HENRY F. SCHUELKE, III, ESQUIRE

Oral History Project
The Historical Society of the District of Columbia Circuit

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The Historical Society of the
District of Columbia Circuit

United States Courts
District of Columbia Circuit

HENRY F. SCHUELKE, III, ESQUIRE

Interviews conducted by: Louis R. Cohen, Esquire
October 11 and November 18 and December 15, 2011
March 8 and May 10 and 24, 2012 June 21, 2012
March 21, 2013

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NOTE

The following pages record interviews conducted on the dates indicated. The interviews were electronically recorded, and the transcription was subsequently reviewed and edited by the interviewee.

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PREFACE

The goal of the Oral History Project of the Historical Society of the District of Columbia Circuit is to preserve the recollections of the judges of the Courts of the District of Columbia Circuit and lawyers, court staff, and others who played important roles in the history of the Circuit. The Project began in 1991. Oral history interviews are conducted by volunteer attorneys who are trained by the Society. Before donating the oral history to the Society, both the subject of the history and the interviewer have had an opportunity to review and edit the transcripts.

Indexed transcripts of the oral histories and related documents are available in the Judges= Library in the E. Barrett Prettyman United States Courthouse, 333 Constitution Avenue, N.W., Washington, D.C., the Manuscript Division of the Library of Congress, and the Library of the Historical Society of the District of Columbia

With the permission of the person being interviewed, oral histories are also available on the Internet through the Society's Web site, www.dcchs.org. Audio recordings of most interviews, as well as electronic versions of the transcripts, are in the custody of the Society.

INTERVIEWEE ORAL HISTORY AGREEMENT

Historical Society of the District of Columbia Circuit

Oral History Agreement of Henry F. Schuelke, III

1. In consideration of the recording and preservation of my oral history memoir by the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Henry F. Schuelke, III, do hereby grant and convey to the Society and its successors and assigns all of my rights, title, and interest in the tape recordings, digital recordings, transcripts, computer diskettes, and DVDs of the interviews of me as described in Schedule A hereto, including literary rights and copyrights. All copies of the tape recordings, digital recordings, transcripts, computer diskettes, and DVDs are subject to the same restrictions herein provided.

2. I also reserve for myself and to the executor of my estate the right to use the tape recordings, digital recordings, transcripts, computer diskettes, and DVDs and their content as a resource for any book, pamphlet, article or other writing of which I or my executor may be the author or co-author.

3. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, digital recordings, transcripts, computer diskettes, and DVDs in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

HFS — 2-24-14

Henry F. Schuelke, III **(Date)**

SWORN TO AND SUBSCRIBED before me this

24th **day of** February **, 2014.**

Catherine Borges-Johnson

Notary Public

CATHERINE BORGES-JOHNSON NOTARY PUBLIC MY COMMISSION EXPIRES 10/14/2016 DISTRICT OF COLUMBIA

My Commission expires: October 14, 2016

ACCEPTED THIS 25th **day of** April **, 2014, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.**

Stephen J. Pollak

Stephen J. Pollak

Schedule A

Tape recordings, digital records, transcripts, and computer media resulting from seven interviews of Henry F. Schuelke, III, on the following dates.

Interview No. and Date	Description of Media Containing Voice Recordings	Pages of Final Transcript
No. 1: October 11, 2011		1-44
No. 2: November 18, 2011		45-94
No. 3: December 15, 2011		95-105
No. 4: March 8, 2012		106-153
No. 5: May 10, 2012		115-141
No. 6: May 24, 2012		154-202
No. 7: June 21, 2012		246-286
No.8: March 21, 2013		287-327

The transcripts of the eight interviews are on one CD.

INTERVIEWER ORAL HISTORY AGREEMENT

The Historical Society of the District of Columbia Circuit

Oral History Agreement of Louis R. Cohen

1. Having agreed to conduct an oral history interview with Henry F. Schuelke, III, for the Historical Society of the District of Columbia Circuit, Washington, D.C., and its employees and agents (hereinafter "the Society"), I, Louis R. Cohen, do hereby grant and convey to the Society and its successors and assign all of my rights, title, and interest in the tape recordings, digital recordings, transcripts, computer diskettes, and DVDs of interviews as described in Schedule A hereto, including literary rights and copyrights.

2. I authorize the Society to duplicate, edit, publish, including publication on the internet, and permit the use of said tape recordings, digital recordings, transcripts, computer diskettes, and DVDs in any manner that the Society considers appropriate, and I waive any claims I may have or acquire to any royalties from such use.

3. I agree that I will make no use of the interview or the information contained therein until it is concluded and edited, or until I receive permission from the Society.

February 26, 2014

Louis R. Cohen **(Date)**

SWORN TO AND SUBSCRIBED before me this

26th day of February, 2014.

Kay D. Dallosta

Notary Public

My commission expires: KAY D. DALLOSTA Notary Public of District of Columbia My Commission Expires June 14, 2017

ACCEPTED THIS 25th day of April, 2014, by Stephen J. Pollak, President of the Historical Society of the District of Columbia Circuit.

Stephen J. Pollak

Stephen J. Pollak

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Oral History of Henry F. Schuelke, III
First Interview
October 11, 2011

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 October 11, 2011. This is the first interview.

MR. COHEN: Hank, why don't we start with your family. I infer there must have been a Henry Schuelke, I, at some point.

MR. SCHUELKE: Indeed there was. Actually I have consulted my slightly older sister this morning. She's the family historian and she refreshed me a little bit. And we are missing a little, a generation here or there, but she's going to follow up so I may be able to augment this. My father Henry F., Jr. was born in 1909 in Newark, New Jersey and passed away in 1991. His father, Henry F., Sr. was also born in Newark in 1885 and passed away in 1947. His father, my great grandfather, was born in the United States. I don't know the specific date but I think it must have been about 1860. And his father, my great, great grandfather emigrated from Germany at some time, probably between 1820 and 1830, near as we can calculate. He married Lena Knorr who was born in the United States. My grandfather married Margaret Cathrou Young who was 1 of 14 children, 8 of whom survived childhood. She was the eldest. She was the daughter of William Young who emigrated from Ireland to Newark, New Jersey in about 1850. And he married Mary Boylan. My grandmother, Margaret Young was born in 1885 and passed away in 1943. So, while I was on this earth for a year or perhaps a little less, I have no memory of my paternal grandmother. My

grandfather, Henry Senior who was born in 1885, passed away in 1947, and I do actually have a couple of fairly vivid memories of him, although I was but 5 years old when he died. The Young family, that is my grandmother's forebears, farmed. They had a celery farm in Newark, New Jersey on what is now Newark International Airport, and they sold the farm. Now, I don't know whether the Port Authority of New York and New Jersey existed at that time but they sold it to whoever built the airport.

MR. COHEN: In a condemnation or. . .

MR. SCHUELKE: I don't believe so, but I'm, I'm really not certain. My mother's side: my mother was born Eleanor Ann Carton in 1914 in New York City and passed away in 2001. Her father was Washington Edward Carton who was 1 of 10 children. He was born in 1886 and died in 1937. Her mother, that is my maternal grandmother, was Margaret Kiely, who was born in 1888 in New York City and died in 1979. Edward Carton, well his name was Washington Edward but he was known as Edward, was born in New York City but his parents at some point moved to Rumson, New Jersey. Rumson is now and has throughout my lifetime been a lovely northern New Jersey shore community. I'm missing a generation back because I know that my mother through the Carton side is a direct, was a direct descendant of Robert Morris, a signatory to the Declaration of Independence, but I'm missing a generation back to Morris. But her family was descended from Morris, I believe he was the first immigrant to

the United States. Had to have been in 1750s. I remember, this has always been a bit of family lore because Robert Morris was reported to have (a) been a very successful businessman and (b) loaned a substantial sum of money to George Washington during the winter that Washington and his army were in Valley Forge. This became a little bit of family lore because at some point when I was a kid, I remember my father taking up this somewhat quixotic quest to figure out whether he could sue the U.S. government for the monies that Robert Morris had loaned George Washington because Morris ended up in debtors' prison at some point before his death.

MR. COHEN: I didn't know that. I knew he was a financier of the revolution.

MR. SCHUELKE: Right. So, that's the genealogical sketch. I was born on November the 10th, 1942 at St. James Hospital in Newark, and I have a slightly elder sister, Margaret Ellen, who was born in June of 1941. So she's some seventeen months older than I. I had a sister Kathleen who was born in 1946 who passed away suddenly, apparently of an aneurism, about two years ago. And the youngest of my three sisters is Mary Beth who was born in 1957. My father always referred to her as "the bonus". You said you were interested in what it was like growing up in northern New Jersey.

MR. COHEN: To go back a generation, did your parents talk about the Depression?

MR. SCHUELKE: Oh yes.

MR. COHEN: Was your father poor?

MR. SCHUELKE: No, my father lost a kidney surgically. I mean if it had been in recent times I'm sure he would not have, but he did. He had some kind of kidney malady and they removed a kidney. And, as a consequence, he was not eligible to serve in the military although he was quite active in the bond, the war bond effort through the war. And actually, the fact that he had lived with one kidney for the rest of his life posed absolutely no problem. So it's good to know that if you ever have to lose a kidney you'll be fine operating on one.

The Depression: my grandfather, as was true on the Carton side of the family as well, was a very successful automobile dealer both in New York City and in northern New Jersey. So much so that he gave my father a Pierce Arrow Roadster for his 21st birthday, and they had staff at home—folks who constantly polished the cars in the family. Then came the Depression. My father had graduated from Seton Hall University with an undergraduate degree and had enrolled there in Law School and started the first year of Law School when the Depression struck, and dropped out of school to go to work. And he went to work for the Metropolitan Life Insurance Company. This would have been 1932, or 3 I think. He worked at the MET the rest of his working life and retired at the age of 65 as the Executive Vice President of the Metropolitan Life Insurance Company. Because we lived in suburban New Jersey throughout the time I grew up, my father commuted daily on the old Lackawanna Railroad from Maplewood, or South Orange, New Jersey into Manhattan every day. And

he was a great guy; difficult, at least for me, the only boy in the family, because he believed in the maxim: much is expected of him who is granted much. So he and I were at loggerheads throughout my teenage years, basically until I went away to college. One of the smartest people I've ever known, although he was a martinet, there's no two ways about that. My mother was a graduate of St. Elizabeth's College in Convent Station, New Jersey where two of my three sisters also matriculated. The third, the youngest one went to Georgetown. And actually back to education for a moment, I went to St. Benedict's Prep in Newark. My father was a 1927 graduate of St. Benedict's Prep so it was foreordained that that's where I was going whether I liked it or not. In the event, I did like it. And my mother was trained as a dietitian, and worked for a number of years, I don't remember precisely, while we were young kids, as the dietitian at St. James Hospital in Newark, which is where I was born and I think my older sister Margie was as well. And then when we were, I don't know, maybe 8 or 10 years old she ceased working, but when we were in college, that is my sister Margie and I, she went to—decided to work and taught in the West Orange public school system, West Orange High School, and taught marriage and the family. Probably completely politically incorrect today to have such course. And I vividly remember when I was in Law School she was still teaching and she had me come a couple of times for some seminar she was doing with these high school seniors, as some part of this marriage and the family curriculum in which I

was supposed to talk about dating. I thought, you know, I don't know what expertise I have in this subject; I'm a few years older than these kids and half of what I would say honestly about dating I don't think I want to say in front of my mother anyway, but that was kind of fun and interesting. My mother was a wonderful, wonderful woman. She was the happiest person I think I've ever known, which was true through her terminal illness when she was 87 years old. She was just happy as could be, at the care she was getting, she was happy as could be that we, the kids, were there in support of her, and she was the great lubricant in the family. As I said my father was difficult and a martinet. My mother always somehow knew what I was up to and managed to cover for me, so my father, unless it was absolutely necessary, wouldn't find out what shenanigans I was up to or. . .they used to go to the, when I was at St. Benedict's, to the annual parent teachers night, and I was at home debating about whether I should flee before they got home, or pretend I was asleep because I knew I was going to hear, "Yeah yeah, smartass, that's what they say about you," you know?

MR. COHEN: Is that because you were a behavior problem?

MR. SCHUELKE: Not in any significant way, no; in those days, when I was at St. Benedict's from 1956 to 1960, there were no drugs.

MR. COHEN: That's like 9th grade to 12th grade, something like that.

MR. SCHUELKE: 9th to 12th.

MR. COHEN: Oh okay.

MR. SCHUELKE: There were no drugs, nobody drank, only occasionally, maybe you know, at some event there'd be some beer, but it was very unusual. And, so it was more in the nature of pranks, you know, that kind of thing. Like one, for example, for which I became somewhat famous, I think I was a sophomore and St. Benedict's Prep was run by the Benedictine monks, who were great, they were unlike the Jesuits with whom I also had subsequent experience, for whom I have great respect. The Benedictines didn't fancy themselves these great intellects as the Jesuits did, and they loved sports, they were huge supporters of the athletic teams of the school, and they could be a lot of fun. And they'd go drink a beer with you. Now when I was a sophomore a new, rather young, Benedictine monk, Father Brown, arrived and taught, you know I don't even remember what course he taught. What I do remember is that we, at least the – a group of a dozen of us maybe, who were good friends and sort of full of ourselves you know as 15 year olds, thought that, oh this was a different story. This guy is a, sort of a twerp, and he seemed, I don't know, a tad effeminate to us, until one day somebody did something which really ticked him off. Turns out the guy was a judo expert, and he flipped this kid across the classroom and everyone was, "Wow!" So one day, somebody had done something, I don't remember what it was, and we were all detained—afternoon detention by him until whoever the culprit was fessed up; and nobody was going to do that of course. So school's over at two thirty or whatever it was, so it's three thirty, it's four thirty, and I really did have to

go to the bathroom. So I raised my hand, "Father, I got to go to the bathroom."

"Nobody is leaving this room." Okay. I think that was because he believed that we wouldn't return and knew that as he was new to the school, I don't think he was confident that he had the clout with the dean to deal with it.

So nobody's leaving this room, so another half an hour goes by, I raise my hand again, "I'm tellin' you Father I really got to go."

"Nobody's leaving this room." Another, some period of time I insist. He says, "Alright, he says go out on the fire escape." Okay, so I go out on the fire escape and I'm taking a leak off the fire escape and there was a quadrangle with, sort of a garden type center to it, and I didn't realize this because I didn't see him, but the Abbot, who was the head religious honcho of the Benedictine Abbey was walking with his breviary, saying his evening prayers or something. And when I, I don't know to this day whether I actually hit him or not, but –

MR. COHEN: Was he wearing a hat?

MR. SCHUELKE: I don't know. But this story became the stuff of legend, and I remember the night my father came back from one of these parent conferences having been told about this little episode. I always got much more hell at home than I did at school. One of his great punishments, which I suffered a number of times, was I would be sent to what he called "in Siberia." Then I was restricted to my room in the house throughout the Christmas

vacation. My mother used to sneak food up to me, that sort of thing. So that's one of my fond memories of St. Benedict's Prep.

MR. COHEN: Was it an all-boys school?

MR. SCHUELKE: Yes. Yes.

MR. COHEN: Was the faculty all monks? Were there nuns?

MR. SCHUELKE: No, no nuns, no nuns. They were all men, there were some laymen. But I, but very very few, like there was the coaching, the football coach, the basketball coach, the wrestling coach, track coach. Excuse me, were laymen. And they taught some, well they taught Phys Ed for example, and you know, maybe a course or two, but otherwise no, it was all, it was all Benedictine monks. And they ranged from the type I described at the outset, hail fellow well met to quite pious. As a matter of fact there was one, Father Benedict, who taught religion who was a very pious man, but everyone respected him. Not everyone quite bought into some of the program; for example, one of my football playing colleagues who was a big strapping kid, whose name was Al Mara. Italian American family. And Father Benedict one day told us that, in dating, our objective should be to find a woman who was going to help us get to heaven, and Mara said, "Father you gotta' be shittin' me!" That was Father Benedict, and I remember they, they also when they built the new Student Union in my, I guess between my junior and senior year, but it was functioning by my senior year. And adjacent to the cafeteria there was a confessional so that if you wanted to go to confession, because they wanted to encourage you,

of course, to go to confession, go to communion, well you could go to confession right there. So I don't remember why, what possessed me to do this, but one day I did. And, I don't know if you're at all familiar with the confessional in a Catholic Church, but the priest sits in this little central booth, there's a penitent's little booth on either side, and he's got a little screen that he can open and close, not to see you but so he can hear. But otherwise you don't see him, he doesn't see you. And, you know, you're theoretically confessing through the medium of this priest, not actually to the priest, you're confessing your sins to God Almighty. And, of course this whole anonymity in the process is designed to encourage forthrightness. So I remember walking into that confessional, they had a little kneeler in there, and you kneeled down, and there was a spiel that we had all been taught, had been taught when we were in first grade probably. "Bless me Father for I have sinned, it's been 'x' weeks, or months since my last confession" and you know here's the list of sins that I have committed. After which the priest gives you a penance of some sort and then absolves you of your sins. Which is a great deal by the way, because then you can start all over again and you can go back next week and get absolved. It's a great system.

Anyway, I walk in there, I kneel down and I start into this spiel and Father Benedict says, "Well Henry." And I'm like, oh, you're not supposed to know who I am and he just recognized my voice. So those are vignettes from high school at St. Benedict's Prep. My father of course,

because he was an alumnus of the school, took a particular proprietary interest in the school and in my success of course, but also making sure that I was towin' the line. How big a school?

MR. COHEN: Yes.

MR. SCHUELKE: You know, I don't remember with any precision, I think my class was probably about a hundred. So four hundred total. Maybe five hundred. The school was historically, from the time my father went there through my time there, and probably for another thirty years thereafter, was a school for middle class white kids from suburban, northern New Jersey. Actually there were very few kids who actually lived in Newark by the time I was in prep school, because the demographics of the city were changing and the African American community was growing quite rapidly. In recent years, the school has become almost exclusively in service of the inner city and so I think the school is probably a hundred percent black and these Benedictines are completely devoted to their education. These kids are doing terrifically well; they have a fantastic rate of graduates who go on to college and so I've always been happy to lend my support, but it's a completely different school than it was in my father's time and mine, at least in terms of the demographic makeup of the school and the geographical area from which the kids come. When I was there and for many years thereafter, Seton Hall had a prep school as well. That was in South Orange, New Jersey. St. Benedict's was in downtown Newark. I grew up, until I was eleven or twelve, in what was called the

Vailsburg section of Newark, which was the westernmost community immediately on the South Orange border. Seton Hall was, and remains, in South Orange maybe a mile west of the South Orange – Newark line. And it drew from the same basic demographic group and so St. Benedict's and Seton Hall were always archrivals in all sports and whatnot. It's kind of like Georgetown Prep and who's their big—

MR. COHEN: Canton or St. Albans?

MR. SCHUELKE: St. Albans, right right. That kind of relationship. You mentioned the, in your email, an interest in growing up in Newark in the 1950's.

MR. COHEN: Mhm.

MR. SCHUELKE: We have, those of us who have paid any attention have come to know Newark in the last thirty or so years as a dysfunctional city with an extremely high poverty rate, an extremely high crime rate, all of which is quite true. Not so in the 1950's. I remember we used to, my Aunt, my father's sister, used to take us shopping on Broad Street in Newark. Broad and Market was the principal intersection in downtown Newark and Broad and Market is probably, I don't know, three or four blocks from the Penn Station in Newark. And there were major department stores and you could, you could walk the streets of downtown as a ten year old kid with no concern whatsoever and where I was until I was eleven or twelve in this so called Vailsburg section of Newark. It was like, I don't know, like Bethesda was in the 1970s maybe. You know, leafy tree-lined streets, and nice homes and crime was nonexistent. I don't ever remember even

thinking, oh I do remember actually, come to think of it. There was some report at some point, because I used to walk to school, this was another part, you know you think of Newark from today's perspective as this sort of forbidding hostile environment, but we used to walk to school. I don't know fifteen blocks, maybe something like that, to grade school. I went to the local parochial grammar school, Sacred Heart and where my mother had gone as a matter of fact. And I had a couple of these old superannuated nuns who had been there when my mother was there. But we'd walk these fifteen or so blocks to school, it was sort of a Norman Rockwell kind of a – . I know it's hard to believe, but that is the truth. And then when I was twelve we moved to Maplewood, New Jersey, which is a sister town to South Orange; they actually share some of the municipal government and the high school is common to both towns. And that was probably five or six miles maybe from the Vailsburg – South Orange line, and was a more affluent community, as it remains. My sister, who has, as a matter of fact, never married, lives in our family home as she has since she was thirteen years old. And she just turned 70, so I rag her about how old she is. So yeah, it was a delightful environment, well as I said my father could be a difficult character. We had dinner at home every night, the family and nobody wanted for anything. We weren't rich, but nobody wanted for anything.

MR. COHEN: Your friends were prosperous as well?

MR. SCHUELKE: Yes.

MR. COHEN: Did you have a car while you were at St. Benedict?

MR. SCHUELKE: No. No my first car, actually the first car I ever drove when I turned seventeen and got my Learner's Permit and my license was a 1952 Packard, which was my father's car, it was the family car at the time. Great car. Now the first car that I ever had in my own right was a Volkswagen Beetle convertible that my father bought for me when I was in—at St. Peter's in college. So I was 18 or 19. 19 probably. So after St. Benedict's, I did go to St. Peter's College in Jersey City, New Jersey. Jesuits. Whom I found quite engaging. I was never much of a student for lack of interest or application, or whatever. That was even true to some degree when I was in college, except for things that I really enjoyed. But I really liked, and was challenged by some of these guys, these Jesuits. I majored in English and had minors in Philosophy and French. And they really introduced me to and turned me on to literature and philosophical thought so I had a great time with that, and as a consequence I did quite well at it.

MR. COHEN: How are Jesuits systematically different from Benedictines?

MR. SCHUELKE: Well they're better educated first.

MR. COHEN: Because they've been to Jesuit…

MR. SCHUELKE: No, because far more of them have advanced degrees. It's, it would have been not unheard of, but unusual for the Benedictine monks who taught us in prep school to have PhD's. They're commonplace among the Jesuits. And the Jesuits historically, and for hundreds of years, have been

extremely proud of that rigorous education to the point of arrogance. And so you either respond well to that or you don't, you know you have, you have some Jesuit who tells you when you ask him, "Why did I get a B on the paper?" Answer: "Because you're not getting an A unless you teach me something, and nobody has yet." Now you either react in a very negative way to that, or you find it challenging. And I tended to sort of find it challenging, sort of a competitive streak, you know? I did well enough that I had scholarship opportunities to several law schools. I had in part, because we were not a wealthy family, and in part because my father and mother, but mostly my father who was the principal bread winner in the family, was determined that he was going to educate my sisters as well. It was on me for law school, for graduate education. And so I decided to take advantage of the scholarship opportunities, and I had a scholarship to Villanova Law School, which was tuition, board, books, the whole works so that's what I did.

MR. COHEN: Before we get there, double back a second. Sports? Did you do sports?

MR. SCHUELKE: I did.

MR. COHEN: Sports in high school? College?

MR. SCHUELKE: Not in college, no, in high school I did. Actually, starting when I was in grade school I always ran track. I was slight, and actually small. I grew five inches between the time I graduated from prep school and sophomore year in college. So lots of people didn't even recognize me. I went from 5 foot 8 and about maybe 140 pounds soaking wet, to 6'1" and, although

I've been thin almost all my life, but I went to 6'1" and 165 or something like that. And I was quite fleet of foot. To my knowledge, I could be wrong about this, but to my knowledge I still hold the schoolboy record for the 60 yard dash in the Archdiocese of Newark. And, and then so that's principally what I did. I could run from morning 'til night.

MR. COHEN: Friendships from back then? Or anything? Anybody you care to talk about?

MR. SCHUELKE: Not really. I have checked in from time to time with some childhood friends, some of whom were at St. Benedict's with me, some of them were neighbors in the community. The guys from St. Benedict's I talk to periodically because of St. Benedict's Prep alumni fundraising efforts, that sort of thing, but I have not maintained a close friendship through my adulthood with any of my St. Benedict's folks. And that's true of my St. Peter's College colleagues as well. Actually, I have had far more contact with guys from St. Benedict's than I have ever had with those from St. Peter's. And I think you know that was partially because St. Peter's was a city college. When I was there it was exclusively a commuter college. Now I moved away and lived in Jersey City with a couple of roommates in apartments for the latter two years that I was there. But everybody would go to school and go home. And so you didn't develop the same kind of relationships. Most of my school friends from over the years are from Law School. And even there, those relationships are not nearly as strong, constant, as my colleagues from the U.S. Attorney's Office here. And a

couple from my days in the JAG Corps. But my closest friends since 1972 have been my U.S. Attorney's Office colleagues.

MR. COHEN: You must have had a fiftieth reunion, had one from St. Benedict's, or have one coming up.

MR. SCHUELKE: Well actually we did have one last year which I did not attend. I actually intended to, but did not because of business travel. And I have the Law School coming up. Which I expect I will.

MR. COHEN: Before we go to Law School, tell me about your sisters.

MR. SCHUELKE: Well as I said my sister Margie always was a homebody. Even when we were kids. She's a lovely lady, a little difficult following her through school, particularly grade school, because she never in her life did anything wrong, so far as I'm aware of. And so I always got either directly, or by innuendo "Why can't you be like your, well behaved like your sister Margie?"

MR. COHEN: So that school was both boys and schools.

MR. SCHUELKE: That was both boys and girls. As are all the Catholic parochial grammar schools, as far as I know. She and I, despite the fact that she is as I had just described there, she and I have always been very close. She's the great family historian and I'm deeply in her debt because my mother was quite ill, terminally as it turned out, for about five years. And because Margie was at home and completely devoted to my mother in any case was her full time care giver and had it not been for her I don't know what the hell I would have done. She would have had to come here or she

would have had to be in assisted living. So I remain deeply in her debt. My sister Kathy—

MR. COHEN: Did Margie have a career?

MR. SCHUELKE: Oh yes, she worked, she was dietitian as well, as was my mother, trained as a dietitian. Worked in the Veteran's Hospital in South Orange, New Jersey for a number of years. And then for many years, she's now retired, for many years she worked for what was then, I guess, H.E.W. in New York City. Doing, not only dietetic, but federally regulated nursing home compliance issues. So she'd go around and do inspections of nursing homes, so she's quite knowledgeable about nursing care, which also was quite useful to her dealing with my mother. Never married, as I said remains in the family home which my mother bequeathed to her quite sensibly and appropriately in my judgment. You know, like most families there are tensions from time to time. Some wag once said if it weren't for families you wouldn't have any problems at all. And so there was some, sort of sniping among my sisters and of course my mother wanted my advice with respect to the disposition of her estate. And while I engaged counsel for her up in New Jersey, because I didn't think it appropriate for me to do it, I did give her advice on some of these issues, which I then discussed with counsel she had up in New Jersey. And I told her that I wanted not to be, didn't want to be a beneficiary under her will so that I would have the luxury of not being accused of having any self interest in this. And she readily agreed to do that, she said, "makes perfect sense to

me, you don't need any of it, that's fine." Sort of reminds me. I tell this little joke about how somebody once put in his will, "and to Lou Cohen, who wanted to be remembered in my will, Hi there Lou." Which reminds me of another little vignette. I had a client now many years ago, a woman who was the former wife of a quite wealthy and accomplished Washington lawyer. He remarried and he made a couple of bequests to various charitable organizations that my client, the ex-wife, wanted to contest; and I'll never forget as a part of their divorce settlement he was obligated to make a half a million dollar bequest to her. And here's how it read in the will "To my former wife, Elizabeth, because I am legally obligated to do so and not because I have one whit of affection for the woman, the sum of $500,000".

