported misconduct, it had such a deleterious effect on the Department that it should be considered a significant aggravating factor to be measured against a number of mitigating factors like each of these two had had lengthy careers in the U.S. Attorney's Office with unblemished records and enjoyed until this time a good reputation and so on. And because it represented a significant aggravating factor, Schools was of the view that a significant penalty was called for. And he also observed that the 40day and the 15day suspensions were at the very highest severity of penalties that had ever been imposed by the Department as the result of a misconduct finding by the Office of Professional Responsibility.

Now OPR, for the last 30 years, has enjoyed a terrible reputation among practitioners in the criminal defense arena. It's the place in the popular view where allegations against prosecutors go to die, and my own experience and observations over these last 30 years are consistent with that view. And I found it just remarkable that one could conclude on the one hand that a significant penalty was called for for the reasons described and that a 40day and a 15day suspension, respectively, met that standard. You know, I and any number of my colleagues at the bar who have

become familiar with this matter, many of them because they had occasion to read my report (or at least its executive summary, because reading 500 and some pages of this report is somewhat off-putting), have observed to me: “You know? If that were one of us on the defense side, we’d be in jail. That’s obstruction of justice. They wouldn’t hesitate for ten seconds to prosecute one of us.” I subscribe to that view as well. And so I personally found this outcome, while not surprising given the history and given the fact that you have an institution investigating its own, disturbing and somewhat surprising because it’s a political problem for the Department of Justice. When I had occasion to testify about my report before the Senate Judiciary Committee and the House Committee on Government Reform and Oversight, three, four, maybe five members of Congress asked me “Do you know whether the Justice Department has taken any action against these people?” “They have not as yet as far as know”, was my response. “And they’re still working? They’re still prosecuting people? They’re still day-to-day prosecutors and somebody else is at risk?” “They’re still working as far as I know, yes Congressman,” was my response. And you would have thought, given those questions, that when they learned of the ultimate sanction they would be appalled and exercised and what not...well they called the Deputy A.G., Jim Cole, who’s a very good guy and a friend of mine; he testified before the Senate Judiciary Committee on June the 6<sup>th</sup>, and to virtually no significant reaction, described what the penalty had been and

how they had arrived at it and poof – it was like, gone. So, that's the denouement.

MR. COHEN: Does the penalty carry with it if not formally at least informally a certain career impairment? I mean you would think that somebody who had behaved badly enough to be suspended would have a harder time getting promoted and would have a harder time perhaps going to somewhere else outside the Department.

MR. SCHUELKE: Well, I think if that prosecutor, the hypothetical prosecutor we're talking about, had aspirations to be appointed to a position that required Senate confirmation, judge, or even, within the Department, the Assistant AG of the Criminal Division or the Deputy AG, it would be a problem I believe. I do not believe it will pose a career problem for either of these two men, both of whom have long been Assistant U.S. Attorneys in the Alaska U.S. Attorneys' Office. One of them remains in the Alaska U.S. Attorneys' Office in his 24<sup>th</sup> or 25<sup>th</sup> year. The other transferred from the Alaska office to an office in the state of Washington sometime in the last two years, but I don't believe that either of them has any aspirations to a senior position in the department. I believe that their respective U.S. Attorneys probably remain supportive of them and so no, I don't expect that it will have any significant career consequences for them, and I don't know whether either of them has any thought of leaving for the private sector, but in Joe Bottini's case, the more senior of the two who remains in Alaska, I don't imagine this would be a problem for him with some law

firm in Anchorage, Alaska. I mean there may be some diehard Ted Stevens supporters who might have a negative view about him as a result of this but no, I really don't think it will have a negative consequence. Now, one of the additional actions that the Department takes whenever they have a finding of professional misconduct is to refer the matter to the bar where the lawyer's admitted and so the Alaska bar, I think this is true for both of them, presumably will get the referral and they'll open an investigation, conduct some kind of review. I'd rather doubt that they would be penalized beyond perhaps a letter of admonition or something along those lines. So I don't really think...I mean obviously it's personally painful for them, and the pendency of these two investigations I have no doubt has been painful for them.

As I testified up on the Hill, when asked my view about motive I did not think this was the product of any animosity towards Senator Stevens. I did not think it was the product of an effort to achieve fame and fortune by the victory in that case. But rather, that I thought it was simply a function of what we call "contest living." You don't like to lose, you want to win. And if you're called upon to make a judgment about whether you have to disclose something which is significantly damaging to the government's case, you know you somehow rationalize nondisclosure and I think that's what happened here. And I don't think that either of them is a venal person and I don't doubt for a moment that they earned their previously unblemished record, so this is a difficult thing on the personal

side. I remain, as I may have said when last we discussed this, appalled at what transpired, in significant part because I am a proud alumnus of the Department of Justice. I was proud of my service there. I was proud of the service of all of my colleagues. We always prided ourselves on doing the right thing. One of the greatest advantages of being in that office here in Washington working for the U.S. Attorneys for whom I worked was that my only imperative was to do what I thought was right. And so I found this whole matter to be personally painful, that I had to come to the conclusions that I did. But that's the story.

MR. COHEN: As you described the situation last time, it seemed to me that you were describing an egregious failure to provide the defense with exculpatory evidence, with evidence that called into serious question the credibility of a critical witness; and you described circumstances that strongly suggested that these guys had to know what they were doing, had to have made an advertent decision, which suggests that even OPR's first step of calling this merely reckless and nonintentional misconduct was a preparation for a soft landing for these guys.