MR. COHEN: That's great.

MR. SCHUELKE: Great stuff. So that was Margie. Kathy, she and I were quite alike, physically. Unlike Margie, who sort of favored my mother's side of the family. I mean my father's side of the family. Whereas Kathy and Marybeth as well and I favored my mother's side. My mother had a brother, my Uncle Bob, whom I loved dearly. Great guy. And you would have thought I was his son. You would have thought had we been contemporaries that we were twins. Well, my sister Kathy and I were quite alike them in that regard. I can remember a couple of times being at the Jersey Shore in the summer and somebody walk up to me on the Boardwalk and say "You Kathy Schuelke's brother"? And so she and my

father, much as he and I were at loggerheads a great deal of the time, so were she and my father. She was less diplomatic than I so it was actually worse in some respects. At least at some point I developed the good sense to try to avoid confrontation. Not Kathy. She went to St. Elizabeth's College as well. As did Margie. So my mother, Margie, and Kathy all went to St. E's, which is a beautiful place in Convent Station, New Jersey, which is the home of the Sisters of Charity, the Catholic order of nuns. It's a quite good school as well. She then married. That was the source of a great deal of friction as well with my father. Her husband, Les Sari, was a perfectly nice good guy. But this came at a time when kids would come to pick up their girlfriend for a Saturday night date wearing jeans and running shoes or something. Well, this was completely unacceptable to my father. It was disrespectful and he should be wearing a suit and tie and so on. He was of a different age. Although I remember having some of those same sentiments about the kids coming to pick up my daughter. Because the sartorial dysfunction gets worse and worse you know. They ultimately divorced. Les had a tough time. Les went through OCS. And after basic went directly to Vietnam. He was a second lieutenant. I think in the second week he was there, he replaced the platoon leader, one of his buddies who flown over there with him, two weeks earlier. The casualty rate among lieutenants in Vietnam in '66, 7, 8 was enormous. They literally had a life expectancy measured in months. He was very severely wounded by a booby trap of some sort. He survived and then he actually

did quite well. He had multiple surgeries to his legs but he did okay. And he was a very good athlete and he continued. He was a good tennis player even after all of this, but it was a huge psychological scar. And I'm not sure when he learned that he had been adopted but he learned that sometime in adulthood. I don't remember if it was before he was in Vietnam or after he came back. And he was on this tear to identify his birth parents. And for reasons that are difficult to understand from the outside, the combination of these things proved to be destructive of the marriage. At least that is how it appeared to me. And they had three kids who are all doing pretty well. And have kids of their own now. But my sister Kathy was single, divorced and living in Winston Salem, North Carolina, because he had taken a job with Wachovia Bank right after he got out of the Army. And so they lived in North Carolina ever since. And so I saw sort of less and less of Kathy over the years and she had the various issues with my mother and with my sister Margie that never made any sense whatsoever to me. And so she became somewhat estranged. And as I said, they had three children. One of them is doing quite well as an investment banker in New York, their oldest son, then they have a daughter who is also doing quite well, she and her husband live in South Carolina. She sells medical devices for one of the major device manufactures. Which is a pretty lucrative profession. They do quite well. So they're doing fine. Although as I said, near the outset, my sister Kathy passed away a couple of years ago. Not having been ill so far as anyone

knew. She was found by a neighbor one morning in her laundry room. Suffered an aneurysm. Poof, gone. So that leaves three of us. My sister Marybeth, very interesting woman. Smart as a whip. Has been married three times. Undergraduate degree from Georgetown. And actually just recently last year got her master's degree from Seton Hall. She lives in Maplewood, as well. She has a son from her second marriage, who's a terrific kid, who's doing very well. He's an actor and playwright, set designer, and he's quite busy in New York and having a grand old time.

MR. COHEN: Interesting how many kids of that generation go into show business. We know a bunch of kids in Hollywood.

MR. SCHUELKE: Yep, interesting. So that's the family. Except for my [own] family.

MR. COHEN: Well, what I was going to sort of do is . . .

MR. SCHUELKE: Chronologically. Okay.

MR. COHEN: Let's go back to law school. Did you like law school?

MR. SCHUELKE: No. In a word.

MR. COHEN: Okay.

MR. SCHUELKE: This requires some psychoanalysis, self-psychoanalysis I suppose. I did not like law school. I did not like it from the first. I did not like the environment. I didn't like among the students this competitive study group approach to it. While I had some very good friends in law school, for the most part I didn't think much in the way most of these kids were operating. And I was more of an academic sort of loner. I didn't have any interest in the study group approach. I would typically cram. I would read

an entire casebook cover to cover before exams. I found it initially not terribly difficult, like first year. Using my own method, I enjoyed the Socratic debate process, when I came to class prepared, which was not always. You remember sitting there waiting for them to call your name. Mr. Cohen, oh shit. And to a significant degree, because I did not find it terribly difficult in the first year and I did pretty well I sort of lost interest in it. Except for a few courses that I really enjoyed.

MR. COHEN: I was going to ask you what courses you enjoyed.

MR. SCHUELKE: I liked con law, I liked criminal law. I remember having a third year seminar which I enjoyed more than anything else. Very, very smart guy was the professor. On the—what the hell did he call it? The philosophy of law or the process of law which I found to be quite interesting. I think part of the problem was I was ready to actually go do something, instead of living this academic environment for another three years when I was 21 years old. Because I have thoroughly enjoyed the practice of law. Now, you know, there are some cases that are not all that terribly interesting and there are some clients who are not all that attractive, but by and large, I have enjoyed it. I enjoyed thoroughly my time in the JAG Corps. To this day, I think the U.S. Attorney's Office is the best job that one can possibly have. I had a good time every day in that job and also felt like we were doing something useful. Which I think we were. But law school, not so much.

MR. COHEN: Anybody on the faculty stood out as great or terrible?

MR. SCHUELKE: There are certainly some who stand out as a matter of personality and methodology. We had a civil procedure professor who was the only one who did not employ the Socratic Method; he was a lecturer. And I think to this day I could quote some of that verbatim. He had a very droll sense of humor. So for example: *Erie v. Tompkins.* The 8:17 bound for Philadelphia departed Pittsburgh at 8:17. At 9:27 as it was approaching the station that—wherever, somewhere in Pennsylvania. The door to the mail car unexpectedly swung open smacking Mr. Tompkins who was on the platform in the back of the head and knocking him straight into legal immortality. And that's basically all I remember about *Erie v. Tomkins,* to tell you the truth.

MR. COHEN: That sounds like the way Jim Chadborne described that case.

MR. SCHUELKE: Is that right?

MR. COHEN: Maybe we have had the same civil procedure professor.

MR. COHEN: You haven't mentioned contracts. Which some people love.

MR. SCHUELKE: Ugh, I hated them. Hated it. Collins, Edward Collins was the contracts professor who had been at the school for years and quite well regarded in the field, but was dreadfully boring. And the subject at least for me was similarly dreadfully boring. So that was a chore. Torts was fun. And as I said, con law, criminal law. But property also dreadful. In the grand curriculum . . .

MR. COHEN: Elective courses?

MR. SCHUELKE: No. I think the only electives we ever had were third year.

MR. COHEN: Any extracurricular activities?

MR. SCHUELKE: Nope, nope. I had no interest in doing that. No I really didn't. My extracurricular activities were social.

MR. COHEN: What about friends, classmates, buddies, you particularly remember during that time?

MR. SCHUELKE: Yeah, several. Pat O'Connor who remains a friend of mine. Who is one of the founders of Cozen O'Connor you know the firm? Marty McGwynn who was one of the most ambitious people I ever met, talented guy. Practiced for a couple of years at Sullivan & Cromwell and ended up, and I couldn't tell you at what point, with the Mellon Bank and retired as its chairman about two or three years ago. And he and O'Connor are fast friends. And so, we keep up over the years with our respective families. John Cunningham—part of our scholarship for the room and board part of it was we served as proctors in undergraduate dorms. And I'll never forget Cunningham was one of the smartest people you'd ever find. Was a great gin player. And he used to take all his kids' money like every night. Playing gin rummy. He's the managing partner of Morgan Lewis in Philadelphia. Bob Nettune, now here's an interesting story. Nettune was a roommate of mine for a while in law school.

MR. COHEN: How do you spell that?

MR. SCHUELKE: Nettune. Also from northern New Jersey, his father had been a confidant, intimate I don't know, a professional associate of Bernard Baruch. And I don't know whether he learned that from his father or came to it naturally

but Bob was bound and determined that he was going to be rich. Smart guy, kind of neurotic, used to drive me nuts because when I wanted to disappear for a couple of weeks because I had to read an entire casebook before exams he just wanted to pick my brain. And he was one of those who would have reams of notes from the study group; all that sort of thing. Well, so we graduate and pass the bar and he went to work for a firm in New York. I don't remember the name but some midsized firm in New York. Hated it. Meanwhile, his younger brother, younger by two or three years, had gone to dental school and joined some practice in one of those leafy suburbs in northern New Jersey and he was making, I don't know what it was, but it was more than Bob was making as an associate in his law firm, cause in those days . . . I started out, I was the highest paid graduate in my law school class when I went to work for Standard Oil of New Jersey. Now, I'll describe that to you in a moment. And I was paid $9,600 a year. So, Bob was probably making $8,000 a year or something like that at his law firm. His kid brother joins this dental practice and he's making $50,000 or something like that. So, he decides that he is going to be a dentist as well. So while he is working for this law firm, he goes to night school in New York to make up science credits. And he applies to and was accepted in a couple of dental schools, but at the 11th hour said "Well, shit, if I'm going to be a dentist why not be a doctor?" Could not get into a medical school. Very smart guy, terrific grades. I don't about the boards, but I'm sure he did fine on that. And the story was he was too

old because they had an obligation to produce doctors with the greatest longevity to serve the community. Or something like that. So he went to Guadalajara, Mexico and enrolled in medical school. Transferred back into the States and the University of Texas after one year in Mexico. Decided to do his residency in ophthalmology because he had done an economic study and decided that's where he was going to make a fortune. Particularly when he studied the communities around Dallas, somewhat east of Dallas, so there was a fairly substantial ranching population. So it was a combination he figured of rich ranchers or Medicare. All of whom were going to need cataract surgery. So, he moved, he opened his practice, he made, netted a million one in his first year in practice. That would have been, I don't know, '70, 7, 8 something like that. And he's now retired, but he had three satellite offices at the height of his practice and he accomplished his objective. He made a fortune and he enjoyed it. It's a very—cataract surgery is sort of high class auto mechanics, is my take on it. And this is after having discussed the subject with him. He wouldn't really disagree with that. But these people come in and they are damn near blind. They go out cause these are outpatient procedures and they can see, they think he's God. And he loved that aspect of it. I mean he got a kick out of it, but he also loved the fact that he could actually do this. But he really liked making a lot of money, which he did. And he lived in this very nice community, you know a family man and raised his boys. Funny guy.

MR. COHEN: I sense—I don't know whether you have the same one—that on the whole doctors who were thought a prosperous profession in our day, now with kids have fallen behind lawyers.

MR. SCHUELKE: I think that's true.

MR. COHEN: The general run of lawyers didn't then make all that much money.

MR. SCHUELKE: I think that's exactly right. And I think that you know the really successful doctors in those days were maybe making $300,000 to $400,000 a year. Which is a hell of a lot of money then. And I think that Medicare/Medicaid has been really tough on them. You know, despite the criticisms about the escalating costs of medical care, the fee for service approach has been significantly restricted. I don't think Nettune in the last 10 years could have done nearly as well as he did when he started and the first 10 or 15 years. And I think it's a rare doctor indeed in private practice who were to use our good profits per partner, are north of a million dollars. Where it's commonplace among lawyers in New York, Washington, Chicago, LA. So yeah, I think that's true. But he succeeded.

MR. COHEN: Maybe we ought to go to JAG but let me ask you this. Did you have a draft deferment?

MR. SCHUELKE: No. No. I had been commissioned through ROTC in college and I have a hard time reconstructing my thought process today but I think basically when I was in college when I was 19 and so I started in college in what 1960? The fall of 1960. And turning 18 that November. I just I think I assumed that I would somehow or other have to fulfill a military

obligation. Because this was while I don't know even if I knew it at the time, but by 1961, we had the earliest of the so-called advisors in Vietnam during the Kennedy Administration. But there was no expectation, at least that I was aware of, that there was going to be a draft and there would be a major war in Vietnam. I just sort of had this general sense that I ought to organize my life to prepare for this and do this in a sensible way. So, I went through ROTC and was commissioned when I graduated from college. I did get a delay in active duty to go to law school. Although there was no commitment on the part of the Army that I would be admitted to the JAG Corps I had to apply for transfer and I had to have passed the bar. But I did get a delay. And because I had been commissioned in the infantry, I would have been like my former brother-in-law, Les Sari, I would have gone into Vietnam with a three month life expectancy. Whatever it was. And by the time I graduated from law school in 1967, we had 300,000 troops in Vietnam. Or shortly thereafter. The Tet Offensive was January of '68. And so, I did apply for a branch transfer into the JAG Corps both because I thought that this would be a far more sensible way to spend my time in the Army given what I hoped and expected to do once I got out of the Army, even though it required an additional two year active duty commitment. JAG Corps was four years; my infantry commitment was two. And also I had no great desire to go get my ass shot off in Vietnam. And so . . .

MR. COHEN: Did you have any Army related activities when you were in law school?

MR. SCHUELKE: No. I graduated from law school in the spring of 67 and I took the bar exam, I guess, in July. I took the bar exam in New York on a Thursday and Friday. And in D.C. the following Monday, Tuesday and Wednesday. And I did that I mean I fully expected that I would be back in New York at the time. But I decided to take the bar exam here as well, just as a hedge. Cause I needed to have passed the bar somewhere. And I went on active duty in March of '68. Now to back up a bit, immediately after I graduated from law school, while I was studying for the bar, I took the New York bar review. Of course. I went to work, I mean I knew I was going into the Army come March, one way or another. And I had a friend who was actually a friend of the family who was a senior marketing executive at Standard Oil, New Jersey, in New York. And so I went to work for Standard Oil. This was before it became Exxon. And at Rockefeller Center which was and remains Exxon's headquarters. And it had nothing to do with the law. I was in this marketing department and I worked for this senior vice president and you know we'd fly off to Brussels every couple weeks. And I just had a great time. And it was lots of fun and quite interesting. And they made me an offer of permanent employment when I got out of the Army after four years. And they had committed to pay me upon my return the difference over four years in what my salary would have been had I stayed there and what Uncle Sam paid me in the Army. While I never did go back there, that was sort of moot. So I went on active duty in March of '68, the first duty assignment was at the JAG

school at UVA in Charlottesville, which was quite good by the way. They had a terrific faculty and my class, and I'm sure that this was true for a couple before me and a couple after me, was composed of some of the best and the brightest from the law schools around the country because of the draft. And so, there are a lot of guys who wanted into the JAG Corps to avoid conscription. As so it was highly competitive and a lot of very smart talented people.

MR. SCHUELKE: Yes. Yeah, they have their own quite lovely school. On the campus.

MR. COHEN: Is it connected to the law school?

MR. SCHUELKE: You mean physically? Or . . .

MR. COHEN: No, I meant as part of the law school?

MR. SCHUELKE: No, No. I'm not sure to tell you the truth what the precise terms of the relationship are whether they are just a tenant there or whether they, I don't really know. But they're not part of UVA law school. It's not like a school of the law school. And then my first assignment at the conclusion of the JAG school was in the staff judge advocate's office at Fort Bliss, Texas. Which is in El Paso.

MR. COHEN: I said we would come back to your family later, but you're not married at this point?

MR. SCHUELKE: No. Shortly thereafter I was. I arrived in El Paso, June maybe and we were married in September, back in New Jersey, and then she joined me back in Fort Bliss. This is my now my former wife. And the mother of my two children. So, you know I don't know what familiarity you have

with the staff judge advocate office operations but the staff judge advocate is the chief legal officer to the commander of whatever unit it is. And this was, Fort Bliss, is the home of the US Army artillery and the Commanding Officer was a two star general so that his staff judge advocate was a either a Lieutenant Colonel or a full Colonel. And because it was a pretty big operation, in part because they also had a basic training and an advanced infantry training program going on at Fort Bliss. The office was a pretty good size and, I don't know, there were probably twenty of us maybe who worked for the staff Judge Advocate. And like most else in life I suppose, including the U.S. Attorneys' Office, when you start you're sort of the bottom of the pecking order and so you do a lot of intake for the kids, the troops, who have various kinds of problems. You know, marital problems, debt problems, you know there were parasites around all these military bases who were loaning money at usurious rates and selling cars that the kids can't afford, and so on. And then they want to sue them, and so we do a lot of that kind of stuff. And at that time, it since changed, but at that time each staff Judge Advocate served both as the prosecuting function in the courts martial process, and the defense so that if, you know, a half a dozen guys in an office were prosecuting cases then half a dozen of them were defending cases. And they typically would assign the younger guys to the defense function. Now, you know, one cynical view of that is the obvious, right?

MR. COHEN: Well spell it out –

MR. SCHUELKE: That, you know, there's a, there's a command prerogative on successfully prosecuting these cases so we're not going to put the newbie in as the prosecutor, we'll let the newbie be the defense lawyer. And, I suppose, depending on the command, and depending on the staff Judge Advocate there, there was some truth to that, and I think there certainly was in that office at Fort Bliss. But, it's also true that the staff Judge Advocate has to advise the command about the disposition of the cases, about what cases to prosecute, at what level, is it a special court martial, or a general court martial and with respect to sentence the Commanding Officer has the authority to decrease sentences. And so he gets advice from the staff Judge Advocate about that. Those are all classically prosecution functions. That's the government side of this and so the not-so-cynical view of this is that you need to have people who have some experience in—in that function, and in some of each I suppose. But to demonstrate in practical terms how this works, I tried to acquittal the first five cases I was assigned to as a defense attorney, then I became a prosecutor. We've had enough of that, is what they said.

MR. COHEN: So you didn't, any one person couldn't do both—prosecute and defend in different cases at the same time.

MR. SCHUELKE: Right, theoretically you could, but it typically, typically didn't work that way.

MR. COHEN: Like *Rumpole of the Bailey*.

MR. SCHUELKE: No, no, no. But you know, the interesting thing about it, I am a, as a product of my experience, I am an admirer of the military justice system. And, you know, my experience includes working there, but also includes, you know, close up and personal comparative analysis having been on the civilian side for all these years.

MR. COHEN: Did the office also give other kinds of advice, I mean advice about contracts, procurements, or?

MR. SCHUELKE: Yes. I never did any of that, but yes they did. They did. But you know it's interesting the old saw is that military justice is to justice like military music is to music. Well, I don't know about the music part, but to the extent that that denigrates the military justice system, in my experience, it's completely wrong. We had a lot, and part of this was the time and for the same reasons that we had a lot of smart people going—wanting to get into the JAG Corps. We had a lot of smart young lawyers who are now practicing in the JAG Corps. This is also at a time when attitudes born of campus life in the 19, early to mid-1960s produced a lot of people who, who were quite independent minded and questioning of the conventional wisdom, and a lot of people who were willing, if not delighted, to mix it up with the powers that be. So we had, we had a lot of these young kids who were very well represented.

MR. COHEN: What kinds of things were they accused of? Disobedience offenses? Deaths, rapes?

MR. SCHUELKE: It ran the gamut, there were a significant number of the peculiarly military offenses like disobedience of lawful orders, there were AWOLS, and desertions, but we tried a lot of garden variety crime. We tried robberies, burglaries, rapes; now and then, of course the Army had exclusive jurisdiction over any offense that was committed on the base, but the local D.A. was happy to have us prosecute somebody who raped some woman in the community, off the base, and so we did a lot of that. I don't remember, the brief time I was there, any murder prosecutions. A lot of that overseas, but I don't remember any in El Paso. But we did, we did the garden variety stuff, including some fairly complicated supply system fraud cases. Which were not terribly dissimilar from a lot of the white collar criminal stuff we've been doing for years.

MR. COHEN: Were there any jury trials?

MR. SCHUELKE: Yes. Yes, there was a before and after, however, with respect to that. In 1968, the Congress passed the Military Justice Act of 1968, which went into effect in October of 1969. For the first time, it required military judges who were not in the same command structure as the convening authority, that is the General who preferred the charges, so they're not within his command and he doesn't review their fitness reports, there's an independent judiciary headquartered here in Washington. Actually it's out in Falls Church, where it's physically located. And so first of all it mandated that there be such an independent judge and that the defendant had the option whether to have a bench trial before the judge or whether to

have a military jury. Theretofore all courts martial were by a military jury and the ranking officer who need not even be a lawyer and acted as the presiding officer so you know with, with advice from the prosecution, he'd rule on matters of admissibility of evidence and so on and the military jury would render a verdict and would impose sentence. With the advent of the Military Justice Act of '68, the military judge occupied the position precisely analogous to a federal district judge. The military jury was simply the fact finder under instructions on the law given by the judge. If the defendant had opted for a military jury and if he were found guilty, the military jury would impose a sentence. If he opted for a bench trial the same as you have in the civilian federal system, the judge would make findings of guilt or innocence and impose sentence.

MR. COHEN: Was he incarcerated, this defendant, during this trial?

MR. SCHUEKLE: Sometimes yes, sometimes no…pretty much similar to what you'd find in the civilian system; if he's a flight risk yes, if it's a violent crime and he seems to pose a continuing danger he could be incarcerated. Yes.

MR. COHEN: Yeah but juries, how do juries get selected? Are the juries officers or …

MR. SCHUEKLE: Yeah well, if the defendant is an enlisted person and wants a jury trial, he's got a right to have one third of the panel enlisted. Otherwise, they're officers and the officers are appointed by the convening authority, the commanding officer of the whatever unit has the authority to prosecute these cases. And you know so one of the…

MR. COHEN: Will there be defense objections to jurors

MR. SCHUEKLE: Yeah, yeah you can you can object for cause much as you can here, no preemptories but for cause. And one of the problems historically was command influence, whether real or by the juror perceived. You're a bird colonel, you are a G3. So you're one of the commanding general's principal staff officers. You work for him. He's appointed you to sit on this court martial jury. You're in with the ranking officer. Well you know what he wants. He would not have preferred this case criminally unless he wanted a conviction in the case and I think, I think that was a significant problem which was likewise significantly ameliorated by the new statute in 1968 because, principally because any defendant had the right not to have any of them at all and try this case before a lawyer who was independently assigned to the judiciary. It became kind of interesting how this played out.

Early on, particularly when I was overseas in Korea and Vietnam, well I should back up so you understand the chronology, I guess. I was in El Paso at Fort Bliss from about June of '68 until February of '69 when I got orders to go overseas and I was initially assigned to the staff Judge Advocate's office in South Korea just south of the DMZ in the Seventh Infantry Division, commanded by another two-star general. My boss, the Staff Judge Advocate was a Lieutenant Colonel—good guy, all the right instincts and intentions but he wasn't the strongest guy you could ever find. Not that I ever saw that play out in a way that worked to the detriment of any of those who were accused in the court martial process.

But just for example, you know, we were all this office and there were maybe 10 of us. We were all 25 or 6 years old and none of us has any interest in the military per se so our hair was too long and you know that sort of thing and he lived in dread that he was somehow gonna be criticized by command structure not only the commanding general but you know his fellows on the staff because, like the medical corps doctors who were all of the same age group and same vintage and…

MR. SCHUEKLE: same mentality and so I, I'll never forget him saying to me one day—the two of us actually. You know we're having a change of command ceremony on Friday; General so-and-so is gonna be coming through here and as he's departing the country, he was the commanding general of the Eighth Army. Three star, four star general so they're all in a tizzy about this and everything has to be perfect. Don't you guys have a case you can try up on the DMZ? They just want to get rid of us you know so nobody would see us and I remember that actually the commanding general of this Seventh Infantry division was a very smart and interesting guy and he would have these staff dinners once a month and each of his principal staff officers was invited to bring one of his junior officers and so I was invited against his better judgment to go to this dinner and I'm sitting and the general is sitting, I'm sitting there and the general's wife is sitting here. The general's wife is this very beautiful French woman. And so all evening over dinner, the three of us are engaged in conversation and the general…

MR. COHEN: The beautiful woman is sitting next to you.

MR. SCHUEKLE: Yeah and the gen, and my boss is like sitting down here. So, out of earshot…

MR. COHEN: The witness just pointed to his left.

MR. SCHUEKLE: Right. He, he's sort of out of earshot but evidently very worried about what's apt to come out of my mouth and the general was actually interested in what I thought about this, that or the other thing so I was perfectly happy to tell him what I thought. But that was kind of the dynamic you know that the poor guy was just scared to death. So, I tried cases there, as a prosecutor, from the time I got there in February until August because the new statute had been passed to be effective in October and they needed judges to comply with the statute as they were reorganizing so they sent me back to Charlottesville for the military judge…

MR. COHEN: You'd been in Korea from…

MR. SCHUEKLE: February 'til August or maybe early September and I came back to Charlottesville to the JAG School for the Military Judge Program. And…

MR. COHEN: We're now in 1969.

MR. SCHUEKLE: '69 and then I went back; now I'm a Military Judge, I'm no longer assigned to any local command, I'm assigned to the U.S. Army Judiciary back here in Washington and rode a circuit. So, I heard cases in Korea, Vietnam, Japan, Okinawa and I did that until the end of my initial overseas tour which was 13 months. So, I was transferred back to the

states in June '70. Is that right? Yeah, I think that's right. June or July of '70. I still had some 18 months remaining on my four year commitment.

MR. COHEN: If you're a judge, is that your sole function you're not prosecuting…

MR. SCHUEKLE: That's it.

MR. COHEN: …and you're not advising?

MR. SCHUEKLE: No. That's the sole function. When I was overseas because it was the custom and because the judiciary powers that be didn't want to unnecessarily poke fingers in eyes, we wore uniforms but robes over the uniforms. When I was back stateside hearing cases, I didn't wear a uniform. We wore robes, judicial robes. And as you might imagine, this was not easy for some of these old senior military officers. You know you've got some kid I mean when I, when I started hearing cases as a Military Judge, I was I had just turned 25 years old. And so, you know you had some two-star general infantry officer whose been in the Army for 30 years who prefers some charges against some GI that obviously he thinks warrants prosecution and you've got this 25 year old kid who throws it out because of speedy trial issues or, or suppresses the confession or suppresses the fruits of a search and so forth. This was, this was not easy for these guys.

MR. COHEN: You must be 26. Turned twenty-six.

MR. SCHUEKLE: Turned 26 I guess in November. Yeah. Yeah. 25, 26 you know there. And so one should have been sort of sensitive to this and judicious in the way one operated. Well, I'm not sure we all were and even when we were

or I was, cause I was conscious of it, the outcomes that I thought were mandated by the law were not well received. Like for example, I remember I was back in the same Seventh Division in Korea now I'm back as a Military Judge. There was another one of these change of command ceremonies and so for a day or two before the ceremony they're all scurrying around to make sure there's not a scrap of litter anywhere and the grass is all properly mowed and this and that and part of the ceremony was a salute to be fired by a couple of howitzers. So they bring the howitzers down from an artillery unit on the DMZ and they're on the parade ground and they assign, I think there were two, young privates or PFC's on guard duty. They're supposed to be guarding these howitzers. Well, there's nothing whatsoever going on here. There's no conceivable danger that somebody's gonna come and drive away one of these howitzers. Alright, so dawn on the morning of the event, the Chief of Staff, who's the senior most officer under the General, who is a full Colonel and one of his minions is out doing a quick inspection to make sure everything's fine and they come upon this kid who's on guard duty who is asleep in the cab of a two and half ton truck which was hooked up to the 155 millimeter howitzer. So, he's assigned to the artillery unit so one of them calls up to his commanding officer in the artillery unit and gives him a ration of shit about the fact that one of his troops is asleep on guard duty and the guy says well, we'll take care of that. They charge him sleeping on guard duty, which is a criminal offense. Now, it should be a

criminal offense in the right circumstances; if we're in a combat zone and I'm supposed to be on guard duty and you're trying to get a cat nap in your foxhole when the enemy is a hundred yards away, serious business if I'm sleeping on guard duty. But this was sort of silly you know. I don't think that there was overt command influence in this. This, this was the perceived kind of command influenced the guy thought he'd better do this because the muckety muck is the one that reported it to him. So, they go through the whole process, they charge the kid, it's a Special Court Martial so, it's limited in its jurisdiction to six months confinement, reduction in rank and fines and so on and naturally the defense waived a military jury and tried this case before me. Well, I heard the evidence, it technically met the operative legal definition of the offense and I found him guilty. Now, I'm to sentence him. So, I sentenced him to pay a $100 fine or something like that. Well, you would think that I had just released Charles Manson to the public. Now, did I, did I understand that they wouldn't be happy? Yeah, I guess I did and, and I certainly wasn't intent on poking my finger in anybody's eye but I thought that that was the right thing to do; I thought to lock this kid up was unnecessary, ridiculous. The kid had an unblemished prior record. So, and that led to this interesting phenomenon. Early on, after the new Act went into effect, virtually all of the defense lawyers would advise their clients to waive the military jury, try this case before the military judge. Because they're thinking of cases like that and as that case illustrates, I think they were right, if you're

talking about these peculiarly military offenses. Well, they had a rude awakening when it came to trial on violent crime. Because you know I tried cases in which a guy's charged with aggravated assault because he sliced up one of his fellows with a straight razor and the kid needed 400 stitches or something like that. Well, that kid was going to jail. Whereas a lot of the line military officers had this sort of "boys will be boys" view and it's more important that we put them back to work. So this process took a while for people to understand where the lines are. And so increasingly, when I was trying serious violent crime we'd have military juries as frequently as not. Unless there was some particular dispositive legal defense.

MR. COHEN: So you did preside over jury trials?

MR. SCHUEKLE: Oh, yes.

MR. COHEN: What about the appeals, what kind of appellate process was there

MR. SCHUEKLE: The first step in the process is administrative; the commanding general wouldn't have to necessarily be a commanding general, the commanding officer, it's called a Convening Authority, he is the one that convenes the court martial and he prefers the charges. Has to approve of the sentence and can reduce it. And so that is one step in the process. Then there is a two level appellate process. An independent judiciary here in Washington. The Courts of Military Review which is an intermediate court of appeals. And the Armed Forces Court of Appeals it's now called; when I was in it, it was called the Court of Military Appeals. It is

composed of judges who are not members of the armed services, who are civilians who are appointed by the President and serve for fixed terms. And a pretty good sophisticated court. And a very good appellate bar from JAG Corps. And I think that is true across the services. I mean I am obviously familiar with the Army. But I think that's true in the Navy, the Marine Corp, and the Air force as well. Because all of the services have an appellate function where lawyers are assigned to do the appellate work who are pretty good.

MR. COHEN: We have now been running more than two hours. I propose that we stop and start up again with your U.S. Attorney's Office experience.

MR. SCHUEKLE: Sure.

Oral History of Henry F. Schuelke, III
Second Interview
November 18, 2011

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 November 18, 2011. This is the second interview.

MR. COHEN: This is Louis Cohen. It's November 18, 2011. This is the second session in the oral history of Henry F. Schuelke, III. And let's get started.

Hank, you said there's a story from your time in Korea that you would like to tell.

MR. SCHUELKE: When I first was assigned to Korea – this is before I returned for the Military Judge program in Charlottesville and then went back – but when I was first there,–

MR. COHEN: So the year's about

MR. SCHUELKE: Early '69. A colleague of mine in the Staff Judge Advocate's Office in Fort Bliss, Texas was also assigned to Korea at about the same time as I. And we were permitted, on our own dime, as it were, to have our spouses accompany us. No housing; we had to make our own arrangements for housing. And my mother had a friend who, in turn, had a friend who was in the diplomatic corps in the U.S. and had a home, a lovely home, in Seoul, Korea, and he had been posted elsewhere. And the home was available. And, so, Rex Ruff was my colleague's name, and I rented this quite lovely home. And it came with two young Korean women as staff. They were 18 to 20, maybe, something like that. And my wife, my then wife, worked with them very closely in maintaining the home and

preparing meals and what not. And she became reasonably proficient in Korean, at least so much of the language as was necessary to communicate on these subjects. And one Saturday, she asked me to accompany one of these young women into the market so that she could purchase rice – you know, like a 25 pound bag of rice or something like that, as part of the weekly staple. And I did and I was in uniform and it was obvious to me that this young woman who had, of course, been, you know, exceedingly deferential simply because, you know, I was the American officer and I was substantially – well, I wasn't that much older actually – but I was somewhat older – but it was evident to me on this day that she was very uncomfortable. And we did the shopping and we returned and my wife later told me that she had asked never to be required again to go into the market with me because people might think that she was my concubine and she would, at least at her societal level, be essentially ostracized, you know, by her family and friends, whatever.

MR. COHEN: Sure.

MR. SCHUELKE: Very, very interesting experience. And we only, that is, Rex and I, only spent weekends, and not every weekend, there at the house because we were working up near the DMZ. And so if I were there on a weekend, I would have one of these young women make arrangements for me to have a taxi pick me up at, say, 5 o'clock in the morning on Monday morning to drive up to Tongduchon which was the village near the 7th Division headquarters. And it was probably only 35 miles maybe but it took at

least 2 hours because the roads were not at all good and there was all manner of traffic from goat carts to oxen carts to people on bicycles with drugged but live hogs strapped to the back of the bicycle because they had no refrigeration so they would transport them while alive.

MR. COHEN: Mm hm.

MR. SCHUELKE: And I had many great times on those trips including one very cold snowy morning. I was in the back of the taxicab and the taxi was driving too fast for the conditions and approached a bus terminal and a bus pulled out in front of us and he slammed on the brakes but, of course, he simply skidded, probably accelerated while skidding, hit the bus broadside, and I saw it coming and kind of ducked down as much as I could in the back seat. I was not injured. Some window broke and the driver got glass shards in his fingers or something. So there was blood around the car and it looked like it was a terrible accident which it really wasn't. And within a matter of seconds, I would say, a hundred people materialized, surrounding the cab, because they saw me in uniform and they were all claiming to have been on the bus apparently and they were going to sue the U.S. government.

MR. COHEN: They hadn't heard about sovereign immunity.

MR. SCHUELKE: Right. So I remember getting out of the cab saying, "That's it, I'm out of here," elbowing my way through this crowd, finding another cab and getting on my way.

MR. COHEN: Were there also loose animals on these roads as you might find in India?

MR. SCHUELKE: No, no. No, I mean, there were a lot of stray dogs and that sort of thing but, no, not livestock. But it is quite true that they would transport these hogs, apparently comatose on rice wine, and this guy would be riding a regular old bicycle with a 200 pound hog strapped on the back. And they took all manner of discarded glass and, I don't know, plastics and some metals and sell them to some kind of reprocessing plant. And they would be riding a bicycle and there would be this stuff somehow tied on and it would be a stack of this stuff that was like 6 or 8 feet high. It was absolutely amazing that they could actually navigate, but they did.

MR. COHEN: They were two wheelers, three wheelers?

MR. SCHUELKE: Two wheelers.

MR. COHEN: Did you work hard during that period in JAG as compared with other jobs you've had since where you obviously have worked very hard?

MR. SCHUELKE: Yes, I would say yes. When I was in a trial lawyer capacity, as either a prosecutor or defense attorney, we had substantial calendars and preparation for trial and ongoing preparation in the course of the trial with which all of us are quite familiar was no different. So, I would be in court from 9 in the morning until 4 or 5 in the afternoon and probably worked until 2 or 3 o'clock in the morning to prepare for the next day. So that was really no different. There was a lot of travel and some consequent down time. When I went back to Korea first as a military judge I had a helicopter assigned to me because I might have two cases to hear on a given day at one base and I might have two scheduled for the following

day at another, and so we would fly from base to base which is always an interesting experience. I did a lot of that when I was in Vietnam, as well, although in Korea I basically had a personal helicopter chauffeur who was a young warrant officer. And I remember one Friday evening, we were up at the 2nd Division which was right adjacent to the DMZ. And, of course, I wanted to get back to Seoul Friday night. And it was snowing and there was snow on the ground. And I said to the pilot, can we get out of here tonight? Because I knew that the SOP, as it were, was that they don't fly, they don't land and take off in snow conditions because the rotors will kick up a lot of snow and you're basically blinded. And his response to me was, "Sir, you're in command. If you say we're leaving, we're leaving." Okay. Let's go. And so we did. Flew back to Seoul that night – without incident I might say.

Although I did go down once in a helicopter there. These were what they called OH23s which are 2-seat canopy – much as you see the TV stations use. A single gasoline powered Briggs and Stratton engine, it's kind of like what you have on your lawn mower only larger. And they're a workhorse, they're absolutely reliable. A great little aircraft. And in nice weather an enjoyable way to travel because they're completely open on the side so you can stick, put your foot out on the skid and the view absolutely panoramic. And if you're interested in photography, that's a great thing to do, which I was also at the time. But we were flying one night – not night, it was not dark – one evening and it

was rapidly losing oil pressure which was evident on the gauge. And the pilot was trying to make it to the closest available landing zone but didn't. And the engine seized. And we were probably at 2000 feet I would estimate and the aircraft will autogyrate just from the static rotors. And so the aircraft is spinning which slows the descent to some degree. But, you know, we hit the ground with a [hits the desk with a thump] and nobody was hurt.

MR. COHEN: So does the little vertical propeller stop at that point. I mean is that what goes round and around because the–

MR. SCHUELKE: It stops.

MR. COHEN: Okay.

MR. SCHUELKE: It stops. Yeah. And we took a pretty good bounce and I don't' remember – I don't know, maybe I was bruised or something but certainly not significantly injured. And interestingly enough, those aircraft had a far greater safety record even with incidents like that than the Hueys which were ubiquitous in Vietnam. And there were some in Korea when I was there, too, but they were gasoline turbine – they still are – so effectively it's a jet engine driving a turbine and when they would go down, either through mechanical failure, enemy action, whatever it was, most of the fatalities occurred because on impact the fuel tank ruptured and exploded. Eventually, oh, I don't know, by '70 maybe, they had designed a fuel cell which was made of some sort of malleable plastic compound so the thing would take an impact and not rupture like the steel tanks had.

MR. COHEN: I always assumed that the big danger is that unlike an airplane that can glide, a helicopter would plummet if it didn't function, but I guess if it's going around a little bit –

MR. SCHUELKE: Yes, it depends on the aerodynamic conditions when you have a mechanical failure. If the helicopter is flying at 125 miles an hour, that momentum is going to counteract with significant degree the autorotation impact, 'cause the aircraft is still moving at a pretty rapid pace. If you're flying, however, as we were on this particular evening, at a reasonably leisurely pace, in a matter of, I don't know, 10 seconds, maybe, the forward motion of the aircraft is overcome by the autorotation and so then it basically goes straight down.

MR. COHEN: Are there other cases that you had either as a JAG advocate or as a judge that we ought to record, say something about. You talked about one case the last time we were together but I think that's all.

MR. SCHUELKE: Oh, we talked about the –

MR. COHEN: The PFC ____ ____.

MR. SCHUELKE: The kid who was charged with yeah – sleeping on guard duty. There were a couple of cases, one of which I prosecuted and one of which I presided over as a military judge which both involved senior supply and noncommissioned officers who had allegedly, indeed had, engaged in sort of massive fraud stealing all manner of supplies and selling them into the black market. And they were fascinating cases because this was all, of course, well before computers and email and so it was – but they were

document intensive cases requiring a great deal of analysis of what came in and what went out and how it was accounted for. And in both of these cases which are completely unrelated, there had been fairly sophisticated and elaborate efforts taken through false documentation to disguise the nature of the transactions. And so it's like white collar investigations that I had occasion to conduct when I was in the U.S. Attorney's Office later where it was a fascinating detective exercise involving detailed documents and financial transactions. And I suppose when one thinks of court martial practice in the military, one doesn't think of cases of that sort but there are and they're hard work and they're interesting. So, yeah, there were a couple of them.

MR. COHEN: My sense of that comes from *Catch 22*. Isn't there somebody in *Catch 22* who was –

MR. SCHUELKE: I think that's right.

MR. COHEN: Milo Minderbinder.

MR. SCHUELKE: Well, that's gone on, I suppose, since the advent of warfare. And there was a huge market apparently available for it which wasn't difficult to access in a city like Seoul or Saigon. And there were a number of interesting and difficult violent crime cases. You know, one of the things that sort of the searing experience for me while I, as I think I probably said last time, I thoroughly enjoyed my service in JAG Corps. But the sort of personally searing aspect of it was that while as a lawyer barring very unusual circumstances, one is not involved in active hostilities. It's not

very likely that you're going to get shot. You could be in the wrong place at the wrong time when there's a mortar attack somewhere. But you're not humping the boonies on patrol and that sort of thing. Nevertheless, what you get to see is this sort of awful underbelly of the military in a combat zone. You get to deal with the worst of society. Some of it is particularly arresting because I can recall cases in which you had a young trooper who had been in country for 8 or 9 months out of his 13 month tour who had an unblemished record, who was a good soldier, who got in a dispute with a noncommissioned or even an officer at the company or battalion level, felt that he had been unfairly treated in some way and because of the ubiquitous nature of firearms and to some degree the extent to which people get inured to the violence and death in a combat zone, the immediate response is to pull out a weapon and shoot the guy. And there was a case like that. He actually did shoot an officer. Killed him. And he was an 18 or 19 year old kid from some farming community somewhere in the Midwest. And that environment made him into this.

MR. COHEN: Mm hm.

MR. SCHUELKE: You know? My guess is had he stayed in Iowa, gone to work in farming or manufacturing or whatever, he never would have had problems his entire life, you know. So, that part of it I found difficult.

MR. COHEN: What happened to him, what did he receive?

MR. SCHUELKE: He was sentenced to, I don't remember exactly, but a lengthy term in prison back at Leavenworth. I mean, there was no question but that he had

intentionally shot this officer point blank with an M16. Shot him in the chest. Well, you might have made a second degree murder case out of it rather than a premeditated murder case but that's what happened.

MR. COHEN: Did you sense that it happens a lot? I mean, in wars do we lose a lot of lieutenants just because people really, really don't like them?

MR. SCHUELKE: No. In Vietnam, there were a significant number of so-called fragging episodes. That is, some kid is for whatever reason extremely angry and agitated because he's been subject to non-judicial discipline or something which he thought was unjust and unreasonable and marches up to the officers' latrine, and opens the door, and tosses a fragmentation grenade in there. That happened.

MR. COHEN: Mm hm.

MR. SCHUELKE: And it happened a number of times so it was a significant issue. But in terms of absolute numbers, I don't know, my guess is – and this is nothing more than a guess – maybe a dozen officers or NCOs were killed or injured in instances like that over the space of several years.

MR. COHEN: Really?

MR. SCHUELKE: Yes. So, in terms of absolute numbers, though it was not a – there were whole lot more lieutenants that were getting killed on a daily basis in Vietnam in enemy combat. That was a very serious issue. They had a very short life expectancy. Particularly post Tet in spring of '68 through middle of '69 probably.

One of the other things that I found troubling that I think influenced me in some ways when I later became an Assistant U.S. Attorney, there were a lot of civilian judges around the country who would have a kid who was convicted of some offense, not necessarily a serious offense, who would give the kid an option: enlist in the Army or you're going to jail. A terrible practice. But there was a lot of that. And of course that decreased with the rapid increase of draftees in Vietnam. But there was still a lot of that. So you started out to some degree with not exactly the crème de la crème of society.

MR. SCHUELKE: And there were drug problems which were at some times and in some units of epidemic proportion. And there were significant racial conflict issues as well. And there were times when all three of those factors contributed to lots of problems.

MR. COHEN: When you were a judge, did you have anybody like a law clerk? Did you have to essentially do it all yourself?

MR. SCHUELKE: Essentially myself. I mean, we had administrative support for our own personnel needs, pay, housing, that sort of thing, but, no, we had no law clerks. And so I was a big proponent of insisting upon comprehensive pleadings from the parties which a lot of lawyers who up until that point had not been dealing with a military judge found to be burdensome. But, you know, as is true for any trial judge, even if you have law clerk support, it's important to have the positions of the parties well briefed. And it's obviously to their ultimate benefit as well. So that's what I tried

to do, tried to enforce. We had a lot of good lawyers. I think I may have said this when last we met. The popular notion that military justice is somehow deficient. Not so. Wasn't then. I don't believe it is now. We had smart, good, young lawyers. We had a defense bar which was every bit as aggressive as any you'd find in the civilian court system. Nobody was afraid of taking a position that the command wouldn't like. And there were lots of positions taken that the command didn't like but – so, no, I was quite proud and remain so.

MR. COHEN: Mm hm.

MR. SCHUELKE: And I thoroughly enjoyed it.

MR. COHEN: Shall we move on to the U.S. Attorney's Office?

MR. SCHUELKE: Sure.

MR. COHEN: Henry, you go to the U.S. Attorney's Office in 1971?

MR. SCHUELKE: I started in March of '72. Within a week or two of the conclusion of my tour in the Army. I had applied for the position in, I guess, the late summer or fall of '71. And I remember that Tom Flannery, the U.S. Attorney at the time who had hired me with the recommendations of a hiring committee was a lame duck actually at the time he hired me because he had been nominated to the District Court and was awaiting confirmation. So by the time I actually started in March of '72, he was gone.

At the time I started, there were about a hundred Assistant U.S. Attorneys. I do remember that when I left in October of '79, there were

161. And I'm thinking it was probably around 100 when I started, maybe some fewer. The office, of course, was then as it remains, divided in divisions with responsibilities for the District Court and the Superior Court. And within each of them, it was further divided up into Appellate Division which handled the appellate work in both the Circuit Court and the D.C. Court of Appeals. Felony Trial Divisions in both courts. Grand Jury Divisions in both courts. And Major Crimes Division in the District Court. A Fraud Division in the District Court. Misdemeanor Trial Section in the Superior Court. This, in 1972 when I started, was very shortly after the implementation of the Court Reorganization Act. Theretofore, all felonies were prosecuted in the U.S. District Court because the Superior Court, until reorganization, was not a court of general jurisdiction. By the time I started, all the D.C. code offenses were tried in the Superior Court and the District Court handled federal criminal law as well as federal civil litigation, the Civil Division I forgot to mention because a while later when I became the Executive Assistant I had supervisory responsibility for the Civil Division. I never practiced in Civil and had very little knowledge or insight into it. When I became the Executive Assistant, I didn't really have to do very much because now Chief Judge Royce Lamberth was the Chief of the Civil Division. And Royce, a terrific lawyer, knew more about civil litigation than I would ever dream of knowing. And the protocol within the Office was if they were going to settle a case for above a certain dollar threshold, they had to have front

office approval. So Royce would say, I want to settle this case for X dollars and I would say, "Yes, sir. Done. If you think it's right, it's fine with me."

MR. COHEN: So he was the head of the Civil Division of the Office?

MR. SCHUELKE: Yes.

MR. COHEN: At that point?

MR. SCHUELKE: Yes.

MR. COHEN: Yeah.

MR. SCHUELKE: But back to when I began. The practice in the off – well, first of all, everyone had a 3-year commitment which was rarely ever honored in the breach. And because it was the policy and practice of the Office to train young Assistants, there was a rotation which was commonly followed. So one would first be assigned either to the Misdemeanor Trial Section which was a great learning experience but it's also a place where you can do less harm or the Appellate Division on the theory that before you're going to seek to apply the law in the trial court, you ought to know what the law is.

MR. COHEN: Besides that, by definition some other lawyers' already been involved with the case, so you're –

MR. SCHUELKE: Correct. Consistent with that practice, my first assignment was in the Misdemeanor Trial Section. I think I was there for 4 or 5 months. The typical rotation was a year.

MR. COHEN: Is that the Superior Court?

MR. SCHUELKE: Superior Court, yes. Yes. Now, –

MR. COHEN: Before you get there, why did you apply to the Office? Did you think about any other possibilities, seriously, as you were coming out of JAG?

MR. SCHUELKE: I thought about other possibilities. I don't know that I terribly seriously thought about other possibilities. I had decided, based on my time here in Washington over the last year and a half in the Army, that I wanted to stay in Washington. I didn't know anybody in Washington. I didn't have any network of colleagues as I might have had if I went back home. And it seemed to me that if I were going to practice law here in Washington, I ought to become acquainted not only with the courts but also with practitioners here in Washington. And even though by that time I had tried a substantial number of cases in the JAG Corps, I persisted in the view that if I wanted to be a trial lawyer which is what I thought I wanted to be, you couldn't have a better opportunity to develop and perfect those skills. And I went into it expecting that I would fulfill my 3year commitment but then I would go into private practice. Now it didn't quite work out that way because I was there for 7 years and I can tell you why but that was basically my motivation.

MR. COHEN: Was it hard to get a job in the U.S. Attorney's Office at that point? Were those jobs eagerly sought after?

MR. SCHUELKE: Oh they were eagerly sought after. I can't remember to tell you the truth what was going on then with respect to available slots, you know. There were periods of time thereafter when there were hiring freezes in place and I don't believe that was so at that time. It was highly sought after. It was

competitive. I can tell you that several years later when I was the chairman of the hiring committee for the Office that we would typically have a pool of applicants of several hundred. We would winnow that down to about 40 finalists as it were and then make offers to maybe a dozen a year. So it was quite competitive. You know, I think a lot of people well understood that this was an opportunity impossible to equal elsewhere. And I still think that's the case. I mean, surely the U.S. Attorney's Office in the Southern District of New York is a great office. It's not as great as they think they are but it's a great office. And while there are certainly significant opportunities for young lawyers in that office to gain trial experience, it's nowhere near as great as it is here simply in terms of the volume of cases. You could join the U.S. Attorney's Office in the Southern District – and I think this is true in Chicago, L.A., you know, virtually anywhere – you could join that office and you could be there for 2 years and never have first chair at a trial. The volume isn't nearly as great. There is I think somewhat less attrition and so senior lawyers are there longer whereas when you join the U.S. Attorney's Office here you can go to Superior Court and whether you're trying misdemeanors for six months or a year, or what they call felony twos which are guns, drugs, uncomplicated homicide cases, you're going to try somewhere between 2 and half a dozen cases a month. And there's just no substitute for that. And because I believe that in addition to developing the obvious skills of conducting a direct and cross

examination, making an opening statement, closing argument, the fundamental thing that one has to learn as a trial lawyer is judgment. And if you're trying a lot of cases, and you're thrown into them, as was true in Misdemeanor Trial with virtually no opportunity to prepare, I mean none, you would meet the police officer in the hallway outside the courtroom and you would spend 10 minutes frantically trying to read the relevant documentation and you'd walk into the courtroom and start the trial. You may or may not have had the opportunity even to interview a principal complaining witness. So you learn very rapidly not to take stupid, unreasonable positions. And that's the only way one learns that. You can't find that in any book. And so I just think there's no substitute for that sort of sink or swim approach to trial work. And we had that in spades.

And we had in those days in the Superior Court quite an interesting collection of judges most of whom were superannuated judges who'd been on the Court of General Sessions before it became the Superior Court at the time of the court reorganization. And it was a collection of either unqualified, irascible, and some of them nut cases, you know. And that was true. And so one had to learn to deal with all manner of wackiness which is just a great experience.

So I did the Misdemeanor Trial assignment –

MR. COHEN: Was it another difference between here and let's say the Southern District that up there they simply don't have anything equivalent to Superior Court jurisdiction?

MR. SCHUELKE: Yes. Yes. The U.S. Attorney's Office here in the District is the only one in the country that is a local D.A. as well as the federal prosecutor which adds another sort of interesting dimension. Forgive me if I'm getting sort of off the track –

MR. COHEN: No, no. I think this is interesting.

MR. SCHUELKE: – chronologically. But I have thought and continue to think that my experience in the U.S. Attorney's Office here in the District was the time of my professional life. I had a great time every day which is not to say we didn't work hard because we did. But I did it in the company of some terrific people. I always felt like I could walk down the hall to the guy next door who was smarter than I was to hash things out, you know?

I had the pleasure of working for U.S. Attorneys who had no political agenda whatsoever. And so our only charter was to do what we thought was right. And barring coming up with some totally wacky idea, you could expect you'd get support. That's not true in U.S. Attorney's Offices around the country. You know, the U.S. Attorneys other than here in Washington are selected as a result of a political process. Not that I'm suggesting there's something wrong with that, it's just a fact. So, the Congressional delegation in you name it, Ohio, Texas is largely responsible for the nominations that come out of the White House for the

U.S. Attorneys. And as a result of that, there are some political agendas. There are U.S. Attorneys who want to be the governor of Texas and they make prosecutorial judgments which are seen to advance their political ambitions. I think that's just a fact of life. And that's true in the state systems as well. Not so here. Paradoxically, the U.S. Attorney's Office in Washington is only 7 blocks from main Justice but we were more distant from main Justice than I think the U.S. Attorney's Office in Alaska was. Part of that was because –

MR. COHEN: Because it's less political?

MR. SCHUELKE: – Yeah, part of it was because half of our business was being the local D.A. for the District of Columbia. The Justice Department had no – I wouldn't say that – it would be unfair to say they had no interest in that, but it would be fair to say that it did not implicate administration goals and policies in any way. And because we don't have a Congressional delegation in Washington, you never had that kind of political influence into the selection process. And so this office has always been free of that kind of political influence. We also happened to have had a U.S. Attorney when I was there of absolute integrity who I'm confident would not have succumbed to any kind of political pressure even if there'd been any. Someone like Earl Silbert I have in mind principally.

MR. COHEN: Who were these U.S. attorneys? Let's just sort of get that down.

MR. SCHUELKE: Who were the U.S. Attorneys during my tenure? Judge Tom Flannery was the U.S. Attorney whom I described earlier who actually hired me while

he was a lame duck awaiting confirmation to the District Court. By the time I began in March of '72, he was on the bench and replaced by Harold Titus who had been his principal assistant. Titus was a fascinating man who had been by all accounts a superb trial lawyer, one of the best at mustering and evincing righteous indignation on behalf of the people in a criminal case. He was quite a patrician in bearing. There were stories about how he would try a rape case, for example, and among the physical evidence, let's say, were the victim's panties. Well, he would ostentatiously put on latex gloves before he would handle the evidence. I don't really know, or if I did I don't remember the details, but he was somehow an intimate of the Eisenhower family. He was not related to the Eisenhowers. But at some point during his youth and perhaps into his 20s and 30's, he was always described to me as kind of a member of the Eisenhower family. He had been married at one point to Dina Merrill, the actress.

MR. COHEN: Yes.