MR. SCHUELKE: I think that's right. I understand that the submissions made by the respondent lawyers through their counsel to the initial draft OPR report played a significant part in OPR's ultimate conclusion that the conduct was reckless rather than intentional, which leads me to infer that the first OPR draft likely concluded as I did that the conduct was intentional. The OPR report ultimately explained that they did not find the conduct to be

intentional because, while they recognized the circumstantial evidence of intent, which I found to be compelling, beyond a reasonable doubt compelling, they found no evidence because there was none in the form of an email, for example, in which one of the two of these prosecutors specifically said, "I know I have to turn this over but I'm not going to." In other words, by that reasoning, in order to have reached an intentional conduct conclusion they would have had to have a confession. Now, we all well understand that circumstantial evidence of intent is every bit as reliable as an evidentiary proposition as direct evidence of intent, like a confession. To assert, as they did in the fact, that in order to reach such a conclusion one would have to have that direct evidence sort of stands the evidentiary law on its head.

MR. COHEN: You explained last time that your only jurisdiction here, so to speak, was to investigate criminal contempt at the request of the court, and you of course for separation of powers and other reasons couldn't be given jurisdiction to consider other criminal prosecution. Did anybody, as far as you know, look at the question of obstruction of justice here and the possibility of going beyond disciplinary action and prosecuting them for obstruction?

MR. SCHUELKE: Not that I'm aware of and I'm confident that there was no such consideration. You know, I footnoted the conclusion section of my report, in which I concluded that a contempt prosecution would not lie, and said in the footnote that I express no view as to whether or not a prosecution

for obstruction of justice might lie, and cited such a case that was brought against a prosecutor in Detroit a few years ago which ended in an acquittal which was clearly, in my view, a case of jury nullification. That footnote was in there, it was out, in was in, it was out, because I was...

MR. COHEN: You went back and forth?

MR. SCHUELKE: Yeah, I went back and forth because I had an internal debate about, whether this gratuitous observation of mine was appropriate; because of course when I said I expressed no view about whether such a prosecution would lie, that probably suggested that in my view it would.

MR. COHEN: Yeah.

MR. SCHUELKE: And, I ultimately decided to leave it in. Whether there was any consideration of that at the Department I have no idea, but I doubt it.

MR. COHEN: Because you were pretty clear that you would have prosecuted for criminal contempt except that Judge Sullivan hadn't issued the order that would be the foundation for such a prosecution.

MR. SCHUELKE: That's correct. Now, you know, once the Department through the OPR investigation came to the conclusion that there was not willful conduct then, by definition, an obstruction of justice prosecution would not lie because that's a specific intent crime. So, whether anybody actually thought that through and said, "Hmm I wonder if we ought to, you know, look at obstruction as a possibility?" Well, you know we've already concluded that there's no intentional conduct so that's the end of that." Whether that little mental exercise was indulged I do not know.

MR. COHEN: Anything else about Stevens? At this point, we've said that this at the end of this you and I can go back over what you have said and pick up anything else we think of as we're doing it.

MR. SCHUELKE: No. I don't think so at the moment.

MR. COHEN: Okay. Well, let's go on. But before we do that, there is one other thing; you got a lot of praise for the report and I want to record that fact, the praise included at least one commentator who said your own judiciousness in the report, declining to bring or recommend a prosecution because there would have been a, as you saw it, a crippling weakness in the case, contrasted quite favorably with the way the two Justice Department lawyers themselves behaved in relation to the Stevens prosecution.

MR. SCHUELKE: Well, that's nice and I'm gratified that somebody had that view. To make the record complete however, it should be noted that the report was criticized to a significant degree in some quarters. The quarters however were the lawyers who represented the couple of the subject attorneys so, you know I sort of take that with a grain of salt. But, yeah it's nice that somebody thought I did a good job.

MR. COHEN: Should we go on to what you listed as the Enron matter.

MR. SCHUELKE: Oh, I think this is a pretty simple story. The Enron case, of course, was a major event, not only in the annals of corporate finance but also in the annals of criminal law. The Justice Department fairly soon after the failure of Enron in the fall of 2001, established a task force and devoted enormous resources to the investigation, as did the SEC, and the outcome

aside from the demise of Enron, was somewhat of a mixed bag for the government. Jeffrey Skilling, who had been the CEO at the time of the relevant events, was successfully prosecuted and while he still has an appeal in the works, was sentenced to a term of 24 years, which I think is absurd, but the Department thought that was a grand accomplishment. Andy Fastow, who was the principal architect of the financial shenanigans ultimately worked out a plea deal largely because they had pressured him with the prospect of prosecuting his wife as well. And, his deal was 10 years and I know he's out. And, I don't remember exactly how much time he served, it was probably six or seven years anyway. I represented the treasurer at the time of the events whose name was Ben Glisan. Glisan, like a number of his colleagues at Enron, was young, meaning mid30's, smart and quite self-absorbed. I don't mean that he was, as a matter of personality, self-absorbed. I mean, as the title of one of the books about the Enron affair has it, *The Brightest Guys in the Room*, they all thought they were the brightest guys in the room. And, they were too smart by half. Glisan, working for Fastow, was the architect of a number of these extremely convoluted so-called special purpose entities, which were established in order through a series of reciprocal loan agreements to take debt obligations off the Enron corporate books. So, while there might be, as a common sense matter, several billions of dollars' worth of debt, the Enron financial statements don't show it because they were off the books. They were obligations of the so-called special purpose entities. And, it