MR. SCHUELKE: And he was a close friend – I couldn't tell you how or why, of Tyrone Power. And I remember tales about how when during the late 60s, early 70s, Tyrone was a very popular name among the African American community, and as a consequence there were a number of criminal defendants in the system whose name was Tyrone. He was always offended by that because of his friendship and affection for Tyrone Power. But he, like Earl who followed him, but for completely different reasons,

was completely independent, and I think part of it may have been the fact that he was so well connected among the Republicans that he didn't need to curry any political favor and he felt he was immune from that sort of pressure which may have been the case. But he was a great proponent of hiring assistants who appeared to have the ability to be trial lawyers. That's what he was most interested in, and he would unflaggingly support any of us. Earl was apolitical – completely apolitical.

MR. COHEN: When does Earl take Titus' place? How long had he been there?

MR. SCHUELKE: Well, Titus resigned at the point during the Watergate investigation at which Richard Kleindienst had been implicated in some failure of oversight allegedly at the behest of the White House. Titus and Kleindienst were very close friends. Titus, I don't know this because Titus ever told me personally, but I was given to understand that Titus at that point was so troubled by what had occurred both at the Justice Department and the FBI as it was becoming known through the Watergate investigation and publicity that he was sick of it and he'd had it. Now when exactly that was –

MR. COHEN: Well, that has to be in '74.

MR. SCHUELKE: – '74, I would say probably mid '74 because Earl was one of the three original prosecutors from the U.S. Attorney's Office who investigated the origins of the Watergate scandal, namely the break-in at the DNC before the special prosecutors were eventually appointed.

MR. COHEN: Well, was Earl appointed by – this is Earl Silbert. Was he appointed by Nixon or by Ford?

MR. SCHUELKE: Nixon.

MR. COHEN: That's interesting.

MR. SCHUELKE: Hmmmm, and Earl was, well, I said earlier that he was completely apolitical and I think that's true. He was a registered Democrat, came from a good Massachusetts Democratic family. So in short, I had the distinct pleasure of working in that environment where we were free of any kind of political influence. And Earl remained the U.S. Attorney almost to the end of my time there. Earl left in July of '79. I left on Halloween of 1979. So for a couple of months, Carl Rauh, who had been the principal assistant to Earl, was the acting U.S. Attorney, and Earl and Carl and I had worked together in the so-called front office since sometime in '76, so from '76 to '79.

MR. COHEN: Your point that it's remarkably apolitical is corroborated by the fact that Earl I guess – you said he was appointed by Nixon. He survived through the Ford Administration and into the Carter Administration.

MR. SCHUELKE: Right.

MR. COHEN: Even though I take it this is a job that serves at the pleasure of the president.

MR. SCHUELKE: It does indeed. And that's another example, I think, of this phenomenon that we talked about earlier that, unlike elsewhere, even putting aside the Justice Department, presidents don't come into office saying I need to

replace the U.S. Attorneys. If they do, they're not focused on the District of Columbia.

MR. COHEN: So go back to your own career.

MR. SCHUELKE: Even recently during the claimed scandal I'm not sure how much of a scandal it actually was – about U.S. Attorney firings during the second term of the Bush Administration. Nobody got fired here.

MR. COHEN: I was going to say go back and give me the short history of your career. You come in, you spend six months in the misdemeanor section, and then how does the rest of the time break down?

MR. SCHUELKE: Well, then the normal rotation would be you start in misdemeanors and then you would go to appellate, or you start in appellate and then you go to misdemeanors. And then you would go to one of the grand jury sections either in Superior Court or District Court. After I don't know, I think it's around six months that I was in Misdemeanor Trial they sent me to the Felony Trial Division. So I skipped the typical rotation because I had had significant trial experience before I ever arrived there, and the powers that be were apparently satisfied that I had equipped myself well enough in those first six months. And so I went to the Felony Trial Division in Superior Court. As I alluded to earlier, the structure of the calendars in the Superior Court then as now was Felony II calendar which were guns, drugs, uncomplicated homicides, sexual offenses, larcenies, burglaries.

MR. COHEN: Some of those sound pretty serious.

MR. SCHUELKE: Well, they are. They're serious, and the only reason that they're distinguished from the so-called Felony I calendar is because the Felony I calendar would include conspiracies, multiple defendants like three or more defendant – three or more codefendant cases, complicated first degree murder and felony murder prosecutions which were thought to involve more complex and protracted litigation so a given judge could manage fewer of those cases on the calendar. Whereas in the Felony II you had serious crimes, but you maybe had solo defendants and you didn't have conspiracy cases and so on. And the U.S. Attorney's Office was organized so that each judge who had a felony calendar, one or two, had three AUSAs assigned to that calendar. And when I started in Felony II's in late '72, the typical Felony II calendar had maybe 350 cases on it. I mean it was a big calendar. And in an effort to manage the calendar, a judge would set maybe three different cases for trial on a given Monday in the expectation that two of them were going to break down for some reason. Either they're going to plead or a continuance is going to be granted for some reason, and that happened. And so that was a sensible way to calendar. But what would often happen is I would try a case from Monday of week one through Friday, some four or five day trial. The next Monday I've got one of the three that is calendared for trial and the other two are the ones that break down. I'm in trial again, you know, back to back. And so, you know, we were very, very busy. We had –

MR. COHEN: Well, it sounds like a better way to handle the judge's calendar than to handle the lawyers' calendars.

MR. SCHUELKE: No question, no question. It was designed for docket management on the part of the court. Now, you know, I'm not suggesting that on that given Monday I was totally surprised that it was my case that was going to go to trial. I mean I had a sense from my colleagues on what's likely or what's going on with your case, is it going to go on Monday or is it not. We pretty much knew. That didn't lessen the burden anyway if the chips fell the way I described. Most of these judges developed an affection for the team of AUSAs working before them. These are my AUSAs. And to the extent that we were good at what we did, knew the law because some of these judges were new to that aspect of the practice, they were most appreciative. Now, you know, one could argue, I suppose, and I'm sure some did that that's the problem, you know. That's why we've got so-called government judges, you know. They buy what their AUSAs have to say, and I suppose in some cases that there may have been some truth to that. But I think it was a result of the fact that we did call the shots straight and that we did know what we were talking about and that we did not lead them down some inappropriate path. Which is why, touching on the subject that I have had the misfortune or fortune depending on how you look at it to be investigating for the last couple of years for Judge Sullivan, which is why it pains me to see on an ever increasing basis

district judges and circuit courts around the country appalled at *Brady* violations on the part of the federal prosecutors.

MR. COHEN: Now you're referring to the Stevens investigation I assume.

MR. SCHUELKE: Yes, yes.

MR. COHEN: Which we'll come back to by the way it seems to me I have read within the last few weeks a story in the Washington Post about a number of *Brady* violations and judges complaining about *Brady* violations around the country.

MR. SCHUELKE: Yeah, yeah. I mean the Supreme Court has recently heard two from New Orleans, not the Justice Department, Harry Connick's office, the district attorney in New Orleans, you know, cases in which the guy's on death row. It's a one witness ID case. They failed to disclose to the defense that first the witness had told them he didn't really get a good look at anybody. Then he couldn't describe the person who committed the offense. Then, you know, by the time the trial started, oh, yeah, it was this guy. So, yeah, that's troubling, but that's a different subject. So I was in felony trial, oh, yeah, I was in felony trial, both Felony II and then the Felony I calendar from late '72 until early '74, yeah, so about a year and a half at which point I was appointed as the Chief of the Superior Court Grand Jury Section where I earned the well-earned reputation for never being around because shortly after I had that assignment, I was asked to try the then remaining Hanafi Muslim murder case, a murder – seven murders that had occurred in January of 1973. And so even as I held this position

ostensibly as Chief of the Grand Jury Section, I was almost immediately off preparing to try that case. And you may remember there was a comic strip for years called the Phantom.

MR. COHEN: Yes.

MR. SCHUELKE: And the Phantom's nickname in the comic strip was the ghost who walks. So some wag –

MR. COHEN: Mr. Walker, he was called.

MR. SCHUELKE: So some wag had made up a name plate for the door to my office in the Grand Jury Section, the ghost who walks.

MR. COHEN: Well, we'll come back to the Hanafi case. Was the Superior Court subject to Fifth Amendment grand jury requirements?

MR. SCHUELKE: Yes. The system is identical.

MR. COHEN: And what does, so the Grand Jury Section is the section that is seeking indictments?

MR. SCHUELKE: Yes, or presenting cases in circumstances in which it was the policy of the office to present them even if the office was not actually seeking an indictment. I'll give you an example of that. First, let me describe the function of the office. Ninety-eight percent of the cases processed in Superior Court, felony cases, are originated by the police. The case is brought to the office for initial papering and scheduled for a preliminary hearing and virtually immediately assigned to an assistant in the Grand Jury Section. If the case is indicted before the preliminary hearing was scheduled, then no preliminary hearing is needed because the indictment is

the finding of probable cause, making the preliminary hearing a moot exercise. And so the assistant assigned to the grand jury would present the witnesses to the grand jury, would advise the grand jury on the elements of the applicable law and would prepare for the grand jury a draft indictment and, after the grand jury voted to indict, would present the indictment which was done on a weekly basis at considerable volume to the chief judge or his designee of the Superior Court, and the case would then be assigned to a trial judge and that would commence the process. There are cases that are initiated by the police which the U.S. Attorney's Office oftentimes will decline to prosecute, what we call no papering. That can sometimes be controversial as between the police and office or the FBI and the office. There are cases which are papered and presented to the grand jury, one class of cases regardless of what the office's view of the merits of the prosecution might be – homicides. It has long been the policy of the office and I believe it still is that homicide cases are going to be indicted or not by the representatives of the community, not by the U.S. Attorney. So I might have a homicide case where it is clear to me that the defendant acted in self-defense, but it will be presented to the grand jury. Now one way or the other, during the course of the presentation, the grand jury is going to hear the defense case as well and virtually all of those cases are no billed. Once in a blue moon, you might have a grand jury that takes a different view and indicts a case.

MR. COHEN: Which means that you then have to try it.

MR. SCHUELKE: Well, one case that I recall, I think while I was, at least in titular fashion, the chief of the grand jury section, involved a couple, both physicians, who lived on upper 16th Street Northwest, the Gold Coast, and there had been a long history of spousal abuse by the husband. One day he walked in the front door, she was waiting for him and shot him right smack in the center of his forehead. And it was the view of the office that this was a murder case. This was not a case of immediate self-defense. He may have deserved killing, but this was a murder case. Well, the grand jury was not going to indict this woman. So we withdrew it and presented it to another grand jury, which did.

MR. COHEN: That's interesting.

MR. SCHUELKE: That happens very, very rarely. So that's essentially what the grand jury section does, and the chief of the grand jury section is responsible for reviewing indictments. And the practice is the assistant assigned to the case will write a memorandum describing the evidence and the charges and the weaknesses and the strengths of the case and so on, and the chief of the grand jury section might say that's great, but I think you need to explore this and you need to explore that before I sign off on this. I remember one case, for example –

MR. COHEN: So this is after indictment.

MR. SCHUELKE: No, no. This is after the assistant has basically presented the evidence to the grand jury and is seeking approval to ask the grand jury to indict on the following charges. I remember a homicide case, a stabbing case in

which the postmortem examination report identified two wounds. And recovered from the defendant or at the scene of the crime was a knife with a serrated blade. And so I'm reading this assistant's account of this, and I have a couple of questions about this. Okay, there's a serrated blade. There are two wounds. According to the ME's office, are they both compatible with a serrated blade?

And the answer was I don't know. I said, well, I think we need to know that. And by this time, I had tried a significant number of homicide cases, and I always enjoyed digging into the forensic aspect of it. In a lot of cases, there's not much of a forensic issue, you know. Somebody's shot in the head, well, it's that. But sometimes it's fascinating, and I knew most of the medical examiners as a result of my own cases. And because of that interest of mine, I said to the AUSA, Steve Gordon is his name, terrific guy, he's a partner at Holland & Knight, let's go over and talk to Dr. Blackburn. His name was Brian Blackburn. Okay, so we go over to the ME's office. I said Brian [Blackburn], I understand there, I guess by that time I had read the autopsy protocol myself, were two wounds. I'm told the guy had a knife with a serrated blade. What's the story here? Well, one of them is consistent with the serrated blade. The other one was a scalpel. That was the lethal wound. That was the end of that case.

MR. COHEN: Sounds like somebody else did it to me.

MR. SCHUELKE: Well, it was not that – what the hell is the name of the hospital up on Capitol Hill? There's still a hospital there, but it's got a different name

and under different management. But for years during the 70s, I cannot think of the name of the hospital, but it was renowned among the homicide detectives to such a degree that if they got a call or they monitored a call for a shooting or a stabbing and the victim went to that hospital, they'd send Homicide because if the wound inflicted by the perpetrator didn't kill them, the hospital would. That was their reputation. And the lethal wound in this case in the medical examiner's view was administered by someone in ER. It was a scalpel. So that's sort of the function of the chief of the grand jury section. Now a case like that, obviously is extremely unusual which is why I happen to remember that one. There are hundreds of others that unless prompted somehow I would not remember.

MR. COHEN: So you're chief of the grand jury section, and then, and then what, just in terms of the structure of your own career in the office?

MR. SCHUELKE: Well I was then asked to try the Hanafi case which I did three times between the fall of 1974 and sometime in 1977. And this was somewhat of a long convoluted story involving three successive trials of the same matter.

MR. COHEN: Why don't we come back and we'll walk through it. But how much else are you doing at the time?

MR. SCHUELKE: Well, I'm ostensibly doing this grand jury supervisory work, which I did in fact, although I did earn the "ghost who walks" reputation. I was hard to find, and so a deputy had to do a lot of this stuff. When I concluded the Hanafi cases which I did basically full time for three years and I was sort

of tired and was figuring out ways that I could dabble to give myself a little bit of a break for a while when the chief of the homicide division of the Metropolitan Police Department, with whom I became quite close as a result of the Hanafi cases, came to me and asked me if I would work with them on a difficult open case about which they were getting a lot of pressure. And so I said yeah, I'd be happy to do that. Let me talk to Earl, and so Earl said fine. If that's what you're going to do, great. So I did that open case investigation until we closed it and then I tried that case in '75. That's right. That case, that investigation and trial came in the interspace between the second and the third of the Hanafi cases I tried. By the time I had finished the last of the Hanafi trials, I was assigned to the Fraud Division over in District Court. The first time I had been out of Superior Court in all the time I'd been there. And I was in the Fraud Division for a very brief period of time when I was appointed the Executive Assistant. So Earl was the U.S. Attorney and Carl [Rauh] was the Principal Assistant and I was the Executive Assistant with management responsibility across the office which we tried to divvy up into subject matter areas and because of my then long and intimate experience in the Superior Court, I tended to focus to a significant degree on the Superior Court, although the Fraud Division was in my portfolio as well. Which led to my involvement in another rather interesting case, the Church of Scientology which we can talk about at some point if you'd like.

MR. COHEN: You bet.

MR. SCHUELKE: But basically from the summer of 1974 until mid, no, until, yeah, like mid '77, I was asked to and did try specially assigned cases. There was an hiatus for what turned out to be a fairly brief period of time when I became the Executive Assistant, up until, that was mid '76, I think, until probably the fall of '77 or maybe early '78 I was asked to try the *Antonelli Yeldell* case, along with Rick Beizer, who had been – who was in the Fraud Division and had been investigating that for a couple of years. And so I was asked to join him so the two of us would be the trial team. I tried that case twice along with Rick. The first trial started in September of '78, yes. Tried to guilty verdict. New trial granted. Then the case was transferred to Philadelphia owing to the publicity of the, principally of the guilty verdict here in Washington, which Judge Gesell thought would make it impossible to select an unbiased jury here in the district, which is probably right. We tried the second time in Philadelphia in the fall of '79. And that was the last case I tried in the office. Now, much as I was the "ghost who walked" when I was in the grand jury section trying cases, I was sort of the "ghost who walked" when I was the Executive Assistant as well because I held that position throughout the – until I left the office at the – in October of '79.

MR. COHEN: Why don't we go back and walk through the Hanafi case. Do you want to start by just summarizing what it was about?

MR. SCHUELKE: Yes. In the, from the late '60s through the early '70s and somewhat beyond, the Nation of Islam, also known as the Black Muslims, a Black separatist organization lead by Elijah Muhammad whose headquarters was in Chicago, had mosques around the country. I'm trying to recall, but I cannot off the top of my head, how many mosques there were, but principal among them was the mosque in New York which was headed by Louis Farrakhan, at the time. A mosque in Philadelphia, which was known even before the Hanafi case as the gangster mosque. One of the principal lieutenants of Elijah Muhammad in the late '60s was a man whose name was Hamaas Khalis. He was born Ernest Timothy McGee in New York City. He was a jazz musician. A short powerfully built powerful personality who eventually fell out with Elijah Muhammad.

MR. COHEN: Why don't you spell out Hamaas Khalis?

MR. SCHUELKE: HAM double ASKHALIS. Hamaas increasingly adopted views not terribly dissimilar from Malcolm X, which were divergent with the views of Elijah Muhammad and the organization in general. Hamaas left the organization altogether and founded a Muslim sect known as the Hanafi Muslims. One of his early adherents was Abdul-Jabbar, Kareem Abdul-Jabbar, the Los Angeles Lakers all-star center, who purchased for the group a home at 7600 16th Street, Northwest, which was both the Khalis family home and the religious center of the group. Hamaas, in my own judgment, became increasingly unbalanced, mentally unbalanced. And by late 1972 he decided to go semipublic with a series of criticisms that he

had of Elijah Muhammad. When I say semipublic, I mean he sent a letter describing his criticisms to every one of the Nation of Islam mosques in the country. He got no response, which made him all the more angry. And so in either late December of '72 or early January of '73 he penned and posted to all the mosques another letter. This one reiterated his criticisms but took the gloves off in terms of personal attacks on Elijah Muhammad. He called him a creep, faggot and a number of other not so endearing terms. This one got a response, when a group from the Philadelphia mosque invaded their home on 16th Street and murdered seven people.

MR. SCHUELKE: The Philadelphia mosque, by I don't know, '70, '71, as had been pretty well documented in the Philadelphia press, included a number of hard, violent criminals who had been involved in most anything that criminals are involved in a big city – drug trafficking, enforcement of the drug business, protection rackets, who had – who got religion, so to speak. Either because they sincerely got religion or because it was convenient to their, the operation of their activities and I couldn't tell you which of the two is accurate, to tell you the truth. But there was a guy whose name was Ronald Harvey. There was a guy whose name was John Griffin. There was a kid, pretty young, named Theodore Moody. There was a guy whose name was William Christian, who had long been involved in various sorts of violent criminal activity in Philadelphia. When I said the protection racket, they were like old time mob activities. They were, they were

demanding protection money from small businesses, bars and restaurants in northeast Philadelphia, and in order to enforce it on at least one occasion, which I recall, beheaded somebody and left the head on the doorstep of the saloon, just to send a message. And they paid. Well, as we ultimately established, after the second of Hamaas' letters was received, this group of thugs from the Philadelphia mosque was assembled. We were never able to establish at whose authority. We were never able to prove a direct link to Chicago. We had some evidence of the involvement of Louis Farrakhan later in the process. But they put together this hit squad. They traveled by automobile from Philadelphia. They stayed the night before the murders in a little motel on New York Avenue, just up by the northeast market. I can't remember what street that is, a couple of blocks east of North Capital Street. And Hamaas Khalis had two wives. Khadija, KHADIJA, was the elder of his two wives. Rather a tall, striking, regal appearing woman. Bibi was the name of his younger wife. He had an adult daughter whose name was Amina, who was at that time in her late 20s. He had a son who was about 30, and by his second wife he had two children, one of whom at the time of these events on the 18th of January, 1973 was nine days old. Amina, the daughter, had a nine year old son. Her husband was in the house and murdered as well. Hamaas and Khadija were not at home when the hit squad arrived. They had left and gone shopping at the Giant which is up in Silver Spring, which is only half a mile away. And as we were able to reconstruct it

because Amina, the daughter, survived and testified. There came a knock at the door. They had a young guy there who was a big, burly, he wasn't a relative, but he was a member of the Hanafi sect and kind of played guard at the place. He went to the door. They had sent this one kid, Theodore Moody, up to the door, feigning an interest in selling some kind of literature. And this, the guard character smelled a rat, tried to close the door, one of the others emerged from the bushes and they managed to push their way into the house and the rest of them all came in. They drowned the baby, the nine day old baby in the bathtub in the basement. And they took the nine year old boy, marched him upstairs, shot him twice in the head. They shot the younger wife, Bibi, several times in the head. She survived physically. She remains wheelchair bound to this day, and was not a competent witness as a result of her injuries. They shot the two adult males and killed them. And eight, eight were shot altogether, seven died. Amina quite miraculously survived. She testified that one of them, whom we later, whom she later identified as Ronald Harvey, was marching her up the stairs from the first to the second floor and she knew by that time that they had drowned the baby. And she asked them why the baby. And he said, because he has the seed of the hypocrite in him, Hamaas. Amina was shot three times in the head. Aside from, I guess what we now call posttraumatic stress syndrome, in a matter of months she bore no evidence of physical injury. As a matter of fact, at the hospital one of the slugs completely flattened fell out of her hair onto the

gurney. It never penetrated her skull. Now this case was investigated by the Metropolitan Police Department, with some assistance from the FBI. A great deal of assistance from the Philadelphia Police Major Crimes Division, and painstaking forensic work. Fortunately, the crew left a lot of evidence. At some point while these events were going on, Hamaas and Khadija came home. And he couldn't get in the house. Either he didn't have a key with him because there is supposed to be somebody there guarding the door, and he's banging away at the door, nothing. And at that the group of them fled out the back of the house. Ran across the neighbor's lawn. Had parked their cars about a block up the street on the other side of 16th Street and discarded along the way –

MR. COHEN: Even though the intended target had just come home?

MR. SCHUELKE: Right.

MR. COHEN: Okay.

MR. SCHUELKE: They discarded a number of things that were weighing them down as they were trying to escape, including a suitcase which had a sawed off shotgun in it. That morning's Philadelphia Daily News, which bore a couple of fingerprints. Some credit card receipts, which were receipts from the use of a credit card, both for gasoline purchase on I95 in Delaware, and a motel up on New York Avenue in the name, a credit card in the name of a victim of a home invasion in Philadelphia, that had occurred several months earlier. And so through the efforts of our investigation that case was closed. And John Clark, who was one of the principal perpetrators

here along with Ronald Harvey, was identified as one of the home invaders in that case. That's why I say this group was – was the thug contingent of this Philadelphia mosque because that home invasion, and there were a couple of others that we discovered as well, had nothing to do with Hamaas Khalis or the Black Muslims at all. It was just a crime spree. And so, ultimately, seven of them were indicted. There were actually eight who were identified as coconspirators. The eighth died of leukemia very shortly before the indictments were returned. The case went to trial the first time before Leonard Braman of the Superior Court. The case was tried by the late Bob Shuker, who later became a Superior Court judge, and the late John Evans, who was a fine trial lawyer in the U.S. Attorneys' Office as well, assisted by a third assistant whose name was Percy Russell. All seven were found guilty by the jury. Judge Braman granted a Rule 29 motion for judgment of acquittal as to the seventh on the basis of what he perceived to be insufficient evidence. And they were, in due course, sentenced, each of them, to seven consecutive life terms. There was no death penalty in the District of Columbia at the time. There was no life without parole at the time. The penalty for first degree murder was a minimum of 20 years without parole. And so he sentenced them to seven consecutive terms. There's a postscript. One, two, three of them have since died. The remainder continue to serve in several different federal penitentiaries. No, I'm mistaken. I said that seven of them went to, the surviving seven went to trial. No. Six did. Because Ronald Harvey, who

was actually, in my judgment, the lead bandit in this group, escaped capture. See, this is a great story. He was under surveillance in Philadelphia by the FBI. It was to be precisely coordinated and choreographed that when the indictment was returned, communication would go out and they could arrest whoever they had under surveillance. Ronald Harvey was driving through downtown Philadelphia tailed by the FBI. He went through a red light. The FBI didn't. Ronald Harvey was arrested in Chicago a year later. And so that's when I was asked to try this case. So I tried the Ronald Harvey case.

MR. COHEN: Had you been involved in the –

MR. SCHUELKE: No.

MR. COHEN: case at all? Okay.

MR. SCHUELKE: I did a lot of sort of reinvestigating aspects of it. But Shuker and Evans, Russell, Percy Russell was their colleague on that trial team, had no stomach to do this anymore. And Shuker recommended to Earl that I do it. So he asked me if I'd do it, and I said I would. I got to know Hamaas Khalis pretty well in the process. I got to know Amina Khalis pretty well. Hamaas was getting nuttier and nuttier. The protocol was, if I wanted to talk to Amina to prepare her, I had to go up to the house, I had to meet Hamaas and then Hamaas would decide if she was going to be made available. He didn't trust us. He believed that this whole process was preposterous. They all should have been executed immediately and buried under the courthouse. That would be the only value of the courthouse as

far as he was concerned. And he saw conspiracies most everywhere. For example, on the day, the very day that the indictments were first returned, President Nixon hosted Mohammed Ali at the White House. And the front page of the Washington Post had a picture of Mohammed Ali and the president. Mohammed Ali was an adherent of the Nation of Islam. This was a complete and utter insult to Hamaas Khalis. And that – that was indicative to him of the fact that the government really didn't care about the worst crime that had ever occurred in history, as far as he was concerned. So, Joe O'Brien who was the commander of the homicide division, who had worked this case from the beginning, had earned Hamaas Khalis' respect. I think he was the only one. Joe was a terrific guy. A great detective, great cop, great person. So Joe would always take me up to the house. And we'd sit there cooling our heels for 45 minutes until Hamaas came in. We would stand, of course, you know, as a polite person does when he entered the room. We were never invited to sit and so we would stand for 45 minutes while he railed about whatever. And so I became accustomed to this and eventually we'd get to talk to Amina. In the course of the Harvey trial I introduced evidence of the participation of each of the conspirators, which one would have to do because evidence of Harvey's association with Clark was critical to establishing Harvey's involvement in one aspect of this or another and we had direct evidence with respect to Harvey as well because they'd lifted his palm print from above a urinal in the hotel where they stayed the night before the murders.

And when he was finally arrested in Chicago and was told by one of the agents that he was being arrested for the Hanafi murders in Washington, he conveniently said, I've never been in Washington, which is a very useful –

MR. COHEN: Lie.

MR. SCHUELKE: – lie. So, in the course of that, I presented the identification evidence as well. Amina Khalis had identified from photographs and ultimately a lineup. John Griffin was a tall, slender, dark skinned African American man with close cropped hair. I cannot remember at the moment which one of them, but another of them fit that description practically precisely. They could have been twins, except that Griffin was about six feet tall and the other was about five foot nine. As a part of the efforts to comply with Supreme Court guidance on avoiding subjectivity in identification procedures, it had long been the practice of the Metropolitan Police Department to homogenize lineups so that if you had somebody, let's say the suspect in the case was five foot nine, and they had a bunch of fillers who were six feet tall, they'd have them sit or stand on a box, so they all looked to be about roughly the same height. Which I always thought was really stupid since height is a salient part of a description and the witness ought to be able to discern relative heights. In any case, I showed her a, in the course of trial preparation, a photograph of the lineup. And she said, that's the one who did, yada ya, which she had always described as the conduct of John Griffin, but the one she was pointing to was the other one.

And so I, talk about *Brady* obligations, I wrote a detailed memo of exactly what had transpired in my office on that day. Gave it to the defense, gave a copy to the judge. I was called as a witness in the course of their motion to suppress his identification and testified as to what had happened. And her testimony was admitted, in fact, in the course of that trial. But, Judge Braman granted a new trial to the one whom she had misidentified in the course of this trial preparation which I had conducted. So I got to try John Griffin again the next time. We got through maybe two minutes of the cross examination of Amina Khalis in the Griffin trial when she refused to answer any further questions put to her by this "lawyer, so called, for this murdering whatever." So Judge Braman called a halt to the proceedings and met with Amina and the lawyers in chambers in an effort to explain to her that she was under subpoena and compulsion and he was going to adjourn the proceedings for the day but that she had to be back tomorrow morning, and I knew she wasn't coming back. In the interim, between the Harvey trial and the Griffin retrial –

MR. COHEN: Harvey had already been convicted?

MR. SCHUELKE: Harvey was convicted. Harvey was convicted, was out in the federal penitentiary in Marion where they have this underground facility for the worst of the worst until he died of a heart attack. I don't think he served more than several years before he died, but yeah, he had been convicted. In the interspace between the Harvey trial and Griffin two, as you may remember, Hamaas Khalis and a band of his adherents invaded and took

over, simultaneously, the District Building, the Islamic Center on Mass. Avenue and the B'Nai B'rith at Rhode Island and 17th Street and held everyone hostage for several days, demanding who knows what. It wasn't entirely coherent. But at the District Building a Washington Post reporter was shot and killed when one of these characters fired a shotgun blast. I don't think it was actually aimed at the guy but a pellet or two happened to hit him in a lethal spot. A couple of pellets from that same blast hit Marion Barry. At the Islamic Center several people were seriously injured from machete blows. I don't think anyone was injured at the Islamic Center. And so, Joe O'Brien and I were tasked –

MR. COHEN: Was it at the B'Nai B'rith where people were injured?

MR. SCHUELKE: Yes. O'Brien and I were tasked to negotiate and get them to surrender. We enlisted the services of the then Iranian ambassador to the United States. A quite colorful character who used to squire Elizabeth Taylor around among others. The Kuwaiti ambassador and I forget, another Middle Eastern ambassador, all of whom –

MR. COHEN: Egypt, I think?

MR. SCHUELKE: It may have been Egypt. All of whom were Muslim and all of whom were well equipped to talk the holy Koran with Hamaas if that's what he wanted to talk about and preach about peace and harmony. And actually, they were quite effective. And indefatigable. We did this for three days straight. Night and day. And my role –

MR. COHEN: So they're holding hostages all this time?

MR. SCHUELKE: Yeah. My role and, and Joe O'Brien's was sort of to advise this trio of ambassadors on what we thought, based on what we knew about him, might be effective. I never engaged in any direct discussions with Hamaas. Joe probably did and eventually they surrendered. And they were all prosecuted. Hamaas was still serving life in prison at the FCI in Chicago. And…

MR. COHEN: For the murder? For felony murder?

MR. SCHUELKE: Yeah maybe I don't remember. They were certainly charged with armed kidnapping and armed assault, and whether or not they were charged with the Post reporter's homicide, whether he was, I don't remember. I declined the invitation to try that case and everybody understood why. I still think that as crazy as Hamaas was and is, that's one of the saddest footnotes to this whole story, he was driven completely batty by what happened to his family.

MR. SCHUELKE: He spends the rest of his life in prison. I'm not saying he, he didn't deserve to be locked up…

MR. COHEN: Yeah.

MR. SCHUELKE: But it's one of those sad ironies of life. So, when during the course of the second Griffin trial, Amina Khalis said that's it. I knew she wasn't coming back.

MR. SCHUELKE: The takeover of the District Building, and the B'Nai B'rith and the Islamic Center occurred subsequent to the second Griffin trial. She did fail to appear as ordered on the following day during the Griffin trial. Judge

Braman issued a bench warrant for her arrest. I, with the advice and consent of my office, told him that the executive branch was not going to execute this bench warrant. I am not going to have more bloodshed in that house. Now I'm telling you that's what's going to happen. Well, he was so pissed off at me and at Earl and he actually told me Bob Shuker was still in the office at that time. He told me at one point in this that if Bob Shuker agreed with me then he was as much as of a dolt as I am. He and I did not get on well throughout a lot of this. And there's a very interesting postscript to that as well. And so, I proposed to go to trial on the basis of her unavailability and relying on her previous testimony, yada, yada, yada, yada, ya which we ultimately did and Griffin was acquitted. No, no, yeah, no not right. In a third, in a third trial Griffin was eventually acquitted.

After all of this was over, Judge Braman and I had…Judge Braman and I had some long heart-to-hearts at the conclusion of these of this series of trials after which we became very dear friends. He has been a terrific supporter of mine over the years and his brother, Norman Braman is a very wealthy businessman and who once owned the Philadelphia Eagles. I've done business for him as a result of referrals from his brother, Leonard. I represent Leonard's son and there have been any number of other matters which he, which he has referred to me or recommended and we remain very good friends.

MR. SCHUELKE: Leonard Braman is a very smart, very hard working trial judge. You will not find a better trial judge anywhere in the world in my judgment but he's

very difficult to work before. He thinks, as he told me in one of these subsequent conversations, that all he ever attempts to do is, "If somebody comes into my courtroom wearing a sign that says lawyer that you know he'd better be a good lawyer." And I said well that's nice and you're entitled to that expectation but I'm here to tell you that there are an awful lot of my colleagues in this office who have worked before you who feel like every time they set foot in that courtroom they have to walk on eggshells because for good reason or not, you're gonna jump down their throat and he knew that…

MR. COHEN: Does he have a temper?

MR. SCHUELKE: No, no, no, but he's just cutting merciless. "Mr. Cohen, you're not aware of the case of the United Stated versus …..?

MR. COHEN: Yes, okay.

MR. SCHUELKE: Okay. No, he knew that I didn't feel like that, that's why he and I were at odds the whole time cause I would fight with him. I wasn't afraid of him but, and he makes you a good lawyer. There's no two ways about it, "Ya know you, you damn well better be prepared." And that, and that certainly motivated me working in front of him as well. But trial lawyers ought to, good trial lawyers ought to have a pleasant experience in the courtroom. If you're good and you know what you're doing, you ought to enjoy it you ought not to feel like you know any second now somebody's gonna come down on your head for no apparent reason. And there were a lot of little things with him, little anecdotes looking back on them they're pretty

funny. Like for example, my partner all these years, Larry Wechsler, tried the Griffin case with me, I enlisted him. A couple of funny stories about that … have we exhausted our…

MR. COHEN: Well, we would be exhausting you. I was gonna say when we get to the end of this sequence we can stop.

MR. SHUELKE: Well, you know I may have told you this the first time, but my mother once said that one would think that I had been vaccinated with a phonograph needle. So, I understand that I can yack and yack and yack so but …

MR. SHUELKE: On one of the occasions I described to you when we went up to the house on 16th Street to prep Amina Khalis, Larry Wechsler was with me. So it was Larry and me facing Hamaas who was ranting and raving, Joe O'Brien was behind him and Joe was sort of making faces and I'm trying my level best to keep a straight face. But Hamaas Khalis was a rabid anti=Semite among other things. And so Judge Braman, he would always call "that your *yehudi* judge" and all manner of Jewish banking conspiracy and that had you know nothing to do with anything that I could discern but Larry is Jewish. This guy frightened Larry. Larry didn't really want any part of this. And so at one point, we're standing there, he's to my right, Hamaas is in front of us and all of a sudden Larry grabs me and basically but for hanging onto me has fallen to the floor. That's weird. Get him up and what the hell's the matter with you? Oh my knee gave out is what he said. Knowing truthfully he had fainted in the, in the face of Hamaas's

diatribe Larry has never lived that one down. O'Brien, rest his soul, and I ragged Larry about that for years. And another occasion that Larry loves to tell, we were in court one day and there was a defense witness on the stand. And I was sitting at counsel table apparently like this.

MR. COHEN: You mean with your knee crossed and up against the table.

MR. SCHUELKE: Yes, with my hands clamped around my knee and I'm focused on the witness cause the witness was standing over here the judge is here. I'm not paying any attention to the judge, I'm focusing on the witness's testimony. Larry starts poking me. I look at him and he gestures toward Judge Braman was motioning with his hand.

MR. COHEN: What is he doing? He's motioning keep it down or ...

MR. SHUELKE: So I thought nothing of it. I focused back on the witness. Larry pokes me again. Now Braman has this agitated look on his face and…

MR. COHEN: He's waving his hand down, I'm just trying to get it on the transcript what you're doing.

MR. SCHUELKE: Right.

MR. COHEN: Trying to get it on my transcript

MR. SSHUELKE: Oh yes, I'm sorry.

MR. COHEN: What you're doing

MR. SCHUELKE: What the record should reflect is that he was waving his hand down and as Larry loves to tell this story, I'm not sure I believe that this actually happened, but Larry says so _____ "Hank thinks he's waving to him. So, he waved back." At some point whether that actually happened

or not I don't know, Judge Braman got very irritated COME TO THE BENCH. We go up to the bench and he said "Mr. Shuelke have you not seen me trying to get your attention". "Well, actually your honor I was listening to the witness and sorry if I failed to notice that." "Your knee is above the table." I'm thinking what is he talking about. "Your knee was above the table." "Ok, your honor, I'll make sure that doesn't happen again." So that's …

MR. COHEN: That's it.

MR. SCHUELKE: This, this violated the Braman rule of decorum at counsel table one of my many sins in the course of the trials of those cases. So, I think that basically wraps up the story of the Hanafi saga.

MR. COHEN: Why don't we stop there for today.

Oral History of Henry F. Schuelke, III
Third Interview
December 15, 2011

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 December 15, 2011. This is the third interview.

MR. COHEN: Hank, we talked about starting with some further words about the Hanafi trials and related activities that we were talking about at the end of the last session.

MR. SCHUELKE: Thanks Lou. As I recounted during our last session, there came a time in 1970 . . . late 1974, after the conclusion of the Ronald Harvey trial. And that Judge Braman granted a new trial to John Griffin who had been convicted during the first trial. He granted that new trial because of some conflicting eyewitness identification testimony that I had elicited from Amina Khalis during the course of the Harvey trial. In 1975, a retrial of John Griffin commenced. Amina Khalis was, as she had been in two previous trials, a principal government eyewitness. Amina . . . became increasingly since the time of the murders in 1973, difficult and intolerant of the process. She believed that the defendants, all of them, John Griffin, among them, were despicable, less than human characters and whoever it was who represented them, in her view, was similarly despicable. And so, early in the trial, her direct testimony was concluded and the defense began cross-examination. And within perhaps 30 minutes, she became

belligerent in response to the cross-examination and emotionally distraught. At which point, Judge Braman declared a recess and attempted to use his good offices in an effort to calm her down, which efforts proved to be unavailing. He had Amina and the lawyers for both sides meet with him in his chambers and he tried to (a) console her and (b) impress upon her her obligation to answer whatever questions he decided were permissible in the course of the trial. And he adjourned the proceedings that day and ordered that she reappear the following day. She told me immediately after that chambers conference that she was not going to return to court. That she was through participating in this process and that was that. And, like Judge Braman, I made the effort to persuade her otherwise which proved also to be unavailing. And so on the following day, she failed to appear. Through a discussions that I had with my colleagues at the office and with Joe O'Brien, the Commander of Homicide Division of the Metropolitan Police Department, we came to the conclusion that if Judge Braman were to issue a bench warrant and the warrant were to be executed at the home at 7700 16th Street, it would have to be done forcibly, and we anticipated that that forcible execution of the warrant would result in bloodshed. And so Judge Braman did issue a bench warrant commanding Amina Khalis' arrest and on behalf of the Justice Department, I told him that the Justice Department would not execute the warrant for fear that bloodshed would ensue and that we were not prepared to be the instruments of that, yet again, in this house and

were prepared to live with whatever consequences there might be so far as the successful prosecution of John Griffin was concerned.

MR. COHEN: What was the fear of bloodshed, that is, who was going to shed whose blood or, or who do you think might?

MR. SCHUELKE: As, as I believe I indicated when last we spoke, Hamaas Khalis had a fairly substantial number of, around a dozen, young men who served as bodyguards essentially, at the home and there was always one or two of them stationed outside the front door and there were others in the house and at least in the house, I know because I witnessed it myself, they were armed. Not with firearms but with swords and daggers. They kind of looked like the scene out of the Arabian Nights with their curved scimitars and it was my view shared by Joe O'Brien that there would be a violent encounter between the U.S. Marshals and/or the police, however they put the task force together, and this group of young guards at the home. And I didn't know whether the bloodshed would be that of some of the officers or some of the Hanafi folks but I was quite convinced that this would not occur without violence.

MR. COHEN: So it wasn't the fear that Amina, herself, would be a victim of violence if she…

MR. SCHUELKE: …no, no. No, my fear was that through Hamaas who was the man in charge ultimately, they would barricade that house so that nobody could get to Amina. And it would have been violent. I believed it then. I believe it today and subsequent events have supported that belief. Now,

Judge Braman was very displeased at the position which I took on behalf of the Justice Department. Partially, I think, because he was not himself persuaded that my forecast would prove to be accurate and partially because the position that we took was sort of an affront to his judicial authority. The Judge issues a warrant. The Executive Branch executes it.

MR. COHEN: And often Marshals must face the threat of physical opposition and the possibility that they may have to resort to force to overcome that and people could be hurt, so there must have been something exceptional about this case.

MR. SCHUELKE: It was exceptional. So, he was very unhappy and with me, personally, in particular, and threatened at one point to hold me in contempt. And I'll never forget, we're in his chambers, I guess it was that evening after I had announced that we were not going to execute the warrant and the discussion became quite heated and he ultimately threw me out of his chambers. We then did proceed with the Griffin trial without Amina Khalis' testimony because he did admit, in my judgment, a sufficient portion of the prior recorded testimony to make out a *prima facie* case. No, no, that's not correct. I'm conflating, that trial and the next Griffin trial.

The result at the time that Amina Khalis refused to appear, was that he declared a mistrial. Then the issue was, were we able to retry the case without her, which we did, partially on the basis of her prior recorded testimony. And partially because I had spent a fair amount of time up in

Philadelphia seeking the cooperation of three women who had been either the spouses or the girlfriends of three of the Hanafi conspirators. And it was a long and arduous process – two of them were incarcerated themselves up in Philadelphia and two of them ultimately did testify. I refer to that as the Lysistrata version of the Hanafi Muslim murder trials. And notwithstanding those efforts, Griffin was ultimately acquitted in the third trial. Griffin was, however, serving in prison and continues to this day, to serve a life sentence in connection with another matter in Philadelphia that our investigation was instrumental in producing. Then in 1977, Hamaas Khalis led takeovers of the District Building, B'Nai B'rith, and the Islamic Center took place. Where there was, as we discussed last time, some significant violence and one of Hamaas Khalis' demands as he held all his people hostage, was that Judge Braman refund to him the sum of money that he had paid when he had to hire a lawyer during the first trial because Judge Braman had issued a show cause order as to why he shouldn't be held in contempt for his outburst during the first trial. Obviously, he had never forgotten this and I remember meeting again with Judge Braman one evening in his chambers, when things were a little different. He conceded that we were right because what I had sort of forecast might happen is more or less what happened on this occasion and he was truly frightened for his own safety and he wanted to know could he just write just write a check to Hamaas Khalis and would I get it to him. And I said, no, no, no – that's not what we do. And that was the turning

point in our relationship and as I had indicated earlier, he and I had some long talks about our experience, our mutual experience in these cases and about his frustrations with me and mine with him and ultimately worked all that out and became quite dear friends and we remain dear friends. And he performed my marriage ceremony in 1988. So that's the wrap-up on the history of the Hanafi.

MR. COHEN: I just have one more question about the decision not to serve the warrant. If I were the judge I'd say, well, we can't have the Justice Department decide it's not going to serve a warrant just because of your fears that bloodshed might result. What's special about this case? I mean, was it simply that there was so much bloodshed already in that place?

MR. SCHUELKE: Yes. Yes. I mean, you're quite right. The Justice Department should not refrain from executing a warrant because it anticipates that there might be violence in the course of the execution and it happens with some frequency. The issue here was, in my view, adopted by the U.S. Attorney and by main Justice as well, we had a case in which seven members of this extended family were murdered in that home. It was and is to this day, the largest mass murder that has ever occurred in Washington and it was particularly gruesome involving, as it did, infants and children, as well as adults. And I, frankly, subscribe to Hamaas Khalis' view that they were among classic crime victims and I did not want to exacerbate that because I thought it was unnecessary to accomplish our prosecutorial objectives and that's the principal reason.

MR. COHEN: Okay. Should we go on to the *Antonelli* and *Yeldell*, or?

MR. SCHUELKE: Sure.

MR. COHEN: Okay. We'll talk about that maybe starting with who those two men were and how they – how the prosecution arose and how it worked. What was the evidence of wrongdoing to start with?

MR. SCHUELKE: I was a Johnny-come-lately to this investigation. Rick Beizer, who was in the Fraud Division of the U.S. Attorney's Office had . . .

MR. COHEN: B E I Z E R.

MR. SCHUELKE: Yes, as he always announced when he identified himself in court, "Morning your Honor, Rick Beizer. That's B as in boy, E I Z as zebra, E R." He had begun his investigation working with a grand jury two years or so before I was assigned very shortly before the indictment was returned to try the case with him. And Nick Antonelli was a very wealthy Washington businessman. A real estate developer who also owned the PMI Parking Garage, a parking lot company. Part of the genius of his real estate development was that he would buy up undeveloped or distressed properties long before he thought it was time to redevelop them and would build a parking lot – on an interim basis – and so not only did he have the investment in the property that he hoped and expected would dramatically increase overtime, he had a revenue stream in the meantime. But the PMI became a very big and successful business and still is independent of them. And he bought a piece of property on Florida Avenue Northeast, just off the intersection of New York Avenue where the old Peoples Drug

Store warehouse was for many years. And it was a fairly small – I can't remember how many square feet it was, but it was a fairly small, say, four or five-story office building. And he was interested in a government tenant for the building and ultimately, the District of Columbia Government through the DHRS Department of [can't remember what those initials stand for now because that agency no longer exists or, at least, not by that name]. Joseph Yeldell, a Washingtonian as well, and fairly ambitious politician, was the director of that agency during the Walter Washington Administration. And that agency, as a result of decisions taken by Yeldell, did indeed lease the building from Antonelli. A long term, twenty year lease, triple net lease, which provided the cash flow that would support Antonelli's acquisition of the building and its renovations and so on. Simultaneous with these events, three different banks with whom Antonelli had a business relationship and/or served on the board, made a series of loans to Yeldell, individual personal loans.

MR. COHEN: One of those banks was Madison?

MR. SCHUELKE: Yes, the Madison National Bank. And I believe that Antonelli did serve on the board of the Madison. And so it was the theory of the case that the loans which were granted on favorable terms and which were unsupported by a reliable credit history were *quid pro quo* for the lease arrangement on the Florida Avenue building. This was a difficult case for the government because while there was ample evidence that Yeldell had steered the leased to the Antonelli building, falsely claiming that a competitor who

was trying to purchase the building and looking to lease it to the government as well, was a corrupt businessman when in truth and in fact, the evidence demonstrated that Yeldell knew nothing whatsoever about the guy. So there, there was no, there was no question about Yeldell's personal role in steering the lease. The loans were being serviced and so Ed Williams' argument, of course, throughout the trials, was that this is the strangest …

MR. COHEN: … he was Antonelli's counsel?

MR. SCHUELKE: Yes. This had to be the strangest bribery case in history where the bribe is a loan that was paid in full.

MR. COHEN: It was paid in full?

MR. SCHUELKE: Umm, well it was – I don't remember whether by the time of the trials it had been paid in full or it was being paid in full – it was not in arrears.

MR. COHEN: What was the total amount, do you know?

MR. SCHUELKE: I don't.

MR. COHEN: In any event, it was an amount that …

MR. SCHUELKE: I don't. It was a substantial.

MR. COHEN: Whatever his credit history, Yeldell was.

MR. SCHUELKE: Right.

MR. COHEN: In a position to okay it.

MR. SCHUELKE: Right. And you know the loan applications which were supported by personal financial statements were false in any number of respects. Yeldell had a – did a lot of borrowing and he had this sort of interesting

approach that if he were in the process of applying for credit, he'd have a very substantial financial statement. If he were in the process of trying to work out a resolution when he was in arrears elsewhere, his financial statement would show that he was damn near penniless. But the case was indicted after much debate within the office and …

MR. COHEN: … was there evidence of other relationships, activities between Antonelli and Yeldell or was this the only one?

MR. SCHUELKE: No. No. This was a basically a, while there were several loans involved, this was essentially a single transaction and there was no evidence, as I now recall of a prior relationship between the two of them. It was kind of a complex case because there was no direct evidence of an agreement between them, and there were no wire taps, there were no written communications. It was a very detailed circumstantial case in which on day one, Yeldell would take an action that was designed to lead to the lease of the building. On day two, one of the banks would make a loan to him. So it was that kind of a temporal kind of circumstantial case.

MR. COHEN: No written instructions from Antonelli to any of the banks?

MR. SCHUELKE: Nope.

MR. COHEN: Testimony about conversations?

MR. SCHUELKE: Yes.

MR. COHEN: With Antonelli?

MR. SCHUELKE: Yes. But, but only, I mean, conversations implies some of the bankers were on the loan committee in which it was expressed as routine business,

so if Antonelli, as a member of the board, attended a meeting at which a series of credit transactions were to be considered for approval, Antonelli voted in favor. So the case was indicted in the summer of 1978 assigned to Judge Gerhard Gesell and I believe it was only at the time of the indictment that Edward Bennett Williams was retained by Nick Antonelli. Let's pause for a second while I think.

Oral History of Henry F. Schuelke, III
Fourth Interview
March 8, 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 March 8, 2012. This is the fourth interview.

MR. COHEN: This is the fourth session in the oral history of Hank Schuelke and we're in the middle of discussing the Antonelli & Yeldell prosecution when you were at the U.S. Attorney's Office. We had covered the background up to the indictment, why don't you start with the first trial and your work with Rick Beizer and describe how that trial went and we'll go on from there.

MR. SCHUELKE: All right, the first trial was in the fall of 1978 before Judge Gerhard Gesell in the District Court here in Washington. Messrs. Yeldell and Antonelli were charged with multiple counts, essentially involving a bribery scheme. Antonelli, who was a prominent local real estate developer, owned, or actually was in the process of purchasing a building on Florida Avenue Northeast, just off of New York Avenue. And as was his practice, in many cases, he sought to line up a government tenant so that the income stream from the lease would basically finance his purchase of the building. And he ultimately succeeded in leasing this building to the District of Columbia Department of Human Services, which at the time was headed by Joseph Yeldell who was, and remains, a longtime local D.C. politician. The allegation essentially was that in a tight timeframe there were reciprocal acts. Yeldell, who had serious financial – personal financial difficulties, arranged through the good offices of Antonelli, who served on

the board of the Madison National Bank, a loan and as the steps in that process application through presentation to the bank's lending committee and presentation to the bank's board there were contemporaneous acts on the leasing side which benefited Antonelli. And in the course of that process Yeldell –

MR. SCHUELKE: From the government's perspective – from my own perspective, to put it in simpler terms, this was not an easy case. It was a case that I was satisfied was properly and appropriately brought, and a conviction of each of them would have been altogether appropriate, but it was a difficult case. Ed Williams, who represented Antonelli through both of the trials, was fond of saying at every conceivable opportunity, "This is a bribe? What kind of a bribe is this? It was a loan, that he repaid. What kind of a bribe is that?" And that was essentially true, he was making payments on the loan. It was also potentially difficult, although it certainly didn't prove to be the case, because of the somewhat charged racial environment in the city in those days. And indeed Yeldell, and to some degree Antonelli, did what is more lately come to be known as "play the race card" through the course of the trial.

MR. COHEN: Yeldell was African American.

MR. SCHUELKE: Yeldell was African American, right. Now, Rick Beizer, who at the time was in the Fraud Division of the U.S. Attorney's Office, had investigated this matter for a couple of years and presented it to the grand jury, which returned the indictment, but before I was ever assigned to participate.

Shortly, or perhaps immediately after the indictment I was asked by the U.S. Attorney, Earl Silbert to try the case along with Rick. I was, at the time, the Executive Assistant U.S. Attorney so I was in the so-called front office and I had broad supervisory responsibility for the office which was largely the Superior Court Division. Which is where much of my experience had been in the office up until that point, but it did include as well the Fraud Division so I had general familiarity with the case from that perch. But it was a pretty steep learning curve for me because the – I don't remember exactly, but I would say the case was indicted early in 1978 and it went to trial in September. So, Rick and I tried the case, we were joined by a young very very bright and talented Assistant U.S. Attorney whose name was Michael Lehr, Lehr, whom we enlisted to serve as the brains of the operation in terms of, in terms of drafting pleadings and so on. Although he had, as it progressed, a somewhat more significant role, although to this day, I had dinner with him the other night, to this day he refers to himself as "no chair Lehr" as a result of his relative position on the trial team in that case. The trial of the case the first time took about six weeks. It was a hotly contested trial although at least from my perspective and Rick's as well, I think, it was most enjoyable. We enjoyed the opportunity to try a case against Ed Williams. We were relatively young and were, each of us, for somewhat different reasons, not the sorts of personalities to be much intimidated by Edward Bennett Williams and so we rather enjoyed it.

MR. COHEN: Who were the prosecution witnesses?

MR. SCHUELKE: Well there was a collection of DHS, Department of Human Services employees who were involved in the mechanics of the leasing process who were in a position to, and did, testify about Yeldell's role in directing their decisions in the matter. There were the bankers on the loan side and that was essentially it. There were no eye witnesses as it were. There were no insiders and so this was largely a circumstantial case.

MR. COHEN: Were they friendly witnesses? I mean to the Government –

MR. SCHUELKE: I would say on the DHS side they were altogether cooperative if not actually friendly. Not so much on the bank side. And we had fights with the banks and their lawyers about various issues, but there wasn't a great deal of difficulty in that respect. Rather, the case boiled down to our ability to demonstrate that on a given Monday, X event transpired with respect to the loan. On the next day, Tuesday, Y event transpired with respect to the lease and so on. And it painted a vivid picture of the *quid pro quo* relationship. Yeldell, because he was a public figure, and because the subject of this lease had been the subject of some press, had on a number of occasions spoken publicly about it. Press conferences, for example, and it was not terribly difficult for us to demonstrate that in the course of those public statements he lied about the facts. Which constituted a significant consciousness of guilt kind of argument that the Government had going to the issues of specific intent.

MR. COHEN: Did Yeldell take the stand?

MR. SCHUELKE: He did. Which is an interesting story. But before I get to that, there was another player in these events who was not a witness. He was one of these classic players in some criminal trials which neither side wants to have to call and neither did in this case. He was a local African-American entrepreneur inventor who had a prolific genius for inventing various devices or technologies that he managed to sell to various government agencies, both federal and local. School exit automatic locking systems, school door locking systems. He was one of the pioneers in the development of LEDs, light emitting diodes and so he had a brilliant idea that every over-the-road semi-truck, and a lot of other trucks are required by law to have marker lights across the roof from the top of the windshield. The tractor trailers down the sides of the trailer and so on. And until that point, the late 1970s, these were all incandescent bulbs and so at whatever interval, somebody had to be climbing up on a ladder and replacing the bulbs on these trucks and that was sort of labor intensive and quite expensive whereas these LEDs last forever. Now, he wasn't much of a business man so typically he would give away controlling interest in a number of these deals because he needed some seed money and so people would invest and years afterward, after I was in private practice, he would come to me repeatedly with some of these new concepts. Some of which were very good but by the time he came to me he'd already given away most of the equity in the deals and so on. Anyway, he was also a small time real estate entrepreneur and he had a proposal to lease this selfsame

building and his proposal was quite competitive. And while he certainly didn't have the kind of financial resources that Antonelli had, he had, the income stream from leases and he could have financed the building as well. Yeldell directed the leasing department folks not to deal with him, claiming that he knew him and knew him to be a man of less than stellar character when in truth and in fact he did not know him from Adam. And that was a significant kind of consciousness of guilt. In other words he basically directed them to eliminate the competition on the basis of a bogus story. Yeldell was represented in both trials by John Shorter an African-American lawyer, since deceased. A very good lawyer with a wealth of criminal trial experience and a perfect gentleman who had terrific rapport with juries. And he did indeed put Yeldell on the stand. Yeldell, as happens in a lot of criminal cases in which defendants testify, proved to be the best government witness. We had a field day cross examining Joe Yeldell. Much to the dismay of Ed Williams who told me some time later, after the trials had concluded, that the entire time Yeldell was on the stand he thought he was going to have a heart attack. The case went to the jury after six weeks of trial and the jury was out three hours which is quite remarkable since in many criminal trials it takes them an hour to figure out who the foreperson is. And they returned the guilty verdicts with respect to each defendant, each count in the indictment.