was kind of fascinating because Glisan, for me, spent days, weeks, I suppose, drawing for me on an easel the intricate relationships between all these sub entities for one single transaction and would take the entire page on the easel. It had like 35 boxes on it with arrows going this way and that way. And, they had these quite provocative names for all of these SPEs, special purpose entities, the raptor, for example. Here's the part of it that I found most interesting and which I to this day believe was a significant success for Glisan. Glisan was indicted along with Andy Fastow in a multi-count securities fraud indictment. Had he gone to trial and had he been found guilty, which was at a time before the federal sentencing guidelines by virtue of a Supreme Court decision were made advisory, that is they were mandatory at this time, would have faced sentencing range of from nine to 14 years. It was clear to me early on, post indictment we had motions practice and argued a number of motions, and so we were probably together with Fastow as codefendants for the court for six months maybe. But, it was clear to me from the first that Fastow was not going to go to trial, that Fastow was going to cut a deal. The pressure on him, from a sentencing perspective, was substantially greater than it was for Glisan, and as I indicated, there was the matter of his wife. And, the prospect of going to trial alone with Andy Fastow as the Government's cooperating witness, notwithstanding all of his baggage and notwithstanding the fun I might well have had cross examining Andy Fastow, was not a very attractive proposition for my client. The

Government, which as I said had assembled this task force and devoted tremendous resources, by the time we were six months post indictment, had yet to successfully prosecute anyone. And, I knew that they desperately wanted somebody to go to jail. They wanted the publicity of somebody going to jail. Glisan had two young children who were like six and nine years old maybe at the time. My calculus was as follows, look Ben, I think the Government is desperate for a quick trophy. You've been charged in addition to securities fraud, which are 30 year maximum, statutory maximum, counts, you've also been charged with a 5 year conspiracy count. If the Government were to agree to take a plea to the conspiracy count, you'd serve 5 years, 60 months less good time credits which is 15 percent. So, that's what you have to be prepared to do. You could do it now, you could be out when your kids are still in their early teens. And, in my view, what we ought to do, assuming the Government will take this as a straight up plea, no cooperation, because if you cooperate and even if the Government is wholly thrilled with your cooperation, is prepared to recommend to the court a downward departure from any guideline sentence and even if you ended up getting a year or for that matter probation, that's not going to happen until the conclusion of whatever cases they're prosecuting in which they have you as a cooperating witness because they want to, (a) hold this dangling sword over your head to ensure your continuing cooperation, and (b) they don't want the defense in any of those cases to be able to cross examine you

with a sentence that already has been imposed with which they can claim, you know, is a slap on the wrist and therefore significantly, so they would argue, detracts from your credibility. So, that means this thing is going to go on, it could go on for five years before you're ever sentenced and then you're looking at whatever time you're getting. And, he ultimately agreed that was the appropriate course and I remember I was out in South Dakota on a motorcycle trip with my wife and a couple of friends in August of 2004 and I called the head of the Enron task force and said today only, he'll plead to the five year conspiracy count with the full expectation he's going to get sentenced to the five years because that's way under what the guideline range was but that was the statutory cap on the sentence. And, he can be in the pokey two weeks from now or a month from now, whenever we get it done and they did it. They jumped.

MR. COHEN: Had you had any previous conversation with the prosecutors that made you think you could make that deal?

MR. SCHUELKE: I never had any conversations with them about the prospect of such a deal. I had lots of conversations with them about the case, about some of my views about it. We had some quite acrimonious discussions, we had some quite confrontational arguments in court about their discovery practices, you know for example, they set up a discovery facility and commercial space in Houston where millions and millions of documents were stored both in hardcopy and electronically. And, the way they and the FBI set this up all the defense attorneys had to go to that facility to review

discovery that they were making available to us. And, it was ridiculous, I mean not only for an out-of-town lawyer like myself to have the time and expense to the client of my traveling to Houston together with a couple of associates, but the FBI, you would have thought the crown jewels of the nation were stored in this room. You weren't allowed to bring a cell phone in so you couldn't even do any other business in the day. And, so, you know, I raised this issue with the court and I said to them, you know, Your Honor, you've been talking about scheduling a trial on X date, I don't remember what that was but it was some six months out let's say. I said, you know, I could go to this "gulag" of a discovery facility every day but for Christmas day for the next five years and I could not possibly competently review the discovery material. They, for example, even though they have much of this stored electronically, refuse to give us remote access to it. I could do this from my office in Washington. And, so we got into lots of fights about that sort of thing. And, so I think that to some degree it was my sense in addition to the fact that they wanted a quick trophy in that big Enron case, they wanted to get rid of me too because I was a thorn in their side. And, we had the only judge on the bench in the Southern District of Texas who was not a "dyed in the wool" stone government judge. And, so they were a little worried about him because he wasn't in their pocket.

MR. COHEN: Who was it?

MR. SCHUELKE: Kenneth Hoyt. A very good sensible guy. So, that was the deal we struck notwithstanding the fact that he had never entered into any cooperation agreement as they approached the Skilling and ...

MR. COHEN: They asked for a cooperation agreement, I mean, when you made the call that somebody said what about cooperation?

MR. SCHUELKE: No, I don't remember whether they asked or not, I told them we wouldn't do it. But, as the Lay and the Skilling trial approached, they approached and sought his cooperation. He'd already been sentenced so there weren't the issues that I had earlier been concerned about.

MR. COHEN: Was he in prison at that time?

MR. SCHUELKE: Yeah, he was in prison and because he did go immediately upon sentencing. He was stepped back right from the courtroom. And, they very much liked him and while there was never any agreement in place and the Court played no role whatsoever in this they were, they took care of him. He had furloughs to come back and prepare for meetings with them and he could stay with this family, you know, for half the week. And, he also enrolled in this Bureau of Prison's alcohol treatment program which when successfully completed for minimum security people cuts your sentence in half. And, so he did that and he ended up . . .