MR. COHEN: Were there lots of counts? Three hours seem very short, it's like –

MR. SCHUELKE: You know, I honestly don't remember. It was essentially a bribery case which you probably could have prosecuted on a single count. As is typical we charged a conspiracy to commit bribery as well as a substantive count and I think we may have charged a false statement count or two which would have been exclusively Yeldell but it wasn't a terribly complicated case. And while there certainly were documents, you know the lease documents and the loan documents and so on, it wasn't like a terribly document intensive case. It just seemed clear to me that the jury had very little difficulty in concluding that this was a crooked deal and that Antonelli in effect bribed Yeldell.

MR. COHEN: Had Antonelli taken the stand?

MR. SCHUELKE: He did. Antonelli was a very interesting and odd personality whose demeanor on the stand was distant. He was somewhat peremptory in the way he would respond and he referred to himself in the third person throughout his testimony. No, Mr. Antonelli did not do that. No, Mr. Antonelli did so and so.

MR. COHEN: This was even when you asked him did you do X?

MR. SCHUELKE: Yes. So I would say, "So let me see, that's you you're talking about right? You're Mr. Antonelli?" And so he was not at all an attractive or persuasive witness. I mentioned earlier that there was bit of a race card played here and that was basically Williams. It fleshed out on examination of both Antonelli and Yeldell that here's this wealthy longtime civic minded resident, actually he wasn't a resident of the

District of Columbia, but a business man in the District of Columbia who properly, above board, used his good offices to come to the aid of a man who had become a friend of his and so he was the Good Samaritan in terms of assisting with the loans, and the notion that, in the cynical view of these prosecutors that's not so, bespeaks an attitude that an African American and a white man can't be or wouldn't be personal friends even though their relationship grew out of a business situation. And you know when you're confronted with that as a prosecutor or as a defense lawyer because it can come up in either way, you have to be very very careful. Lest you offend jurors and that was a predominant African American jury. But I made the judgment that this is something that we needed to take on and so my principal argument to them was look, as you and I know, there are thousands and thousands of African American citizens in this community who have and continue to suffer discrimination in many forms. That does not describe Joe Yeldell. Joe Yeldell, through the application of his own talents, was well educated, had the opportunity to serve a White House fellowship, succeeded both in business ventures and in his political career and so we're supposed to believe that he's some discriminated against person, I ain't buying it. And they did not either but you know, you recognize wading into that this is a high risk kind of venture but my judgment was you simply couldn't afford to ignore it. Closing arguments on, sort of on that subject were great fun because Williams, who is a terrific, was a terrific trial lawyer, no two ways about it

and a great showman and a smart tactician was also or could also muster the persona of a preacher and so we did indeed have a lengthy discourse on the Old Testament parable of the Good Samaritan which in my rebuttal argument prompted me to tell the jury that I don't profess to be an expert on the Old Testament or either of them for that matter but I do have a recollection of the parable of the Good Samaritan. The only part of that that I don't remember is when after the Good Samaritan aided the traveler on the road whom he found in distress he came back two days later and said [knocking sound] now it's my turn.

So that was essentially the first trial. I think the trial concluded a day or two before Thanksgiving because over the Thanksgiving weekend, I remember, the defense filed a motion for a new trial claiming to have just then recently discovered that a juror had failed to answer truthfully during the course of *voir dire*. During the course of *voir dire* you identified the witnesses and identified the relevant institutions like the Madison National Bank, about whom you'll hear testimony and does any of you have any relationship with the bank, maintain an account there and so on; and this young woman juror who was in her mid20's as I recall, did not respond in the affirmative. They discovered at some point, Williams always maintained to me that they discovered this after the verdict, that indeed at some point, seven or eight years earlier when she was in high school, had had a checking account at the Madison National Bank that never had a balance greater than about $87.00 and the account had been

closed for now five or six years or something like that. Which seemed to me and apparently to Judge Gesell initially to be immaterial and of no great moment and somebody reported to me some fellow judge reported to me at some point over that Thanksgiving weekend that he had spoken to Gesell who had said yeah, well Williams ain't gonna win this one. Something like that. And so he denied the motion for a new trial. Whereupon, like a day later, we have another motion for a new trial predicated on the claim that that self-same juror had failed to disclose that her father had years earlier worked as a parking attendant at one of Antonelli's PMI parking garages. A big part of Antonelli's empire was the PMI parking. And that he'd been fired and that therefore this young woman might well have harbored some resentment toward Antonelli. So we had a hearing on the subject. The father was an alcoholic who was barely literate but who had executed an affidavit which was obviously drafted by some lawyer and if you ask the witness, this is your affidavit, paragraph three says blah blah blah blah blah what does that mean? I don't know. And that's the way that examination went. So Williams got all indignant about the fact that I had somehow impugned his integrity by suggesting that he had invented this affidavit and shoved it down the guy's throat or something so he demanded to testify, which he did. The net result of which as I remember was basically, no he didn't do that, he had David Kendall draft the affidavit. But what everyone thought of the merits of this, which weren't great because the woman, the juror, testified

that her father had left their home when she was about six years old, I don't remember, she either had never seen him since or saw him you know sporadically, had no idea that he ever worked for PMI and couldn't possibly therefore have been upset about the fact that he got fired. And had that been the only basis for a motion for a new trial, I think Gesell would've come to the same conclusion as the first time. What he did however was say that's it, same juror, two issues, that's it. Not in Courtroom Six, new trial. And we *mandamused* him, unsuccessfully as it turned it out. And I'll never forget the day Beizer and I walked into his chambers to serve him with a courtesy copy of the *mandamus* petition and I thought his head was going to explode. He was absolutely livid about this. So, new trial.

MR. COHEN: I thought there was some Redskins-Dallas event in there between those two things?

MR. SCHUELKE: Well, no.

MR. COHEN: No?

MR. SCHUELKE: No. I think what you, I may have described this the last time we met. I told you a few moments ago that Rick and I kind of enjoyed this opportunity to mix it up with Ed Williams and he was then the President of the Washington Redskins. I think he had a twenty percent interest in the team. Jack Kent Cooke was still in Los Angeles so Williams basically ran the team and first thing that happened was the trial began on a Monday. On the previous day, the President, Jimmy Carter, was in

Williams's owner's box at RFK Stadium for the game and so Monday morning's Washington Post, the day that we're going to start picking a jury, we have on the front page of the Post the picture of the President and Ed Williams at the Redskins game. And I remember saying to him that morning that was a very nice touch Ed, maybe you can get the Pope next Sunday. Then as it happened that year the Redskins lost the first four games of the season which were played during the course of the trial. So every Monday morning just in an effort to sort of get under his skin, we'd come into the courtroom, I'd walk over to defense table and I'd say Ed you know I've been working my ass off all weekend and I'm sure you too were preparing for this trial, so did the Redskins win or what? He'd say fuck you. So there was that kind of interplay. And that's the only Redskin thing that I recall.

MR. COHEN: Ok. Maybe I'm mixing it up with something. I thought there was some moment when Gesell put off ruling until after a weekend and there was development over the weekend but that's not right.

MR. SCHUELKE: It was Thanksgiving weekend which intervened as I remember between the first new trial motion and his ruling. But I don't remember any Redskin game connection in that. You know there was an interesting, this is sort of inside baseball, but interesting dynamic in the courtroom. Gerhard Gesell was a very bright man who had a very robust opinion of his, himself, who was a very controlling judge who brooked no nonsense in his courtroom and was, in his view, the most important figure in this

courtroom in the eyes of the public, the jury, or whatever. So, he took pains throughout this trial not to be seen to be a fan of Ed Williams. Now, as you know, Ed Williams was a larger than life personality and probably at the time the most prominent trial lawyer in the country. So Gesell would refer to him as "Williams" and I can remember we're having chambers conferences during the course of the trial about some issue or other. And we walk out back to the courtroom and Williams would say to me "I don't know what it is with him you know. I don't care if calls me Ed, I don't care if he calls me Mr. Williams, but what is this Williams shit?" And Gesell would always refer to Beizer and me as "lads." "Well lads I think you'd better do this or that" and "Williams"! Just rankled Williams to no end. So, you know, every trial, particularly one that is sort of high visibility, is an anxiety-producing experience for trial lawyers. And this was no exception you know. High stakes, great visibility, packed courtroom every day in large part because every young lawyer in town wanted to see Ed Williams at work. But notwithstanding those typical sorts of anxieties, Rick and I had a great time trying this case for reasons I've tried to describe. The second trial venue is transferred to Philadelphia because of the publicity in Washington attending the guilty verdicts, which is probably the right call. Gerhard Gesell went with it so we moved the operation almost a year later, almost exactly a year later, to Philadelphia for the retrial.

MR. COHEN: He tried the second?

MR. SCHUELKE: Yes. Trying a case the second time with which I have all too much experience is a difficult proposition because even if you practice pretty liberal discovery as a prosecutor every trial has got unanticipated twists and turns. Not so the second time around. And try as one might to alter the approach so that you can maintain a certain amount of spontaneity which was always important to me, it's very difficult to do that. So, you go into it but the entire case has been tried. Now you have not only whatever grand jury testimony had been produced as Jencks material, you got the entire trial record, and it's a much easier exercise for the defense. Plus it seemed to me that while a bribe premised upon a loan or a couple of loans that had been repaid with interest is a tough sell in Washington, it's a real tough sell in Philadelphia where there are all kinds of corruption cases. So, we tried the case again and they were acquitted. The change in the dynamic was kind of interesting because whereas John Shorter tried the case for Yeldell, the first time, pretty much near as I could tell independent of Williams, it was clear from the beginning of the second trial that Williams had managed to take this over and he was damned if he was going to sit there and have Yeldell be eviscerated again on the witness stand, so Yeldell did not testify. Shorter played a very sort of backseat role as it were in the trial the second time around and that was obviously the right tactical judgment because you know if Yeldell had testified again, we would probably have another 15 or 20 false statements out of him. So that was that.

MR. COHEN: So Yeldell didn't take the stand the second time.

MR. SCHUELKE: Did not. I always got a kick out of the fact that – well first I should tell you that Ed Williams, I knew before we tried the case the first time, in addition to being a very talented trial lawyer and a great showman was a very very hardworking lawyer whose preparation was prodigious and who typically moved out of his home and closed himself in some hotel for like two months before the trial. And I learned from friends of mine at Williams & Connolly that after the guilty verdicts here in Washington, for months he was unapproachable. He was so distraught about the fact that his client had been convicted in this trial. Nevertheless, some time after the second trial, not too much after, six months maybe, my youngest sister happened to be at some event at the White House – I couldn't tell you what it was, and so was Ed Williams, and she, brash thing that she was, went up to him, introduced herself, told her that she was my sister and that she had followed the trial and wanted to congratulate him for ultimately winning. And he said "No no no no we just split a doubleheader that's all," which I thought was quite charitable. Because there is no question that ultimately he won.

MR. COHEN: Remind me of the name of your younger sister.

MR. SCHUELKE: Marybeth. So that's the sum and substance of the Yeldell Antonelli trial.

MR. COHEN: Kendall was assisting –

MR. SCHUELKE: And Greg Craig.

MR. COHEN: And Greg Craig. And had you worked opposite them or with them.

MR. SCHUELKE: No I don't believe I had ever met either of them before. And they were, you know, pretty young. I think they were probably both associates in the firm at the time. And I don't believe that either of them had a speaking role in the trial. I think that's, I don't know, they may have examined some witness but they were, Ed's associate support team. Both of them became good friends of mine in subsequent years and we have had matters in common a number of times. And Greg more so than David, although David and I had a matter in common in the course of the Whitewater investigations of the Clintons in the Clinton White House and so we had occasion over a long period of time to kind of collaborate on that. So it's kind of interesting you know, you start out and you meet someone, you start out as adversaries across the courtroom and then over the next 20 years or 25 years you develop a friendship and a mutually satisfactory business practice relationship.

MR. COHEN: And they both remained at Williams & Connolly becoming partners and so on for a long time.

MR. SCHUELKE: Yes, Kendall is there still. Greg left. He is now at Skadden Arps. Oh, he left at the beginning of the Obama Administration to become the White House counsel. A thankless task as it turned out, and he went to Skadden rather than returning to Williams & Connolly. He had a number of periods of government service during his ten years at Williams & Connolly. He was at the State Department during the Clinton White House and then went back to the firm. I think he had another stint I don't

remember exactly where but he had a couple of stints for the federal government for, you know, a period of a couple of years. And I think he chose not to go back to Williams & Connolly because at this stage he really wasn't interested in being a fulltime litigator. He's got a pretty substantial kind of political portfolio and he'd like to be the in-house counsel who advises foreign governments] and what have you and I think he's successfully doing that. Terrific guy by the way.

MR. COHEN: Yeah I've met him. I agree with you.

MR. COHEN: Okay we're about to leave your years at the U.S. Attorney's Office; we've talked about the Hanafi cases as well as this – are there any other cases from that period that ought to talk about?

MR. SCHUELKE: I think there is one that's always been kind of a favorite of mine and so I'll try to briefly describe that one. After I finished the last of the Hanafi trials and before my assignment for the Yeldell Antonelli case, I was kind of tired and I was interested in having some latitude to do other things than manage a trial calendar. This was before I went to the front office. And so the commander of the homicide unit at the time was Captain Joe O'Brien whom I had come to know quite well through the Hanafi cases and he asked Earl [Silbert] if he could make me available to work with homicide on one particular case and maybe a couple of other open unsolved homicide cases, because if you have a prosecutor who has the time and the interest, you can bring to bear compulsory processes through the grand jury, which the homicide detectives can't do alone. The one that

drove that request was a murder that occurred in the Holiday Inn at 14th and Rhode Island Avenues in – late in 1974. The United Mineworkers whose headquarters were at MacPherson Square, were all in the city for their contract negotiations and a number of them were staying at this Holiday Inn and one evening as they came back from UMW headquarters after their meetings and were changing clothes to go out to dinner, a couple of them had congregated in the room of one of them. Another one came from his room across the hall and joined them, left the door ajar, there in the room shooting the breeze, and some bandit walks into the room armed with a handgun. Orders them all to lie on the floor, produce their wallets and whatever cash they had and wristwatches and so on and so forth. Seemed to be a simple armed robbery. Another one of the UMW guys came from his room and approached the door to this room, saw what was going on, turned and bolted down the hall. Well the bandit saw him, ran after him and shot him. Shot him in the back and then delivered a coup de grace in the back of his head. The bandit then disappeared. The cops are on the scene and then not much after that they got some brief description from a desk clerk who saw this fellow sort of hurriedly going through the lobby and out the front door. Went out after him, looked up and down the street, he disappeared. It was only like a matter of seconds, he just disappeared. So, the UMW folks all believed that this was a hit because this is only a couple years after the Yablonski murders in Philadelphia. And there's no convincing them that this wasn't

some kind of a mob inspired hit. And the case is open and it's open and it's open and they're right in the White House and the White House is putting the heat on the Metropolitan Police Department. So, Joe O'Brien assigns his deputy Lieutenant Dick Thornton. First I'd met him, who became a very very dear friend of mine over the years thereafter, who passed away unfortunately about five or six years ago. So we start looking into this case and the first thing I learn is that shortly after the murder like half an hour maybe, two guys had been arrested outside the Whitelaw Hotel which is at 14th and T maybe?

MR. COHEN: T or U.

MR. SCHUELKE: U – and recovered – and the reason that they were arrested was because the Whitelaw at that time was a principal drug dealing shooting gallery kind of place. And so the undercover cops are constantly driving around patrolling that. So they drive around the corner and they see these two guys who appear to be involved in a hand-to-hand transaction which they think is a drug deal. So they circle the block and come back and approach them, do a pat down, and they find a box of nine millimeter ammunition in the back pocket of one of the two of them. And so they search around a little bit and there's a little vacant lot behind the hotel which is where they had accosted the two of them. And behind the wall of shrubbery whatever they find the nine millimeter semiautomatic pistol. So they lock the two of them up for constructive possession of this unlicensed firearm. One of them is a local denizen of Washington, a two bit crook who's got a record

as long as your arm but never for anything terribly serious. Cyrus Levi was his name. So they're both presented in court the next morning. They're both charged with a misdemeanor because carrying a pistol without a license in those days was a felony only if you had a prior such conviction or some other felony conviction. By the time they present them in court, they hadn't run the prints through the FBI and they didn't know about priors. So they both get released on bond. Cyrus – he's not going anywhere. The other guy never appears again. So I want to know, you know it was a nine millimeter that was the murder weapon because we had recovered slugs from the body and this seems awfully coincidental to me so I want to talk to Cyrus Levi. Cyrus had a lawyer but Cyrus was experienced in the criminal justice system and he was outraged about the fact that he had this charge because of his gun, and because the ammo was found in the other guy's pocket. So to make a long story short, I eventually decided to bite the bullet and cut some kind of a deal with him. And this is, I don't know, several months after I got involved in this, and so I agreed to dismiss the charge against him, I guess, in exchange for his cooperation, or we took some – he took a plea to a misdemeanor with no jail time. Something like that. We come up with some satisfactory agreement. The day that we're going to actually take this plea, I was in my office, which at the time was in the Pension Building, now the Building Museum, because there was a period of time in the late 70s, mid 70s, where the U.S. Attorney's Office had offices in there. Which is,

across the street from the Superior Court Building A. So I'm in my office and I get a call from Cyrus Levi's lawyer who says to me, he's here. He's in the courthouse. Who's in the courthouse? The other dude, who had given a false name when he was, which I can't remember at the moment, he's here Cyrus just saw him. Because Cyrus was out in the corridor waiting to go in the courtroom where we're going to take his plea. So I have Dick Thornton and another young, semi-cowboy homicide detective with me and we walk across the street, we walk into Building A, and standing against the wall opposite the elevator that goes to the cell block is this man whom I immediately recognized because I'd been looking at his pictures for some time now and I knew fifteen of his different aliases and so on. And I say, that's him. And so the young homicide detective spins him around and slams him against the wall, handcuffs him, pulls out his wallet and yeah I see like five of the known alias I.D.'s he's got. So, he's arrested.

MR. COHEN: Was he armed?

MR. SCHUELKE: No, I think he had a knife, but otherwise no. He was, the short of this is that he was from New York. He shot and killed during a robbery some man in – on the street in midtown Manhattan. A couple months before the murder here in Washington. Was arrested, was awaiting trial, they had him in the Tombs, and one day as they do every day, some deputy jailor comes in there with a list of everybody that got to be released today by the court. Lou Cohen, our boy raises his hand, and out he goes. His girlfriend

was a professional shoplifter and booster, as they call them, here in Washington. She had been locked up. She was about to be released because I think he came to post bail for her, and he was waiting for her to come up from the cell block. And he figured he was fine in Washington. He was – he got it, he shot that guy and he was gone and nobody was the wiser. The interesting – the further interesting part of this –

MR. COHEN: So it's all just a coincidence.

MR. SCHUELKE: The gun. We have this, you know, this high pressure, you know, open homicide case and I want to know, I guess this is before I knew about the Cyrus Levi connection, I want to know what, if any, leads we have on the gun. You know, we've got a couple of spent rounds from which we can make a positive firearms ID if we had the gun. So I have them put out a bulletin to the New Jersey State Police looking for a nine millimeter semiautomatic because they stop probably ten cars a week on the Jersey Turnpike and recover lots of firearms, because given the law in Virginia where you can buy a half a dozen a week or whatever the hell it is, this is huge traffic to sell guns up the East Coast. And the guy who was the head of MPD Washington Firearms Identifications Branch called me because he saw this bulletin and he said, yeah I saw this bulletin, you know, you're looking for the gun from the UMW case right?

Right.

We saw that gun the night it happened.

Say what?

Yeah, the gun that they recovered outside the Whitelaw Hotel is, in my judgment, without a doubt, the murder weapon.

Well how come your technicians report says they examined that gun and were unable to determine?

He said, Oh, because you know the science of firearms identification is you have a rifled barrel, you have a soft lead projectile and as it's rifled down the barrel, the rifling in the barrel engraves the lead slug and each is unique. Like a fingerprint. So you know I can fire a suspect gun, recover the slug from a tank of water, I can put it in a stereo microscope and compare it to the questioned one. And yup, same number of striations, same direction, blah blah, I get like six different criteria and they can say positive ID or no. The undetermined one is a thing apart. What does that mean?

Well at some time in the life of this particular weapon, somebody had the barrel in a vise, or it otherwise somehow got distorted. So every time you fire a round through it you get no identifiable striations. Instead you get the same smudge.

I said, well isn't the fact that you get the same smudge without fail the functional equivalent of the same.

Well yeah in my judgment, you know yeah that's why I say we saw the gun that night. But our discipline is predicated exclusively on matching the striations.

So I went out and lined up an independent firearms outfit, I forget the name of it now, a very prominent one. They made a positive ID based on that sort of obvious repeatable phenomenon and identified the cartridge cases that were found on the scene as well from the markings of the breach face of the pistol to the base of the cartridge case. So that's one, you know, like major screw up to happen at the very beginning. The other one was they recovered some pretty good latent prints from the door of the hotel room. And similarly I go to, you know, look into the fingerprint analysis and they say, unable to make a determination, because the set of so-called known prints that they had was some kind of a photocopy that was insufficiently clear so that they could match them. So when we locked him up that day in the courthouse I personally went and supervised the fingerprinting of this guy to make sure we got a good set of prints and sure enough we had a positive ID on like four different fingerprints, or part of a palm print from the hotel room door.

MR. COHEN: As far as you know, do people squeeze guns in vises for the purpose of –

MR. SCHUELKE: No, I've never heard of that. People file serial numbers off them but no I've never heard of that. And I don't have any idea how that happened. I mean it's possible I suppose that, you know, at some point in its life somebody had fitted it with a silencer and couldn't get the damn thing off and put it in a vise to try to screw the silencer off the end of the barrel. I don't know. So, the case goes to trial, Tim Morrison, a now retired Senior Judge in the Superior Court and at the time was with the Public Defender

Service, represented him. Another situation in which I had this adversary who became a lifelong friend after that, and he and I are quite good friends. And, you know, by any rational measure, given the print evidence, and the firearms evidence, and I don't know a couple of other things which I don't really remember off the top of my head, this is like sort of a slam dunk case. So the defense was, you know they had no fingerprint evidence, they had no firearms evidence until the White House gets involved. You know, we're going to frame this guy. Well that didn't get very far, and I think he's still doing like 45 to life. It was interesting, he got another five years tacked on because he was at the D.C. jail before he was transferred to a Federal Bureau of Prisons and he and three other guys made an escape attempt. One of them, one of the guards fired a round of buckshot after they were climbing a fence and one of them got hit with the buckshot whereupon our boy said, oop, okay. Ran back in. So he got another five years for an attempted escape. An absolutely cold blooded killer.

MR. COHEN: Have you thought of his name?

MR. SCHUELKE: His real name is Ellsworth Smith. Whose brother, I learned at some point in this investigation, was a homicide detective in Jersey City, New Jersey. And who told me, don't let this asshole make this claim to you about he's from an impoverished background and blah de blah de blah. You know I grew up in that same household. He had a cousin who lived in suburban Maryland. Prince George's County. Whose name he used when he first

got locked up. That's the name I can't remember, but that was the name that was his MPD official name, since that's the name under which they first booked him, and so the indictment bore that name together with a bunch of aliases. But I don't think I ever knew his real name until much later in this process. And he – I used to have a practice which you could get away with with most judges. I would try to get most of my witnesses in the courtroom so when I'm asking the panel, on *voir dire*, you know, Lou Cohen is going to be a witness for the United States, does anybody know him? I'd have you there, I'd say Mr. Cohen would you kindly stand up? And I had like, I don't know, 15 of them sitting in the jury box, introducing them all. And I knew all these people by this time. So I didn't need to read a list or anything, I could look at you and I knew who you were.

MR. COHEN: Yeah.

MR. SCHUELKE: And Morrison later told me that as I was going through that drill, the defendant leaned over and said to him, "We're fucked. He could just look at somebody and call out his name." Okay. So, that one has always kind of fascinated me, it's a great little detective story, you know? And a great story about how things can get screwed up, you know? By, well meaning, otherwise perfectly competent people. The other interesting thing about that, at the risk of boring you with these details, is that the defense, of course, knew, because we disclosed the original firearms examination report: Cannot Determine. So they wanted to send the gun to their own

expert for analysis. So we made arrangements to ship this gun down to Dallas where they had hired a firearms expert, who had been the Dallas Police firearms guy, retired and had his own consulting business. So, I knew therefore who their expert was because I had to arrange to send the gun to him. So I called him up, because he produced a similar report: Can't Determine. So I called him up, introduced myself, said I got a couple of questions for you.

He said, well you what, I mean am I allowed to talk to you? They hired me as their expert and –

I said, well you have every right to decline to talk to me, but you have a right to talk to me as well if that's what you want to do. I suppose I should point out to you that if you decline to talk to me one of the first things I'm going to ask you on cross-examination is how come you refused to talk to me?

Okay okay. So, yeah undetermined. That's it, hard discipline, no striations. He said, but I'll tell you as a former Dallas PD Firearms examiner, if the chief of police came to me in Dallas and asked me, I'd say "you got the right man."

So, that was the cross-examination.

MR. COHEN: Do you watch CSI programs and –

MR. SCHUELKE: You know my wife is a big fan of the CSI programs. So I unavoidably, from time to time, but I'm not a fan of them, no.

MR. COHEN: I once served on a jury, a Superior Court jury in which there were jurors who didn't want to convict a guy of a drug offense because they said, if the policeman were telling the truth he'd have a video tape of the guy handing him –

MR. SCHUELKE: Right, right, right. And those programs are a big problem for prosecutors because jurors also want to know, no fingerprints? No hair? No fiber?

MR. COHEN: No DNA.

MR. SCHUELKE: No DNA? Right, right. I don't particularly care for those programs beca – well first of all, the original one, the CSI Miami, the red headed actor. I forget his name. Who was originally in –

MR. COHEN: I don't watch them, myself.

MR. SCHUELKE: The one from New York with Detective Sipowitz. *NYPD Blue* –

MR. COHEN: Oh yes, yes yes yes.

MR. SCHUELKE: – *NYPD Blue*, he played Sipowitz's original partner. Well I can't stand this guy, this actor. So, you turn that on – otherwise I don't particularly like him because –

MR. COHEN: Sort of short, mostly what I think of is bald.

MR. SCHUELKE: No, that was Sipowitz. His partner –

MR. COHEN: Oh, okay.

MR. SCHUELKE: – his partner was this tall fairly slender, big shock of red hair. And he's the principal CSI Miami actor. Lieutenant somebody or other. But I don't find those shows to be very realistic. So I'm not a big fan of them.

MR. COHEN: Have you in private practice had any violent crime cases?

MR. SCHUELKE: No. Well, no no no that's not entirely true. Depending on how you define violent crime. I tried a case in the Superior Court, it's probably ten years ago now in which four campus police officers at Gallaudet were charged with homicide, manslaughter in the death of a deaf student at Gallaudet. And another fascinating case. Do you want to talk about that?

MR. COHEN: Sure. We'll double back.

MR. SCHUELKE: The decedent in that case was not a kid, he was a man, I don't know, late thirties maybe, who'd been an on again, off again student at Gallaudet. He stood about five foot eight and weighed about 300 pounds. And he was on the campus one day, he was not a current student, he had been the previous semester. And he's on the campus to go visit with a couple of professors because he's got a gripe about the grades he had had the previous semester. And he is pretty belligerent and so one of them calls the campus police, they come, they escort him out of the faculty offices, they're sort of escorting him across the campus, they want to just get him off the campus. He decides he's going to go see somebody at the Student Union and they're not going to let him in there. So they get into a wrestling match. By the time it concludes there are four of these cops who have wrestled this guy to the ground. They got him face down and they're trying to hand cuff him when he appears to be suddenly in great respiratory distress. They roll him over, they start immediately to administer CPR, until they get the paramedics there to intubate the guy, but he dies. There are, I don't know, twenty students who witness this.

They're up there standing on the steps up in front of the Student Union. They're all deaf, okay? And so this entire trial is conducted through interpreters. Fascinating experience. Not using interpreters generally, interpreters interpreting language is pretty simple and straight forward. Interpreting sign language is very complicated because it's imprecise, the sign language itself, particularly if you're getting some kind of a narrative. You know, it's one thing to say yes or no, or blue or brown, but it's also complicated because the interpreters using this American Sign Language have an axe to grind and they basically refused to follow the court's instructions. So if I pose a question and you start to answer it through sign language and a woman is interpreting for her and then you continue into something extraneous and I say that's it, you've answered the question. The interpreter will just keep right on interpreting, the Judge can say, STOP, you know. So this was kind of an interesting phenomenon and you know, basically –

MR. COHEN: Does this have something to do with politics of deafness and sign language?

MR. SCHUELKE: Yes, yes. Yes. Putting that aside a number of these witnesses, all women as I recall, testified in the grand jury, or in the course of interviews with the police said that the cops were choking him. And so the theory of the prosecution was that some one of them, and they never did identify which of them supposedly did this, had him in a choke hold of some kind. Which was not true, in fact, and the evidence didn't bear that out. But it

became clear during the course of the trial as we examined some of these kids what they were really saying was "he was choking." Not that he was being choked. And the sign language is pretty imprecise. So they had to sign "choking," and he clearly was choking. You know, he couldn't breathe, you know, he had advanced atherosclerosis. He was, on post mortem examination, he was about a nanosecond from a heart attack, no matter what. And there's no question he had a lot of weight on his back with these guys pinning him down which tends to compress the diaphragm, compresses the chest cavity to some extent, and so it's more difficult to breathe. And so there's no question that that contributed to the guys death. But this was not intentional conduct, nor was it, in the circumstances, negligent conduct let alone so reckless as to amount to an analogue for intent. And they were ultimately all acquitted.

MR. COHEN: It's interesting the sign language just doesn't adequately distinguish between active and passive, "choking" and "being choked."

MR. SCHUELKE: Well you know it may be that someone who is sufficiently proficient at it can do that, and it may be that the interpreter can as well, but that's not what happened here. It was quite a fascinating case. To give you an idea of how this developed, the prosecutor whose name was David Schertler. I don't know if you know, or know of Dave Schertler. He was, at the time, the head of a homicide unit in U.S. Attorneys' Office. He's a damn good lawyer and he's got, now he's got a very successful small firm of his own. And you know that in criminal trials the government, of course, has the

burden of proof and so the government makes an opening summation, the defense has an opportunity of summation and the government gets a rebuttal. And rebuttal argument for a prosecutor is probably the strongest tool in the tool cabinet in most cases. And he did his opening and we did our summation and he declined to do a rebuttal. I think he was personally convinced that we were right about this. So it's kind of interesting.

MR. COHEN: So they were acquitted.

MR. SCHUELKE: They were acquitted. And I remember arguing to the jury, and we had a, some pretty well educated jurors in that case, including a woman who was a psychologist who happened to end up being foreperson of the jury. And I remember saying to them, you know I've been trying criminal cases across this country, frankly, for forty years or whatever it was, thirty five years, and in virtually every trial in this court house and every other one in the country the jurors are going to be called upon to decide who is lying and who is telling the truth. Because somebody in 99.9 percent of criminal trials is lying. Oath, or no oath. You know you've got the cases in which you've got a murder case and the cops turn one guy who is testifying against the other one to minimize his own exposure to a sentencing and so on. Not this case. You could conclude that nobody lied in this case. Which I think was true. But it's a fascinating psychological study in perception and because of the medical examiner, for example, who did the autopsy. Came up with some perfectly bizarre conclusions. And who frankly admitted to me one time in an interview he was under a

lot pressure because all the publicity about this case and he did his initial autopsy report and then he knew there were these kinds of questions and so he went back and he did some studying on this subject and the other subject. And so, for example, he said he discovered that there were petekiae in the eyelids, the guy's eyelids, well that happens in most asphyxiation cases, but it can happen from lots of other things like exertion during a bowel movement. And, because there's a study, called the so and so study, where you take a section of the tender skin in the forearm which is somewhat similar in density to the cells in the eyelid and you put pressure on it and create these petekiae and then you count the number of petekiae in a square inch –

MR. COHEN: I don't know that word that you were using.

MR. SCHUELKE: Petekiae is a form of hemorrhage, little tiny, like a pinhead hemorrhages that appear in the whites of your eyelids.

MR. COHEN: Spell it?

MR. SCHUELKE: Pet, petaki, ekia, ae I guess in the plural. And you can calculate, you can count the number petekiae in this one square inch and if it's X number the compression had to last for five minutes or something like that. And so based on this he testified that they had been choking him for five minutes. Now, we need to think about that for a minute. That's a long damn time to be choking somebody, you know? So far I'm only up to twelve seconds.

MR. COHEN: Yeah.

MR. SCHUELKE: And I had a terrific former medical examiner who was our witness who took issue with much of the medical examiner's conclusions and then they put on in rebuttal another former medical examiner whom I knew very well, who had been the Chief Medical Examiner at the time of the Hanafi murders with whom I'd worked. And very smart guy. And a very straightforward guy. And I don't remember basically what they had called him to rebut, but it gave me the opportunity, "Dr. Luke, are you aware of the fact that Dr. Whatshisname here testified that he was able to conclude from the XYZ test that the decedent here had been choked for five minutes?"

He said, the XYZ test?

I said, yeah, you remember that from medical school?

I do. I mean that's been universally repudiated for at least twenty-five years. That is preposterous.

That was sort of like the end of that. I remember one of the jurors afterward telling me, yeah well you sure put the nail in the government's coffin on that one. So these trials are lots of fun.

MR. COHEN: Well let's go back. We're through with – okay to go on for a while?

MR. SCHUELKE: Yeah.

MR. COHEN: We're through, I guess, with your career at the U.S. Attorney's Office, unless you now or in a later session think of anything else you want to talk about.

MR. SCHUELKE: Okay.

MR. COHEN: So in 1979 you and Dick Janis and Larry Wechsler form your firm.

MR. SCHUELKE: Yes.

MR. COHEN: Were you all in the U.S. Attorney's Office at that point?

MR. SCHUELKE: No. Excuse me, Larry and I were, and Larry and I had left to join Dick Janis. Excuse me. And form the law firm. He had left the U.S. Attorney's Office several years earlier, had initially joined Jim Sharp, which was then Sharp Randolph and Janis, and that didn't last very long and Janis went out and hung up a shingle by his lonesome, and practiced as a solo practitioner for a year or two. And Larry and I left and joined him and we formed the firm in December of 1979.

MR. COHEN: Did you think about doing anything else?

MR. SCHUELKE: I did. I talked to several firms, had a couple of attractive offers, but I decided, or we decided, – I guess I should just speak for myself. I decided that the prospect of practicing with a couple of friends of mine in our own firm where we would have complete independence was attractive to me and that I was willing to assume the risk and it's sort of ever been thus. When we started this we had – we had a couple of matters immediately. Janis had, by that time, developed a relationship with the Cubic Corporation from San Diego, which is sort of a high-tech government contractor who made mine detectors that were capable of detecting plastic explosives, which they sold to the armed forces. They designed and sold a combat maneuvering system. Have you ever see the movie Top Gun?

MR. COHEN: Yeah.

MR. SCHUELKE: Where they have these fancy computer consoles that track the aircraft in the air and so that's Cubic's product. They're the ones who first came up with the farecard system which is used in the metro system here and elsewhere. And that proved to be a good client of his and therefore of the firm's for quite some time. As I left the U.S. Attorneys' Office, I had already been approached to join the Bert Lance defense team. Bert Lance had been indicted, a bank fraud case involving this small family bank that his family owned in northwest Georgia.

MR. COHEN: This is Calhoun?

MR. SCHUELKE: Yes. And he was indicted along with two codefendants. He was represented by an Atlanta lawyer whose name was Nick Chilovitz who at the time was with, – I'm drawing a blank on the firm, it will come to me. And Chilovitz was an experienced trial lawyer but he was a civil trial lawyer. He had no criminal trial experience. Lance had been represented by Clark Clifford and his then young protégé Bob Altman at Clifford & Warnke when prior to the indictment in the criminal case the Senate Committee which had confirmed him [Lance] to be the director of OMB for Jimmy Carter got wind of some of these allegations about the banking business in Calhoun and kind of reopened this confirmation process. I don't know quite how they do that but they revisited it in any case. And Clifford with great a deal of support –

MR. COHEN: Is this the thing that the New York Times columnist came up with, I mean, he certainly went after Lance. The guy who wrote the column about word usage on Sundays. I think he was also –

MR. SCHUELKE: Oh, oh, oh, oh. Recently passed away.

MR. COHEN: Yeah.

MR. SCHUELKE: It was –

MR. COHEN: I'll come up with his name.

MR. SCHUELKE: It was in the Nixon White House.

MR. COHEN: Yup.

MR. SCHUELKE: Oh shit. I can't think of his name. I don't know, I don't remember him. Because I – I was not involved in any of that other than as an observer, newspaper reader. But Clifford did a terrific job of basically embarrassing a number of these Senators for baseless allegations against this public servant. So when he gets indicted, Clifford and Altman were not happy about the selection of Chilovitz to represent him. Because they thought he ought to have a criminal lawyer. But Bert who's a very smart savvy guy did not want to retain one of the Atlanta prominent and capable criminal defense attorneys of which there are several, at least several. Because in his view they had been associated in the public mind with representing drug dealers and, you know, criminals. And so he didn't want that association. And, I don't know, for whatever reason he was happy with Chilovitz as an alternative. But Clifford and Altman persuaded him that

he needed to have an experienced criminal trial lawyer on the team and recommended me.

MR. COHEN: Although you're still at the U.S. Attorney's at that point? Maybe that's –

MR. SCHUELKE: I think, yeah, I think when the subject was first broached to me I was still in the U.S. Attorney's office planning to leave. I had nothing to do with the Lance case –

MR. COHEN: Oh sure.

MR. SCHUELKE: – on behalf of the justice department.

MR. COHEN: I understand.

MR. SCHUELKE: Nor – nor was it, you know, in any way under my supervision because this was Main Justice that was doing this not the U.S. Attorney's office. Yeah, because I went literally from the U.S. Attorney's office to Atlanta. And I lived, but for, occasional weekends back here, in Atlanta from virtually a day or two after I left the U.S. Attorneys' office until that trial was concluded which was six, seven months later, because the trial was about five months, four months. An interesting experience. I liked Bert a lot. The government's case was in large part incomprehensible and so they lost their broad conspiracy count through a Rule 29 motion at the close of the government's case. It was otherwise not a very attractive bank fraud case, actually it had some similarities to the Antonelli & Yeldell defense because while it was true that Lance used this bank like a personal piggy bank, they never lost a penny. He repaid all of the loans. And he, he was an old timey banker. So, some farmer in northwest Georgia whom he

knew needed $200,000 in order to buy some new combine for the next harvesting season and Bert would loan him the money. No collateral, no nothing. And virtually all those people repaid those loans.

MR. COHEN: And these are all to people he's doing kindnesses for not – not use of the money for interests of his own.

MR. SCHUELKE: No, no, no, no. No, no, no, no, no. There was no self-dealing in that. He did grant himself loans from the bank for some of this own ventures. He had loaned one of his kids like, I forget the sum but a substantial sum so he could start some little private equity business just so he got the experience with the bank's money. But it got repaid with interest. In addition to whatever the weaknesses of the government's case might have been, Bert Lance was a very popular figure in Georgia, particularly among the African American community. And so for example, among our character witnesses was Daddy King, Martin Luther King Jr.'s father who was the original minister of the Ebenezer Baptist Church in Atlanta. Another of our character witnesses was Jimmy Carter's mother.

MR. COHEN: I remember her quite vividly.

MR. SCHUELKE: Colorful character. Who – she testified, typical, you know, character witness direct testimony. The prosecutor, Ed Thompko was the lead prosecutor's name, stands up and says I have no questions for the witness your honor, she says "I come all this way and you're not even gonna ask me one question." The jurors loved her. They loved Daddy King. And there were jurors –it ended up he was acquitted with respect to, I don't

know, eighty percent of the counts in the indictment because it was this long – every loan transaction was another count in that –they were hung with respect to a couple of counts. And the government dismissed so there was no retrial. But there were jurors who told me after the trial they would not find him guilty if God came in and testified.

MR. COHEN: Yeah. He was out of office by then.

MR. SCHUELKE: He was. He was.

MR. COHEN: This did cause him to leave Washington and go back to Georgia?

MR. SCHUELKE: Yes. Yes. But he's done quite well. To this day he's doing fine. I hear from him every now and then. My son married a young woman from a prominent Atlanta family, now seven or eight years ago I guess, and so of course there are wedding announcements in the Atlanta Journal Constitution. He called me and he said it's a high time you got some real good Southern blood into that Yankee family of yours. So that was a fascinating trial. He was a delightful person whom I liked and respected. It was a very difficult personal experience for me because I basically left, you know, everything I knew and moved to Atlanta and I didn't know any of these people. Chilovitz viewed me, not unreasonably I guess, as some interloper that Clark Clifford sent to keep –

MR. COHEN: Watch over him.

MR. SCHUELKE: – watch over him. And as a consequence we had no social relationship whatsoever. I mean I'm there for five months trying this case with him, did I ever get invited out to dinner, nope. And so there were obvious sort

of tensions that went along with that. We divvied up the trial in a fashion that was sort of satisfactory to me.

MR. COHEN: There were just the two of you?

MR. SCHUELKE: He had an associate, his name is Gary Grindler who's now the Chief of Staff to the Attorney General. But he was not a fairly young associate so it was the three of us for all practical purposes. Bert had a magnificent home in Buckhead, the northwest suburb of Atlanta, the high rent district, some beautiful, beautiful mansion.

MR. COHEN: I've read the book.

MR. SCHUELKE: It had a name. I don't remember the name now. But they were living up in Calhoun. So in order to save on expenses I was invited to stay in that house during the trial. Which came with an old delightful African American couple who were the housekeeper and the groundskeeper. And here I am by my lonesome in this, it was probably 20,000 square foot house and Bert's wife, very interesting woman, Labelle, yeah, –

MR. COHEN: Labelle?

MR. SCHUELKE: Labelle. Out of the sense of southern hospitality, wanted to make sure that I was well cared for. So she would be there like every three days so it just wasn't a very comfortable arrangement so eventually I said mmm, this isn't working, so I got an apartment. But that was kind of interesting. She told me by the way, she's a one hundred percent believer. What we these days I guess call born again or a what's – what's the –

MR. COHEN: A believing Christian.

MR. SCHUELKE: Yeah. So while the jury was out, right after the jury went out, we were up at the house, that house in Atlanta the one evening and I was sort of trying to do my own little, you know we need to be prepared, do we think, you know, in good shape, but you know, and what a jury could do and so on and she said to me no He's already decided. I said I beg your pardon?

MR. COHEN: He with a capital H.

MR. SCHUELKE: And she was right. As it turned out. Labelle.

MR. COHEN: I don't want to leap forward but were you involved in the later BCCI stuff –

MR. SCHUELKE: Yes.

MR. COHEN: – that Lance was involved in?

MR. SCHUELKE: No. My firm principally through Larry Wechsler, although this is a big matter and so each of Janis and I sort of made cameo appearances in this case, represented the bank itself. In this criminal case that was brought in Florida against the bank for money laundering and I don't know what all else, Lance had no involvement in that whatsoever. The history –

MR. COHEN: The bank itself – do you mean BCCI.

MR. SCHUELKE: BCCI. Yeah, the Pakistani Bank. The real BCCI story was the one that resulted in the criminal indictments against Clifford and Altman in New York and a lengthy investigation by the Fed. BCCI was owned by a group of independent extremely wealthy Middle Easterners, Kuwaitis, Saudis who were worth, like a billion dollars apiece or more, who had all invested in this bank. The bank bought what became the First American Bank here

in Washington. Clifford became the chairman of the First American Bank and Altman was the President and CEO. The Fed later claimed that they had misrepresented, when the bank was chartered by the Fed, the ownership of the bank. The Fed's claim and ultimately the Justice Department's was then the investors in the bank were straw persons and this group of Pakistani bankers actually owned the bank and so on. So that's what that case was all about. At the same time they're investigating the operations of BCCI, having nothing to do with First American or Clifford or Altman. Because the bank ended up basically entirely illiquid and they had all these obligations all over the world which they couldn't meet. The only Lance connection, and I haven't thought about this in quite some time, early on Lance had an interest in one of the major Atlanta banks and one of these same Middle Eastern investors through Lance's introduction as I remember it bought a stake in that bank as well. But that never figured in any of the BCCI investigations.

MR. COHEN: Is that National Bank of Georgia?

MR. SCHUELKE: That's it, NBG.

MR. COHEN: Okay. Because my partner Art Mathews represented it I guess in connection with that matter and there was a guy named Pharaon –

MR. SCHUELKE: Pharaon.

MR. COHEN: Who I think was represented by Wachtell but I can't quite figure it out.

MR. SCHUELKE: Yeah, I can't either. I can't either.

MR. COHEN: So back to the start of your firm. Do you – may I ask you this, did you, the three of you see yourselves basically as bringing the same interests and the same skills or different interest and different skills?

MR. SCHUELKE: I would say more similar than not. I mean we all had the U.S. Attorney's office background. We all therefore when we went into practice advertised ourselves as white collar criminal defense lawyers. So we shared the same subject matter discipline. Each of us is a pretty different personality with different strengths and weaknesses I think and our practice has kind of evidenced that over the years. And so I may have been more likely to be engaged in a certain type of matter than Larry or Dick might have and the opposite was also true.

MR. COHEN: What sorts of matters were each of you concentrating on?

MR. SCHUELKE: I would say while very few of us in the white collar business try a hell of a lot of cases, I certainly among the three of us have been more the trial lawyer in the group. Larry is the world's most effective negotiator because nobody doesn't like Larry Wechsler, and it's amazing how that can be effective. I can get in a dispute with a prosecutor who is insisting that my client has to plead guilty to this or that or the other thing and I end up telling him to go pound sand, you know, whereas Larry would somehow convince him, you know. Dick is more of a – I'm not sure quite how to explain this, even though his practice, and indeed, over the years we have worked on some of the same matters so to that extent our practices are obviously the same but in his practice in terms, at least in

terms of the way he goes about the practice is more like he's a civil litigator. It's – there's a lot of disputatious motions or this and that, sort of more document intensive but our practice has been both fundamentally the same. I mean, for example, I was engaged by the Senate Ethics Committee, I guess we'll get to this, for the D'Amato investigation and I asked him to work with me on that. So he did. And he's, he's very good, provides very good support in that sense because he's very detail oriented, you can rely on him to turn over every stone if necessary. And we worked together on a number of other matters as well. But essentially I would say the practice has been all of a kind.

MR. COHEN: Did you from the beginning have conversations, agreements, understandings about what kinds of things you would take on or was that just a natural outgrowth of who you were. Did you agree on any kinds of things the firm wouldn't do?

MR. SCHUELKE: Well, yes. First of all, we agreed, I think it's fair to say we agreed, at least I told them that there are a couple of things that I will not do. And I don't remember if they agreed or we agreed that we would all adopt that but nobody disputed it. So I wasn't going to represent drug dealers. I wasn't going to represent – I wasn't going to get involved in street crime cases unless something was particularly interesting for me. I'll give you an example. Jim Sharp was a terrific lawyer, had a fairly substantial practice for a while representing some of these big time drug dealers in South Florida in addition to a very good white collar criminal defense practice

and, he found himself on a couple of occasions making all kinds of representations to the court about his client's commitment to do this and that and the other thing, you know, and of course didn't live up to them and found himself in the position in which he accepted some large upfront fee which made it look like he was just facilitating his client's flouting the law in some way or another and so I'm just not doing that anymore and I never want to be in that situation and so we never did. Neither of my partners did either and they certainly share that view. But the overarching principle upon which we agreed is that we're not going to – we're not going to do anything we don't want to do. So for example I can remember one of these organizations, these, antiabortion groups had been convicted in Maryland if memory serves me, of some, I don't remember if it was a bombing or, it was someone, some, violence against some abortion clinic and, came in and wanted me to represent them on the appeal. No thank you. Well why not? Because I don't represent terrorists that's why. I don't care if you like it or you don't, goodbye. So, you know, we had that kind of luxury which we all agreed that we're not doing something that we don't think we want to do.

MR. COHEN: What about sheer size, I mean, in those days I can remember even from Wilmer, Cutler & Pickering, which was much bigger, that we'd get asked to do something and there would be a real question whether we had the resources to take it on.

MR. SCHUELKE: Yeah and we've had that on any number of occasions. One solution to that which is what we employed in BCCI cases, we lined up a number of our friends in different law firms who would join this effort and so we put together a team. So the team had the resources. And, you know, there've been any number of times that we said we don't have the resources, we can't do this. Now, I will also say that it's long been my view that we could quite easily do some of these corporate internal investigations and representations of corporations particularly in the FCPA area these days and do it probably a lot more economically than the big firms do it. That doesn't happen.

MR. COHEN: It's got to be true.

MR. SCHUELKE: There's no question about it. And that doesn't happen because if you're the general counsel of, you know, Halliburton, for example, and you decide you're going to retain this eight person law firm in Washington to represent the company in what could be a bet the company kind of situation and you go to the senior management and they say what are you nuts?" No, get Paul Weiss and Skadden and that's just politically sort of an obvious, obviously comfortable situation for such a general counsel. But we can do it, and we might do it better and we certainly could do it less expensively.

MR. COHEN: What about structure, right, we're past two hours now, I think we probably ought to quit, but one – just one more question, when you're, the three of you planning to form the firm did you talk about how many people you

would try to hire right away, how much you'd grow or what kind of career you could you offer other people, younger lawyers who might join you?

MR. SCHUELKE: No, not really. We – it was just the three of us when we opened the doors. We leased office space at 1801 K Street or L Street whatever the address was. We set out to look for an associate at the beginning. We sort of made a commitment to ourselves that we're not gonna grow for the sake of growing and we're only gonna grow because the business requires it and we're not gonna borrow any money.

MR. COHEN: Not borrow any money?

MR. SCHUELKE: Right. Now there had been times when we had a line of credit available but we've never had any debt. We may have drawn because of a short term, 30day cash flow issue but, and we always wanted to keep the firm small. And so I never, I don't know that we ever were focused on a number, you know, like we're not going to be more than ten. That sort of came about as a result of having bought our building in 1985. So we had a physical limitation on the capacity for growth. And we didn't want to leave that building and therefore there it is.

MR. COHEN: Let's stop there.

MR. SCHUELKE: Okay.

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

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

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

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

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

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

And so I was engaged

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

MR. SCHUELKE: Yes.

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

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

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

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

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

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

MR. COHEN: At all?

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

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

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

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

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

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

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

MR. SCHUELKE: Of course.

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

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

MR. COHEN: Sure.

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

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

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

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

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

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

MR. COHEN: Okay.

MR. SCHUELKE: But interesting.

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

MR. SCHUELKE: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: One hears the term autism spectrum.

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

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

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

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

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

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

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

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

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

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

MR. COHEN: And the Autism Society still exists?

MR. SCHUELKE: It still exists.

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

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

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

MR. SCHUELKE: That's right.

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

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

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

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

MR. SCHUELKE: Please.

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

MR. SCHUELKE: Fascinating, fascinating. And now

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

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

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

MR. SCHUELKE: Well, good.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: I meant toward Haig.

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

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

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

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

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

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

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

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

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

MR. COHEN: That seems right.

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

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

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

MR. COHEN: You didn't interview witnesses?

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

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

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

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

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

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

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

MR. COHEN: At Skadden Arps.

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

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

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

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

MR. SCHUELKE: Yes, yes, yes.

MR. COHEN: Paying rates dictated by the Senate or

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

MR. COHEN: Jack Spratt.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: Well, I know the name.

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: His job.

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

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

MR. COHEN: You still are?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: The Commission can require that?

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

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

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

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

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

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

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

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

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

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

MR. COHEN: Or would hope we did.

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

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

MR. COHEN: You mean other judges?

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

MR. COHEN: No.

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

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

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

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

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

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

MR. COHEN: I do too.

MR. SCHUELKE: Good.

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

MR. SCHUELKE: Oh yes.

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

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

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

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

MR. COHEN: Yeah, terrific woman.

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

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

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

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

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

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

MR. COHEN: And she chairs the Commission

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

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

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

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

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

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

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

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

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

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

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

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

MR. SCHUELKE: All right.

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

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

MR. COHEN: It is a standing committee?

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

MR. COHEN: Which is 1989 I think.

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

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

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

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

MR. SCHUELKE: No.

MR. COHEN: You were counsel to the whole…

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

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

MR. COHEN: This is post *McNally*.

MR. SCHUELKE: Post *McNally*.

MR. COHEN: Under the amended statute.

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

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

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

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

MR. COHEN: This is Carolyn…

MR. SCHUELKE: Carolyn Huber.

MR. COHEN: Whom we're coming to.

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. COHEN: I think so, do you?

MR. SCHUELKE: I do.

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

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 3O2 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 is 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.

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 1st 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 25th. Whatever that Friday was. That's right because the Senate Judiciary Committee held a hearing on the 6th 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 6th, 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 24th or 25th 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 thought 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.

Oral History of Henry F. Schuelke, III
Eighth Interview
March 21, 2013

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 March 21, 2013. This is the eighth interview.

MR. COHEN: This is the eighth session in the oral history of Henry F. Schuelke, III. I'm Lou Cohen, and let's begin. This is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. We ended last time with some discussion of your work for the Board of Directors of Halliburton and I guess the first question; well actually let me ask this question. How, what was your arrangement with the Board? Can you sort of further describe your role in relation to the projects you undertook?

MR. SCHUELKE: Yes. As I think I indicated when last we met, when from time to time the company becomes the subject of an SEC or a Justice Department investigation, most often in the Foreign Corrupt Practices Act arena, the company, that is management, retains outside counsel whose initial charter is to conduct an internal investigation to ascertain the facts and, thereafter, either to negotiate with the Government a possible resolution short of litigation, or in theory at least, to litigate with the Government.