MR. COHEN: Do they have to have an alcohol problem in order to be eligible to go through the program?

MR. SCHUELKE: Supposedly. Supposedly. In the event, he ended up serving about three years and was “a” or “the” principal witness in the Skilling trial, Skilling and Lay Trial because Lay lived through the trial.

MR. COHEN: I think if I’d been your client I would have thought long and hard about that deal, a lot of me would have said every day is a victory, every day is a day out of prison is a good day even if the threat is robbing of your sleep at night and you never know how long you’re going to live and...

MR. SCHUELKE: Yes, and...

MR. COHEN: Let’s just keep putting it off as long as we can.

MR. SCHUELKE: And, in many situations that’s the sensible thing to do. There were two factors at work here for me which mitigated in the opposite direction, (1) I believe that I knew to a dead solid certainty that however it came to pass and whenever it came to pass he was going to serve a significant period of time incarcerated. So, this wasn’t a situation in which it was reasonable to say, let’s take it a day at a time and maybe you know I’ll never go to jail, that wasn’t going to happen. And, (2) secondly I had had personal experiences with clients, very few thankfully, who missed the entire teenage years of their kids which to me as a father was to be avoided at all costs and I think that’s the argument that eventually carried the day and it worked.

MR. COHEN: Yeah.

MR. SCHUELKE: And, so I was quite pleased with the way that worked out. I think it was, you know, a number of people have said to me, you know, back at the

time lawyers whom I respect who were involved in aspects of this, you know, that was a very ballsy thing to do but you read it right and I think that's true and I was particularly pleased that it worked out as it did because he was a very difficult client. And, I was gratified that despite the difficulties he posed in our interpersonal relationship, he got the best conceivable result he could have gotten.

MR. COHEN: Was there a wire fraud count involved here? I seem to recall.

MR. SCHUELKE: There was every kind of fraud they could come up with, yes.

MR. COHEN: I seem to recall that Skilling in the Supreme Court had a wire fraud, I may be miss recalling this, a conviction reversed on the ground that whatever Congress had done after the *McNally* case, which had held that you couldn't prosecute somebody for a wire fraud unless there was . . .

MR. SCHUELKE: Garden variety financial fraud.

MR. COHEN: Property involved.

MR. SCHUELKE: Right.

MR. COHEN: And Congress responded to that by adding a provision about depriving somebody of your honest services.

MR. SCHUELKE: That's exactly right.

MR. COHEN: And this court struck that down

MR. SCHUELKE: Right, Right. Then mail fraud and wire fraud statutes were amended post *McNally* as you said to add in a so called honest services fraud theory. The theory being that you know I don't have to steal your money by fraud, I can engage in conduct if I am a public official or you're a public official

in which your fraud deprives your constituency of your honest services. And Skilling was convicted on and on the services theory of both mail and wire fraud and the Supreme Court in Skilling said no. This honest services concept is too broad. It has been sought to be applied and has been applied to unethical conduct and the breadth of it is so great that no one can know in advance whether or not his or her conduct violates the law or it doesn't. And so we're going to limit such an offense to the deprivation of honest services only in the context of bribery or kickbacks and there were no such facts or allegations in the Skilling case. Now that didn't help him a whole hell of a lot because it went back to the judge who sentenced him who concluded that the sentence was appropriate even without the mail and wire fraud counts. He however is still litigating over a Brady disclosure problem which I think has some traction at the moment.

MR. COHEN: He's in prison at the moment.

MR. SCHUELKE: Oh yeah.

MR. COHEN: I once had a case called *Carpenter* which involved the fellows who were using the *Wall Street Journal* "Heard on the Street".

MR. SCHUELKE: Oh, "Heard on the Street," I remember that case.

MR. COHEN: They were trading on the basis of their knowledge of what was going to be in the column the following day and they were prosecuted in the Second Circuit for both wire fraud and securities fraud. I was in the Solicitor General's office and they were convicted on both and our objective in the

Supreme Court was to uphold those convictions and we only needed either one of them because they were concurrent sentences. And the Supreme Court had not yet decided that you could have securities fraud on the basis of misappropriated information rather than inside information so that was one fight. The other half of the fight was whether this wire fraud conviction could stand and the Supreme Court came down with *McNally* at the time that we were briefing the *Carpenter* appeal and *McNally* made people in the department quite sad but not me because I knew that we were going to win *Carpenter* because I said you know you have to have property but the Supreme Court will recognize that information owned by a newspaper about what's going to be in tomorrow's edition is the newspaper's property. The Supreme Court isn't going to have any trouble finding that that's property, and sure enough that's what they did.

MR. SCHUELKE: I remember Lexi Morrison. You know who Lexi is?

MR. COHEN: Yes.

MR. SCHUELKE: Had been in the U.S. Attorney's Office with me and then went to the SEC and she was in the enforcement division and I remember when they brought that *Carpenter* case, talking to her about it, I thought it was the most egregious overreach and I still do. And if I remember the facts correctly, it was the author of the "Heard on the Street" column who was trading. Right?

MR. COHEN: Yes, yes and along with his friends who were tippees.

MR. SCHUELKE: Along with tippees. And while I understand this theoretical misappropriation of the Wall Street Journal's property, it always seemed to me it was his property too. And if that's so and it clearly was not inside information, I just don't get it. I still don't.

MR. COHEN: Well, there's always been this paradox in the securities fraud context that if for example, I am the CEO of a company and I know today that I'm going to buy some or sell some of its shares tomorrow, that may be inside information that the rest of the market would be interested in but it's been clear from the beginning that I don't have to say anything.

MR. SCHUELKE: But, but, but you're an insider.

MR. COHEN: Well, yes but it's also been clear from the beginning that I don't have to disclose that information to the person on the other side of my trade or to the market in general I can just go ahead and do it. In other words you are . . .

MR. SCHUELKE: So long as you fall within an open window.

MR. COHEN: I'm agreeing with you yes, but if it's my own trading it's what's in my own head and I'm sort of agreeing with your point of view by saying there's always been this paradox that people are allowed in many circumstances to trade on things that are in their own heads. Even if that information would be material to other people.

MR. SCHUELKE: And I don't remember this but I'm assume that *Carpenter* traded in advance of the publication of the article.

MR. COHEN: Yeah. The *Journal* however...

MR. SCHUELKE: Right?

MR. COHEN: ...did complain, oh well yes sure.

MR. SCHUELKE: Sure.

MR. COHEN: Sure.

MR. SCHUELKE: And so...

MR. COHEN: But the *Journal*...

MR. SCHUELKE: Before he submitted the piece to the *Journal*, it wasn't even the *Journal's* property except to the extent that they're paying him I guess to be researching for the article. So that's more like an honest services kind of concept.

MR. COHEN: No, it's more concrete than that. He called up friends regularly and said tomorrow's column is going to talk about XYZ Company and they went out and bought it because XYZ Company curiously whether the column was favorable or not XYZ Company got something of a bounce...

MR. SCHUELKE: Sure.

MR. COHEN: ...from being mentioned and I think that's right and so I think this was in the *Journal's* hands and he was not convicted of securities fraud took the court, the court divided 4, 4 on whether to and didn't so I guess the conviction was affirmed but it didn't decide the question but it affirmed by majority vote the wire fraud conviction and that said he was cheating his the employer, *The Wall Street Journal*, depriving it of its property right by misusing information that belonged to it about what would be in tomorrow's newspaper and that was the basis for the....

MR. SCHUELKE: I understand although I think that deprivation of property concept is more theoretical than real. One of the journalists, if anything, the more currency “Heard on the Street” had the better it was for *The Wall Street Journal’s* bottom line and the more accurate his predictions proved to be the greater the currency of the articles so it’s hard for me to see how *The Wall Street Journal* in any real sense was the deprived of anything even though they might have this theoretical property right and you know look it’s part of the....

MR. COHEN: Well, if you were the *Journal*, one you might worry that if your columnists were engaged regularly in this kind of scheme they might cook what they write in their column in order to support the scheme and that would be a deprivation and even if they didn’t they actually do it, you might worry that you’re newspaper’s...

MR. SCHUELKE: Reputation.

MR. COHEN: ....credibility, reputation would be impaired because people would say well theoretically they could do it now was either of those...

MR. SCHUELKE: Now that’s why you were in the SG’s Office.

MR. COHEN: Well, were either of those the actual basis for the prosecution, I don’t think so.

MR. SCHUELKE: I don’t think so.

MR. COHEN: But it was a fun case.

MR. SCHUELKE: Yes, it was a fascinating case.

MR. COHEN: Well, ....

MR. SCHUELKE: As was *Gupta* last week.

MR. COHEN: Well, I was going to ask about Justice, your reaction to sort of current Justice Department things – *Gupta, Clemens*....

MR. SCHUELKE: I mean, we're getting off the topic here. Do we want to talk about my views about this?

MR. COHEN: Sure.

MR. SCHUELKE: *Clemens*. I think that the Department having spent untold resources investigating and prosecuting Barry Bonds and Roger Clemens is a complete and utter waste of the taxpayers' money even if they'd had a solid case and had prevailed. Because you know this was really all about Congress in the first instance getting bent out of shape about the nation's former pastime since it's now NFL near as I can tell, tarnished by the steroid era in baseball. Whether these athletes take steroids or whether they don't is fair fodder for sports writers and for sports fans but I don't think, I don't think it's the business of the Congress or certainly not the Justice Department. On top of that, the *Clemens* case was a lousy case. Very poorly presented and so to the extent that the Justice Department got another in a spate of recent bad names as a result of that, I think they earned it. Reggie Walton, the judge who presided over the Clemens trial is a long-time friend of mine. We had served together in the U.S. Attorneys' Office and we see one another socially and he and I serve on a board of a scholarship fund established in the name of the late Judge Robert Shuker of the Superior Court who was a colleague of ours in the

U.S. Attorney's Office as well and as it happened, we had a board meeting Monday night immediately after the *Clemens* verdict was announced.

And so Reggie walks in the board meeting and there are a number of other judges on the board and everybody saying well Reg I guess you're glad that thing is over, oh yeah. And then he took me aside and he said to me you know you're not going to believe this there were four prosecutors that they had at the table throughout the trial which, he said, I thought was a mistake in terms of appearances. Two of them were quite senior, 15, 20 years in the U.S. Attorney's Office. The other two were quite junior. Closing arguments, they had the junior two do it. Not only did they have the junior two do them, they both read their closing arguments. I said "What, how do you read a rebuttal?" Good questions. Damned if I know but the guy read his rebuttal which he had obviously composed before he'd ever heard the defense argument. And he said it was just terrible and it was clear to me he said don't know about the jury but my guess is it seemed to the jury that the two senior guys were just like walking away from this thing. He said you know when we had the first trial that was aborted a year ago.

MR. COHEN: Yeah.

MR. SCHUELKE: That jury had heard less than two days because a mistrial was declared on the second day I think. Number of jurors told him as well as the lawyers afterward that they felt the Government was wasting its time and money on this. That was after two days and he said you know they need to pay

attention to this sort of thing. He also said that, with respect to Andy Pettitte, you know Pettitte's testimony on direct was that I had a conversation with Roger Clemens in which he told me that he had used HGH, human growth hormone. And then I had another conversation with him about two years later in which I reminded him of that. The subject came up somehow and he said what, I never said that, you misunderstood me. Okay. That was as far as the direct testimony went in the trial. On cross he concedes to the defense that I only had at best a 50/50 belief that I remember that first conversation accurately. Well according to Reggie Walton, Pettitte had testified in the grand jury or to the house investigators, I don't know which, that in the first conversation, told me he used HGH, had the second conversation he said no I had misunderstood him and I didn't argue with him just there wasn't any point to it so I said oh, okay but my present memory remains what he told me in the first conversation and they never brought that out of him on direct at the trial and Walton's just like mystified because he knew, everybody knew that's what the record showed. So I don't know and McNamee, the trainer who was the principal government witness had more credibility problems than you could shake a stick at and you know this whole notion about how he's keeping this medical waste in a beer can hidden under his bed for 10 years contaminated with medical waste from other ball players as well. And I, you know I guess this is true I read in the newspaper that the government had 69 different agents working on this case, FBI agents.

MR. COHEN: You think that's why they decided to try him again after the embarrassment of the misconduct, the mistrial the first time?

MR. SCHUELKE: Because of the investment they had in it?

MR. COHEN: Just because of the investment they had.

MR. SCHUELKE: I'm sure that was part of it. I mean although, even if apart from the investment if they think they have a good case and they screwed up the first time and they managed to convince Walton that they don't have a double jeopardy problem which they did, you know the fact that they had screwed it up initially wouldn't necessarily mean they shouldn't ...

MR. COHEN: ... shouldn't start again...

MR. SCHUELKE: ... start again. But the whole thing was just a disaster waiting to happen, I think.

MR. COHEN: You mentioned the *Gupta* case. Do you have any thoughts about that that you might want to record?

MR. SCHUELKE: Well, only, only that the – well yeah, the government in the Southern District is a great success with these insider trading cases which, you know, are a lot easier to make if you're going to wiretap which they did in the *Rajaratnam* case. Although they've got a very serious *Rajaratnam* – *Rajaratnam* has got a very serious appellate issue, I think, with respect to the wiretap. The interesting thing about *Gupta* is that they had, they didn't have him on the wire. They had *Rajaratnam* in talking to others about what *Gupta* had told, something about what *Gupta* had told him. And I guess the evidence was pretty clear that *Gupta* shared with him

information that he learned at one or more of these board meetings. But he himself never traded on this information. He didn't make a penny.

That's kind of interesting.

MR. COHEN: Gupta?

MR. SCHUELKE: Yeah.

MR. COHEN: Yeah.

MR. SCHUELKE: Yeah. Now, whether or not he had some other kind of financial motive because he was involved in some other deal with Rajaratnam, I don't know, but, but I, I don't, I don't remember ever hearing about an insider trading case in which the defendant did not trade.

MR. COHEN: He's only a tipper.

MR. SCHUELKE: He's only a tipper, yeah, yeah. The appellate issue, I think in *Rajaratnam*, is kind of interesting. The government, the FBI, of course, submitted a Title 3 application for the wire intercept. The statute requires that the Court find that conventional means of investigation are unavailing or will be unavailing. And the affidavit submitted to the Court which granted the application made that rote formulaic representation. Did not disclose that the SEC with whom the Justice Department was collaborating, had been investigating this for quite some time, had already subpoenaed hundreds of thousands of records and had taken the Rajaratnam deposition. It gets to the District Court, they argued that the warrant's invalid. The District Court agrees that they had to demonstrate that conventional investigative means were unavailing, they failed to assert that was the case. That was

obviously not the case and they failed to disclose the conventional investigative steps that were ongoing. But, he concluded based on hearings he held on a *nunc pro tunc* basis, that they met the burden imposed by the statute to demonstrate the conventional means for some reason wouldn't work. *Nunc pro tunc* – I mean the law requires a neutral magistrate decide whether or not the ...

MR. COHEN: ... before issuing a warrant...

MR. SCHUELKE: ... issue this warrant.

MR. COHEN: Yeah.

MR. SCHUELKE: Right. So that's the issue on appeal.

MR. COHEN: In other words, whether the wiretap evidence can be used when the justification for the warrant was not presented to the magistrate who issued it. It was...

MR. SCHUELKE: ... right, right. Right, it would be like, it would like having a search warrant issued by a magistrate on the basis of a facially deficient affidavit and then the trial court having a hearing and backfilling and concluding that because I now understand me, a different judge understands that there is a probable cause to issue this warrant. That's okay.

MR. COHEN: Well, it's, it's, it's all – it's like at least second cousin of saying you can justify a search warrant by the results of the search.

MR. SCHUELKE: That's right.

MR. COHEN: Which...

MR. SCHUELKE: ...that's right. And they've got an *amicus* brief signed by half a dozen retired judges. Basically, making this argument and saying "This makes a mockery out of a judicial process." So what the Second Circuit might do with that, I don't know. And then that raises, what I think is an interesting question about the fact that the product of that wire intercept is introduced in Gupta's trial. Now, he doesn't have a privacy interest in Rajaratnam's telephone. But if the fruit of the in effect warrantless wiretap, is introduced in the trial of the third party, is it for that reason inadmissible? I don't know the answer to that. I guess we ...

MR. COHEN: ... that is interest. There must be some answer to that.

MR. SCHUELKE: There must be.

MR. COHEN: There's got to be.

MR. SCHUELKE: There must be.

MR. COHEN: That's got to have been litigated before.

MR. SCHUELKE: There must be, I have not, I have not looked.

MR. COHEN: Muse.

MR. SCHUELKE: I'm just musing on this.

MR. COHEN: Fruit of the poisonous tree ...

MR. SCHUELKE: ... right ...

MR. COHEN: ... and you didn't have the rights in the first place.

MR. SCHUELKE: Yeah, I'm sure it has been in the, in the search and seizure context. It must have been. And I think the answer in those cases is that you're out of luck if you didn't have the privacy interest.

MR. COHEN: There's still a different issue that's raised by something you just said which is that at least one circuit has recently thrown out an *amicus* brief, an *amicus* brief sought to be filed by a bunch of retired judges, I think, saying, you know, we don't think it's appropriate for former federal officials to ...

MR. SCHUELKE: ... maybe that's this case. Do you think that is the Rajaratnam case? Could be.

MR. COHEN: I don't think so, but maybe. Well, shall we go on to Boston Scientific?

MR. SCHUELKE: Boston Scientific. As we had discussed earlier, I came to know and become quite professionally and personally close with the late former Senator Warren when he was the Vice Chairman of the Senate Ethics Committee for whom I worked. Senator Rudman was appointed to the Board of the Boston Scientific Corporation in the early '90s. I believe. Boston Scientific is a Boston-based medical device manufacturer whose principal business is the design and manufacture of cardiovascular stents, although they manufacture a number of other medical devices as well. The medical device industry is fraught with regulatory issues. It's a very tough business, both in terms of product liability and in terms of compliance with FDA regs, because it's very sophisticated stuff with extremely small margins for error in the design and manufacturing process. And because it's implanted in an extremely hostile environment that is inside a human body which is warm and moist. And this is more of a problem with electronic devices like cardiac pace makers and, and

defibrillators but it's a problem in stents as well. And so the company as is true of its competitors is constantly under investigation by the FDA and by the Justice Department secondarily for failures of devices in patients alleged to be known to the company and undisclosed. Known to the company through clinical trials, for example, and undisclosed to the medical community and the patient community. In fact, based on my experience dealing with these, the failures which have occurred have always been within the statistical understood and anticipated failure rate because none of these can be 100% perfect. Nevertheless, it's been subject to lots of investigations and so the first matter in which I became involved, involved stents, but this was not really an FDA related failure case. This was a case in which the company had contracted with an Israeli individual – quite a fascinating character who had been a much decorated General in the Israeli Air Force who was quite a genius and who had started his own medical device design company in Israel and had designed a stent and there's been lots of patent litigation over the stent designs. But they went to a joint venture and it came a cropper after a number of years. And while under the terms of the contract, Boston Scientific was to produce at its facilities x number of stents based on the Israeli design. Because the Israeli company became very difficult to deal with and were making financial demands well beyond the terms of the contract and because Boston Scientific was concerned that this was going to come apart and they would be up the creek in terms of supply. They developed a

secret second production line in Ireland and the facility they had in Ireland and the Israelis ultimately learned about this and claimed this was not only violative of the terms of the contract, even though Boston Scientific was paying them royalties on the stuff it was manufacturing in Ireland, that this was some kind of industrial espionage. They had basically stolen our design, ripping it off in doing it on their own. And the U.S. Attorneys' Office in Boston commenced an investigation because this Israeli character had made a complaint and the most interesting thing about this – I'll tell you a funny story about this. There was a prosecutor in the Boston office, an Assistant U.S. Attorney, whose name is Michael Loucks, pretty senior, who headed up the Healthcare Fraud Unit in that Office and he is very aggressive and made a big name for himself and for that Office in the healthcare fraud prosecutions. He since left the government and he took this on like this was, you know, the biggest in fraud case in history. Warren Rudman was on the Board and was the Chairman of the Board's Litigation Committee and while the Company was represented by Hale and Dorr ...

MR. COHEN: ... where we have Rudman's brother in Boston.

MR. SCHUELKE: Right. Steve Jonas, before the [WCP/HD] merger, of course, Bob Keefe, who are the two principal – oh no, Bill Lee. And Rudman on behalf of the Litigation Committee on the Board retained me to represent the Board. And it was a fascinating case and it was great fun and it was great to work with the Hale & Dorr lawyers and that's how I got to know Steve.

MR. SCHUELKE: Initially. At the time I got to know all three of them actually. And Loucks subpoenaed a half a dozen members of the Board of Directors of the company, not because they were privy to any of their relevant facts, but because he wanted to put the pressure on the company to roll over and plead to something and thought that he could do that by sort of embarrassing the Board – drag them in front of the grand jury. Do you know that your company doing this and that, you know? So, I said to him, so Michael, I tell you what, we're, we're gonna resist these subpoenas but I'm willing to make three or four of them available to you for purposes of an informal interview, not a grand jury appearance. And he finally agreed to do that. Now, the Chairman of the Company who was one of its two founders, is a man whose name is Pete Nicholas. His brother Nick Nicholas is also on the Board, Nick's a former Chairman of Time Warner, both sons of a Greek immigrant who became an Admiral in the U.S. Navy. Two very, very smart guys. Pete is a great salesman. He was the marketing genius of this company. The other cofounder is a guy by the name of John Abele who was the technical guy. And Pete's very gregarious and Pete was named in the course of Loucks' investigation as a target. He was officially denominated a target of the investigation. And Pete Nicholas was devastated by this. "I have my entire life sought to do the right thing. That's the mantra of my family since I was 10 years old. And the notion that he should accuse me of being a criminal, ridiculous." And the truth of the matter is that Loucks who made this sort of clear in a

couple of conversations I had with him, went after Pete Nicholas, he didn't like him. Pete Nicholas, at that time because the company was really riding high, was worth about \$4 billion dollars principally in Boston Scientific stock. And he had donated loads of money. He went to Duke and he is a Trustee of Duke and there are three or four buildings named after him at Duke and there is some fancy gym exercise facility in downtown Boston which is also named for Pete Nicholas where Michael Loucks used to go to work out. And it was clear to me he was, he wanted to get this big rich guy. So, I take Rudman in for this interview. Now Rudman is no shrinking violet. Rudman is a very self-confident man who has a fairly high opinion of his own abilities which I always thought (unlike most of his colleagues when he was in the Senate) was well deserved.

MR. COHEN: Yeah.

MR. SCHUELKE: Loucks said to him, "Now, Senator Rudman, did you ever have a conversation with Nick Nicholas, Peter Nicholas's brother about this investigation?" Rudman says, "Yes, as a matter of fact I have." And what was that? "Well, we were on the Company plane flying from Boston to Washington and Nick said to me, 'Warren, you've been doing this for many years, you're former Attorney General of New Hampshire, I don't understand it. Why is this prosecutor so evidently out to get Pete?' And so I said to him, 'Nick, some prosecutors are headhunters. They want the big splashy trophy.' And Mr. Loucks, I was talking about YOU!" Now I

could barely contain myself. Loucks, who also has a very high opinion of himself, was speechless. You could see the color drain from his face and that was essentially the end of this “interview the Board” exercise. And the thing finally got resolved – the Justice Department will never do a plea deal with a company in exchange for letting the individuals walk. That’s the policy. So they never do it explicitly.

MR. COHEN: Oh, the SEC used to do it all the time.

MR. SCHUELKE: Right, and so does the Justice Department. But, they say they’re not doing it. So in this case, we’ll reach an agreement, the company will reach an agreement to plead to some misdemeanor and pay them \$7 million dollars, which to Boston Scientific was like paying, like you or me paying, a thirteen cent fine. Actually, it was more like you or me paying a one cent fine. And on the very same day that we reached that agreement in principle, they sent a letter to Pete Nicholas’ lawyer telling him that they were declining any prosecution. Now, this was not a *quid pro quo* – we’re not, but – so, that’s what happened. And since that time, I have served as sort of the eyes and ears for the Board on another criminal investigation out in Minnesota that arose out of a product liability case which in turn arose from a series of failures of an implantable defibrillator, which got satisfactorily resolved as well; and then the company (as is true most public companies every time there is an adverse financial event, they either get a shareholder demand or somebody files a shareholder derivative action) and the Board has engaged me to investigate the claims

in demands or in the complaints, make recommendations to the Board whether they ought to prosecute this action against some of its officers or directors, whether they should decline, whether they should take some kind of remedial action, and so on. And so we've done that on a number of occasions.

MR. COHEN: Did those involve the appointment of independent directors?

MR. SCHUELKE: No.

MR. COHEN: These were not claims against the Board itself?

MR. SCHUELKE: Many of them are. But Delaware law is clear that a director need not recuse himself from consideration of a shareholder demand just because he is named in the demand. Otherwise, every shareholder derivative action would name the entire Board and the Board couldn't act. So, these have been fun. I enjoy working with that Board. They're a smart, interesting group of people and now, Warren retired from the Board so I kind of miss him. He was always the most fun to deal with and I'm not so sure with his departure that I'm going to maintain the same relationship with the Board. We'll see.

Halliburton very similar in a number of respects. Halliburton is in a very difficult business because it does business in places in the world where the very name of the country is a red flag for foreign corrupt practices violations. So they're working in West Africa. They're working in the Middle East. They're working in Kazakhstan. They're working in China. And notwithstanding that they're continuing major and very

expensive efforts to put in place the best kind of system of controls and compliance regimes and training to those regimes. I have played a role for the independent directors of the Halliburton Board. As I have for the Boston Scientific Board. Every time they have one of these matters come up, they retain counsel, that is, management retains counsel to conduct an investigation and to negotiate with Justice or the SEC or to litigate with them. Although the latter rarely happens. And the directors have me serving as their “eyes and ears” so they are kept independently informed of the allegations, and the company’s response and the status of matters, so that they can responsibly exercise their fiduciary responsibilities. That’s also a fascinating Board. Another group of smart people and so I enjoy that work as well. And you know, it’s interesting – I’ve, I’ve always had the experience, starting with Hale and Dorr in the first Boston Scientific matter and continuing through three or four of these matters with Halliburton with different outside counsel engaged by management. I’ve always been in this wonderfully luxurious position. The Board will say to me, “Are they doing this right? Are they doing a good job?” And I’ve always been able to say, “Absolutely.” Which is really a luxurious position to be.

MR. COHEN: Did your Halliburton relationship go back to Cheney period?

MR. SCHUELKE: No. It’s right after Cheney and Bush were first elected, and so he was gone. And of course they suffered from that relationship. Not as a business proposition. Because Halliburton, every time the name came up

and somebody made an allegation or a claim Cheney is an albatross that's been around their neck ever since. I think it's dissipated some now since he and Bush are out of office, but, it was not a substantive problem, but a public relations problem, an investor relations problem.

MR. COHEN: Okay, 3:59. Do you do you want to stop there?

MR. SCHUELKE: Good.