The independent directors of the Board, that is nonmanagement members of the Board, owing both to their fiduciary responsibilities to the shareholders and owing as well to the independent directors' desire to

have the Board comport itself in exercising its fiduciary responsibilities so as to eliminate or at least minimize the risk of potential shareholder derivative liability, thought it appropriate and prudent to have counsel separate from that which represented the management of the company. And so, both with respect to Boston Scientific, which we had discussed, and Halliburton, the independent directors of the Board engaged me to serve that role. And so I would, in cooperation with counsel for management keep myself informed of developments both throughout their internal investigation and then with respect to their negotiations with the Government so that the Board was kept informed by one who was independent of management. Because after all ultimately it's the Board that's got to make the decision whether to and on what terms to settle matters with the Government. And so that's essentially how that arrangement has worked.

MR. COHEN: Were there privilege issues in that relationship? I mean can the counsel for management who is conducting the matter directly communicate freely with you as a lawyer for the independent directors?

MR. SCHUELKE: Yes. It's the corporation which is the holder of the privilege, not management as independent of the Board nor the Board as independent of management, and so both outside counsel engaged by management and counsel engaged by the Board serve the same client ultimately. I have never seen this to occur but it's conceivable that you could have an interesting attorney-client privilege issue arise when you have a member

of senior management, or actually it wouldn't even have to be senior management, who engaged separate counsel with respect to the same matter and while that counsel and counsel for management would have a common interest or a joint defense relationship, which would preserve the privileged character, it's conceivable to me that you could have a situation in which the Board, while it might enjoy a common interest, would not be or want to be perceived to be in a joint defense in a situation with such an individual officer or employee. I have not seen that arise but it's conceivable to me that it could.

MR. COHEN: Because there might be counsel for individual managers or individual inside directors in some circumstances?

MR. SCHUELKE: Yes.

MR. COHEN: That would create further complications?

MR. SCHUELKE: It could. It could.

MR. COHEN: How many, roughly or exactly, of these Halliburton episodes have there been, I mean, occasions when you have been called in?

MR. SCHUELKE: I have served the Board in this capacity since 2006, and in the ensuing seven years I think there were four separate and distinct investigations, all of them into allegations about Foreign Corrupt Practice Act violations. I've also, on behalf of the Audit Committee of the Board, conducted an investigation and made findings and recommendations to the Board on the subject of internal finance and accounting issues that were raised by a whistleblower within the company; and once I had concluded that work

and the Board made the judgment to waive the privilege, I shared my findings and conclusions with the SEC, which was satisfied and closed the investigation. With that one exception, they were all FCPA cases.

MR. COHEN: And the whistleblower then proceeded independently or…

MR. SCHUELKE: Made a claim against the company for discriminatory treatment, constructive wrongful termination, because he was in fact not terminated. I did not represent the company or the Board with respect to that. That wasn't a Board issue that was a management issue, and that was resolved to the company's satisfaction. So that's essentially what the nature of that work has been.

And as I believe I said earlier, I have particularly enjoyed this work for two reasons: One, I have been very much impressed with the Boards of both Boston Scientific and Halliburton. All fascinating, highly experienced, insightful and serious-minded people to a person. A wide range of personalities, to be sure, but they all fit that description. And secondly, because as I think I may have observed earlier, I've had occasion in my work for both of those Boards to have the pleasure of collaborating, if you will, with three different law firms who served as outside counsel for management and we operated in a completely open and cooperative fashion and I was in the luxurious position in each of these situations of being able to tell the Board when asked that the company couldn't be in better hands with their outside counsel, which is a nice place to be.

Let me wrap this subject up with some general observations about the Justice Department's and the SEC's emphasis on enforcement of the Foreign Corrupt Practices Act which has been a priority for each of them for at least the last ten years. To be sure, where that statute has been violated by assorted companies and individuals over the years, putting aside for the moment what one might think about the social utility of that statute and its enforcement, about which I have some reservations, and so sure, there have been cases that were appropriately pursued and prosecuted. There are many of them, most of them at least in my experience, which provide the Government with an opportunity, in the form of fines, to reap an enormous financial return far out of proportion to the seriousness of the conduct involved. Company A gets a subpoena from the Justice Department, the company engages outside counsel to conduct an internal investigation as well as to obviously respond to the demand in the subpoena. Because the operations of many of these companies are far flung, I mean after all we're talking about foreign, alleged foreign corrupt practices, undertaking such an investigation is time and labor intensive and it has been commonplace for a company to incur tens of millions of dollars in legal fees to investigate such a matter. Fifty million has not been unusual. Ultimately, when the Government comes to the conclusion that it's prepared to settle the case on some basis, the companies more often than not, far more often than not, agree to negotiate a resolution, which has resulted in the Department by its own account,

independent of the SEC, receiving on average several billions of dollars a year in fines and penalties, and in the SEC receiving comparable numbers.

MR. COHEN: Really? It's that high?

MR. SCHUELKE: Most of these corporations, even if in their judgment they had a triable case are, for assorted economic reasons, not in the position to litigate with the Government; most often that's because of the draconian collateral consequence of suspension and debarment from Government business simply upon the return of an indictment. And so as a business proposition it makes sense in most of these cases for the company to put the matter behind it even though it costs them in addition to the fifty million dollars or so they spent in legal fees another several hundred millions of dollars. My view of this, as I step back from an advocate's position on behalf of any client; it just seems to me to be extortionate, and I don't see that changing any time soon. It's been a huge boon for the Justice Department and the SEC but it…both as a lawyer and as a citizen I find it distasteful.

MR. COHEN: I've heard it said that it has also been a boon for foreign multinational corporations from countries that do not impose such restrictions. One such country for many years was Germany which of course has companies competing with U.S. companies in everything U.S. companies do everywhere. Thoughts about that?

MR. SCHUELKE: Yes, I do. I share that view which is why I expressed reservations about the social utility of the FCPA in the first place. You know, the Justice Department has long taken the position, which I find to be patronizing,

that the real interest in the enforcement of that act is the financial wellbeing of the citizens of a number of countries around the world whose economies are suffering and you've got despots, dictators or otherwise corrupt governments at the top of some of these countries. And according to the Justice Department, if some American company pays a ten million dollar bribe to a senior government official that somehow deprives the people of that country of funds that would support government social programs. Well, that's never made any sense to me because whether the minister of petroleum of Country A receives a ten million dollar bribe that he deposits in a Swiss bank account or not, I don't see what impact one way or the other that has on the local economy and the working class of the country. But that's how the Justice Department proselytizes.

MR. COHEN: I would suppose that the issue was depriving the citizens of the foreign country of the honest services of their leaders and governmental personnel and that that could hurt them if, you know, some minister or general awards a contract to one company rather than another based not on the merits but on who's paying him.

MR. SCHUELKE: No, I agree, and that's a more sensible analysis in my view although I find that sort of patronizing as well. You know, if an American corporation pays such a bribe in order to compete on a level playing field with foreign corporations who labor under no such constraints as the Foreign Corrupt Practices Act, it seems to me that the onus is not on the American law enforcement authorities to police whether or not there are losses of honest

services in some foreign country. Now, for many years the United States was the only major commercial power which imposed any such prohibitions on business practices. And so during that time the U.S. business operated at a distinct competitive disadvantage. The Justice Department has labored mightily over the last 15 years or so to encourage other countries, Europe in particular, to (a) adopt and (b) enforce a similar regime, and the OECD has indeed adopted comparable legislation. But its enforcement is lax, and so U.S. corporations still operate at a significant competitive disadvantage as a result. So that's sort of my philosophical take on…

MR. COHEN: Halliburton is of course a well-known and over the years has been a controversial company in part because former Vice President Cheney, who is associated with them, was a controversial guy. And I'm just wondering whether there's anything more you feel you can say about Halliburton and its activities in particular, recognizing that we are making a public record here?

MR. SCHUELKE: Well, let me say only the following: It's true that while Dick Cheney served as the chairman of the company for a brief period of time, Cheney's subsequent unpopularity as a political figure proved to be a problem for the company. Not in a substantive way because in fact, certainly after he had left the company, Cheney had nothing whatever to do with the business of the company. But you know one would read every time there was some claim brought against the company, "Oh, this is Dick

Cheney's company," which got a lot of folks exercised. So I think the company suffered ultimately from that relationship. It's interesting to note that one of the most publicly visible chapters in the Halliburton story involving the Foreign Corrupt Practices Act involved the conduct of the now former chairman of Halliburton what was then a Halliburton wholly-owned subsidiary, KBR, Kellogg Brown and Root, and that one figured prominently in the press because KBR had a series of very large contracts to support and supply the troops in Iraq. And there were allegations, much of them overblown and on which Halliburton eventually prevailed, that KBR had bilked the Government in some of these contracts in Iraq. There was also a substantial FCPA case involving oil services operations in Nigeria. KBR prior to the resolution of that latter case was spun off and is now a wholly independent corporation. But Halliburton the brand suffered from that association as well. And the work of KBR at the time of the allegations about the Government contracts in Iraq represented about 1% of the annual revenues of the Halliburton Corporation. So given the publicity attendant to that investigation and its resolution, it was always portrayed as Halliburton is making all this money through its fraudulent contracting practices with the U.S. Government. Simply not so.

MR. COHEN: Halliburton was also involved in the Macondo well, the Gulf oil spill.

MR. SCHUELKE: Yes.

MR. COHEN: I guess that remains unresolved?

MR. SCHUELKE: That's correct. Halliburton was a subcontractor through BP and provided the concrete slurry mix which was designed to seal off the well bore. You're right, that has not been resolved and they have unfortunately been finger pointing at one another which I think is unfortunate because in truth I think the two of them really have and ought to have a common adversary and shouldn't be pointing fingers at one another. I mean, my view of that, and I'm not any longer involved in that, I did early on in the BP investigation represent a senior BP executive whose involvement in that matter has been resolved and that's a closed matter. But I was close enough to it to have formed a pretty strongly held opinion about the merits of the Government's claim that BP and/or Halliburton and/or Transocean which owned the rig were criminally negligent. I think this is one of those terribly unfortunate accidents that cost the lives of I think it was nine individuals who had been on the rig and of course an enormous amount of ecological damage to the Gulf Coast. But accidents do happen, and I think that this is an example of the Government, the Justice Department getting way out ahead of itself in publicly stating that there would be criminal charges brought in this case before anybody knew what had happened, and that wish has been father to the thought. For example, a dear friend of mine, a lawyer in Houston, represents one of three individuals who've been criminally charged in that case. His client and one other were both on the rig at the time of the explosion. The third has been charged with making false statements before the Congress about what the actual flow

rate of the spill was between the time of the explosion and the time that the well was finally capped. But these two fellows who were on the rig were sort of midlevel engineers; one of them who is represented by my friend in Houston, was on that rig for the first time starting several days before the explosion occurred. He himself, of course like everyone else on the rig, was at personal lethal risk if indeed they were engaging in negligent conduct. The issue was what's been called a negative pressure test and there were what the crew on the rig thought to be anomalous results of this negative pressure test, and they couldn't quite figure out what it meant and they debated it among themselves for several hours. They consulted with more senior engineers at BP back in Houston, and they finally came to the conclusion that it did not pose a significant risk. Well, in retrospect they were wrong. But analyzing such test results and debating about its significance and consulting with senior engineers seems to be the prudent thing to do, kind of the antithesis of negligence because the negligence standard is not whether or not you proved to be right in the last analysis, it's whether or not you exercised ordinary care in the process, which it seems to me they did. But, you know, the Government wants a couple heads.

MR. COHEN: It occurs to me that there may be lots of people including perhaps even some other oil companies that would rather have history's resolution of this be to blame the negligence or worse of individuals associated with BP and the other companies, rather than, as you said, "accidents do happen,"

because if you start with accidents do happen you might say well that's why we shouldn't be drilling in such sensitive areas in the first place.

MR. SCHUELKE: That's an excellent point and I can understand why other oil companies might have that view.

MR. COHEN: Did you get any sense; have you gotten any sense…

MR. SCHUELKE: No.

MR. COHEN: That that is what happened?

MR. SCHUELKE: No. No, and the Justice Department of course is not acting as a result of that sort of motivation. But no, I've not seen or heard any indication that competing oil companies would be happy to see the fault placed on a couple of negligent individuals. So that's a troubling one for me.

MR. COHEN: Let's move to a completely new subject.

MR. SCHUELKE: All right.

MR. COHEN: The, it came to be known as the Abramoff investigation, in which you were involved. Why don't you start by describing what it was all about, and then your role?

MR. SCHUELKE: Jack Abramoff was the senior Greenberg Traurig Washington lobbyist in the firm's lobbying practice. Greenberg Traurig is a Florida firm. It's headquartered in Miami. Its lobbying practice and the leadership of that practice were actually in Tallahassee because most of their lobbying work was with the Florida legislature. And as a result, because Abramoff developed a quite substantial practice here in Washington, he was like the 800pound gorilla, who was in a position to pretty much run his practice as

he saw fit, with little effective oversight by the senior people in the group who were in Florida. Abramoff had a significant number of clients who were Native American tribes who had casino interests around the country, and he lobbied on their behalf both with respect to federal legislation, with respect to Bureau of Indian Affairs executive branch issues and with respect to assorted state legislatures. The story broke with a series of newspaper articles in Louisiana which reported that one of the Louisiana tribes, the Coushatta tribe had spent tens of millions of dollars in fees with Greenberg's group; and a number of dissident internal tribe political figures came to the view that they had wasted most of this money and got very little as a result. That prompted both congressional and justice department investigations.

MR. COHEN: This is all about 2006?

MR. SCHUELKE: 2000....no, I think it was 2004. Yeah, early in 2004. Greenberg Traurig engaged me to conduct an internal investigation so that the firm would be informed as to what transpired and would therefore be in a position to make a judgment about whether or not the firm as a firm had appropriately represented these clients, and to the extent that the firm concluded that it had not, it would be in a position to negotiate such claims as the clients might have against the firm. A further charter of mine was to cooperate on the firm's behalf with the Justice Department in its ongoing investigation. It's a very interesting and somewhat convoluted story. So let me see if I can boil it down to its essentials. Abramoff approached a

number of the tribes, pitching them for business on the following terms. I will represent you before whatever cognizant agency, whether it's the Congress or the Executive Branch, and I will do it for a flat fee of X dollars per month (and the X dollars was fairly substantial). It was in the neighborhood of a couple of million dollars a month. But, he told them, you're going to be flat wasting your money unless you also engage a firm to do grassroots work and the best in the business whom I strongly recommend is a firm called I can't remember the name they used at the moment, but it was a firm if you can call it that which was really a sole proprietorship which was run by a guy who'd been a staffer for Tom Delay when he was in the House and his business was run out of a beachfront home in Rehoboth, Delaware. And so that, and so the tribes would say well okay if you say that's what we have to do, that's what we are going to do. And the grass roots guy would then make a proposal that he would, he would perform these services for, in one case $2.75 million. In the event, he probably devoted maybe $200,000 worth of effort to this project which the tribe was paying $2.75 million for. And as ultimately became apparent, he and Abramoff had a 50/50 profit sharing relationship. So Abramoff, who had urged the tribe to hire this guy, got half of the $2.75 million, and they repeated that gambit many times over with different tribes.

MR. COHEN: So this was outside of the Greenberg firm?

MR. SCHUELKE: Oh yeah. Well some of Greenberg Traurig's resources were devoted to some of this. But, yeah, this grassroots was an independent outside operation. We, after three maybe four months into our investigation, had developed access in a searchable fashion to all of the Abramoff group's email, where what I just described to you was made abundantly clear and expressed often times in some of the most insulting terms with respect to their clients a bunch of dumb Indians, they're not going to know any better and so on. I on behalf of the firm shared the results of our investigation with the Justice Department. The Justice Department of course conducted its own sort of parallel investigation. But I think it's fair to say that our initial investigation and our review of the email traffic was the principal source of evidence for the Justice Department, which ultimately brought a case against Abramoff who also had a separate totally unrelated criminal case in Florida, and he served I think what amounted to about four years. One of the cases that received a fair amount of press attention was that of one of his younger colleagues whose name is Kevin Ring, RING. There were six or eight young lobbyists working for Abramoff who resolved cases by disposition on fairly liberal terms probation, six months of home confinement or three months of confinement. Ring went to trial twice. The first trial ended in a mistrial owing to a deadlocked jury, and he was found guilty in the second trial and was sentenced, by Ellen Huvelle actually, to some… I think it…

MR. COHEN: … of the U.S. District Court here…

MR. SCHUELKE: District of Columbia. It was either three years or three and a half years, and he is presently serving well, no wait a second. No, yeah he is. I think the Circuit affirmed his conviction. And it was very interesting to me, and I never quite understood this but the case against Ring was charged as a conspiracy to violate the federal gratuity statute because in addition to what I described about the methodology with respect to the tribal clients, it was the practice of Abramoff's group very aggressively to wine and dine members of Congress and their staff, and Abramoff owned a restaurant on Pennsylvania Avenue at the time.

MR. COHEN: What was it called?

MR. SCHUELKE: Signatures. Abramoff's group hosted fairly elaborate dinners most nights of the week, attended by members of Congress, senior members of congressional staff, and there were tickets to concerts and athletic events and so on. And so Ring was basically charged with this conspiracy to violate the gratuities statute and a series of substantive gratuities counts. What always mystified me was why they didn't charge him with garden variety fraud which seemed to me to be a far easier case for them to make and really addressed the most significant conduct; because Ring, through a contact he had, brought one of these tribal clients to Abramoff as a potential client and Abramoff did his typical pitch to that tribe hire me, pay me X but you have to hire the grassroots outfit and so on. And Ring for his efforts was paid by Abramoff and the guy who ran the grass roots operation several hundred thousand dollars as kind of a bonus for his

having brought this client in, and Ring knew very well where the money came from and he knew ultimately from his client and he knew that there were no meaningful services provided for that. But for whatever reason…

MR. COHEN: Was Ring an employee of Greenberg Traurig?

MR. SCHUELKE: He was a shareholder. That firm is a corporation and so the analog to the typical law firm partner is a shareholder in the corporation. So, yeah, he was a shareholder in the firm, and he was relatively young and aggressive and learned how to do business from Abramoff. But it's interesting that given their relative positions in the hierarchy of that operation, he ends up serving almost as much time as Abramoff did which makes very little sense to me. So that was the Abramoff affair.

MR. COHEN: Did, was the firm ever charged with misconduct?

MR. SCHUELKE: No.

MR. COHEN: Was it ever sued by the tribes in connection with all this?

MR. SCHUELKE: The firm settled claims of a number of these tribes to their satisfaction. I don't remember but I don't think that any of them actually filed suit against the firm. I think they were claims, were entertained on a formal basis and the firm settled. I may be mistaken. There may have been one or two that actually filed suit, but they were all resolved in that fashion because the firm from the very first took responsibility for Abramoff's actions.

MR. COHEN: Connecting this with our earlier discussion on the Foreign Corrupt Practices Act, I can remember Stanley Sporkin, who of course was the

almost legendary Director of the Enforcement Division of the SEC, saying "it sticks to the pipes" when you have corrupt practices. The people who are engaging in them take their cuts as well. This is sort of an example of that.

MR. SCHUELKE: It surely is. It sure is – it's a very good example of that. It was a sad story for the firm to be sure. But I think the firm acquitted itself well and did the right thing. And while theoretically the firm had exposure on a *respondeat superior* basis, the Justice Department from the very beginning until the end was of the view that the firm effectively cooperated, mostly by making me available to the Justice Department, and had acted responsibly, and the Department never expressed any interest in pursuing the firm.

MR. COHEN: New subject?

MR. SCHUELKE: All right.

MR. COHEN: Stepping back, we had listed your representation of Carolyn Huber when she was in the Clinton White House as something we were going to talk about and I somehow let us pass that without our talking about it. But why don't we go back to that and describe the situation and what you did.

MR. SCHUELKE: Carolyn Huber had worked for a long time for the Clintons starting when they were in the governor's mansion in Arkansas, and served as a personal secretary and bookkeeper for both Hillary and Bill Clinton. When he was elected president, she came with them to the White House to serve a similar role. She became a witness in the course of Ken Starr's

investigation and also in the course of the Senate Banking Committee's investigation of the so-called Whitewater matter. As you may recall, Hillary Clinton had worked as a partner in a Little Rock law firm while Bill Clinton was the governor of Arkansas, and there became a question about work that she had done while in Arkansas for which the Rose Law Firm, where she had been a partner, could not produce records. So that became known as the Rose Law Firm records issue, and this was the quite mysterious and quite publicly commented-upon gap.

MR. COHEN: They were described as billing records.

MR. SCHUELKE: They were billing records. And lo and behold, one day years later, Carolyn Huber was in her East Wing office where on the floor she had several boxes that had assorted junk in them including personal things and a couple pairs of shoes and assorted papers and what not, and she was sorting through that to clean up the mess at one point and came upon this folder of the famous missing Rose Law Firm billing records. And she testified before D'Amato's Banking Committee and in the course of a series of informal interviews with Ken Starr's staff about the provenance of these records as I just described it. She was simply a witness. She had no personal exposure. But the abiding question was whether or not her account of the discovery of these records was actually truthful or whether in some fashion, Hillary Clinton, who as this theory has it, had been sitting on these records for some time, arranged to have Carolyn discover them so

that they ultimately could be produced. The truth of the matter is anybody's guess.

MR. COHEN: How was the discovery of the records announced? I can't quite remember. Did Hillary say my staff or Carolyn Huber found these?

MR. SCHUELKE: No, no. The Clintons were represented by David Kendall of Williams & Connolly. Carolyn reported this discovery to me. I alerted Kendall, and Kendall produced them in response to the subpoena.

MR. COHEN: How did Carolyn come to you? Had you known her before?

MR. SCHUELKE: No, no.

MR. COHEN: Do you know who suggested you to her?

MR. SCHUELKE: I'm trying to recall. I think she was referred to me by Kendall at Williams & Connolly at a point earlier than this discovery of the records. I'm pretty sure that's the way that came to pass.

MR. COHEN: Why would she have needed a lawyer at an earlier point?

MR. SCHUELKE: Because there were other personal records of the Clintons which she had maintained which were the subject of a subpoena.

MR. COHEN: What's Carolyn Huber doing now?

MR. SCHUELKE: I don't know. I haven't had an occasion to speak to her in quite some time. She and her husband moved back to Arkansas, I know that. But exactly what she's doing, I think they are basically retired. Her husband had been a long time federal government employee, retired, and they moved back to Arkansas. So that's that story.

MR. COHEN: Okay, we've covered a lot of your remarkable and remarkably interesting career. Before we move on to personal stuff, is there anything else that you are thinking of at the moment that we haven't covered that…

MR. SCHUELKE: There's one case from fairly early in my private practice career which I've always found interesting and amusing which I don't believe we've discussed. I think it was 1982. So I'd been in private practice for two years basically when I was engaged to represent a fairly small engineering and mining company from Albany, Georgia, and they had been engaged in turn by a prolific tax shelter promoter from the West Coast who had conceived of a plan which he put in operation to mine placer deposits, that is the gravel in river and stream beds and banks, for gold at a time when the price of gold had spiked to like $450 an ounce. It sounds like a matter of financial insignificance today given the price of gold, but it was substantially more than gold had historically traded, making it theoretically profitable not to mine actual gold veins in mountains, as they did for years in Telluride for example, but rather to mine the gravel, sift the gravel and you know if you managed after a month's work to come up with you know 200 ounces of gold or 500 or whatever it was, it was potentially profitable.

MR. COHEN: As they presumably did down the river from Telluride in Placerville.

MR. SCHUELKE: Presumably so. The tax shelter scheme worked as follows. At the time, this is prior to the Tax Reform Act in 1986, one who invested in mining operations could realize a quadruple deduction from ordinary income

taxation for the value of the investment. So if you were a high income individual and you invested a half a million dollars in this placer mining operation, you could realize a two million dollar tax deduction. So whether you ever made a nickel from the actual produce of the mine was of no consequence. The trick to this, however, was that each investor was required both under the tax laws and under the Securities and Exchange Commission regulations to independently control and own the property which was to be mined. Now this outfit commenced these placer mining operations in two locations simultaneously. One, in the jungles of Panama and two, in the jungle of French Guiana completely inaccessible until my client built a so-called all-weather road through to the jungle and very difficult and expensive to operate. So there's no way for an individual investor who is willing to spend a half a million dollars could have dreamt about even commencing such an operation. So the tax shelter promoter, whose name will come to me in a moment, conceived of this structure that was created in an effort to comply with the applicable SEC regs whereby you take a stretch like say a mile long of this given river in Panama or French Guiana and survey it off in little squares of maybe 10,000 square feet per, sell for the investor's half a million dollars an individual sole ownership interest in this 10,000 square foot little plot so that the mining operation could sift the gravel all the way down this ten-mile stretch of the river and in theory Lou Cohen owned this 10,000 square feet, Hank Schuelke owned the adjacent one and we all independently of course hired

the same mining operator to do it and theoretically that was going to meet the…well

MR. COHEN: Sounds like old SEC orange grove case.

MR. SCHUELKE: Yes, and the same guy had earlier done a similar tax shelter promotion for film in Hollywood by selling individual frames of a film to investors.

MR. COHEN: The theory of this being that he therefore wasn't selling securities.

MR. SCHUELKE: Correct. So I mean that was sort of you know interesting enough and the SEC investigated it for several years, and my client , the mining company, was ultimately exonerated and was never charged criminally whereas the tax shelter promoter was and he's still to my knowledge serving time now 25 years later.

MR. COHEN: For violations of the securities laws or the tax laws or both?

MR. SCHUELKE: Both, and he was also tried and convicted in state court in Indiana and got 15 years there and he's serving this time back-to-back. But here's the interesting part of this to me. I made several trips both to Panama and to French Guiana. The SEC, the individual principal lawyer from the Enforcement Division whose name is Joe Goldstein, who became a good friend of mine as a result of us having met on this case, was of the view that there was no mining operation. He thought this whole thing was made up out of whole cloth. Well that wasn't true, and so first we, we being Pierce O'Donnell. I don't know if you know Pierce. Pierce had been a Supreme Court clerk, went to work for Williams & Connolly right out of his clerkship, led an associate insurrection because they were upset

about the fact that Paul Wolfe was not made a partner when he thought he should have been or they thought he should've been. That was the end of Pierce O'Donnell at Williams & Connolly. Pierce moved out to L.A. First thing he did was run for Congress. He is an amazing character and has had a very long and successful career as a litigator in Los Angeles. So we hired a professional Hollywood film company. We flew them all down to French Guiana to film the mining operation which we did. The … you know French Guiana is actually a department of the Republic of France. So you're in France when you're in French Guiana and there's lovely little capital city, Cayenne, and Air France flies in there. We flew Air France from Los Angeles on that trip I think and then it's about 20 miles north to the river which is the border between French Guiana and Suriname where there's a tiny, tiny little community whose principal historic claim to fame is that they had a guillotine and many French criminals were shipped from France to French Guiana to be executed. (Well, why they bothered to do that, I don't really know.) Then there was a road that my client's company had built through the jungle from there about 30 miles inland into the jungle, which was a quite hazardous and although they called it an all-weather road it was near impassible in any number of points. And so the company had left behind bulldozers in various spots. So if you drove in a four-wheel drive vehicle and you got stuck in the mud, there was a bulldozer there that could winch you or haul you out or push you out or whatever. There was also a small grass airstrip

at the mine, and I flew in there twice on a little single-engine Piper. But I wanted to transit the road itself so I was personally in position to you know represent what it was like. Well, Goldstein decided that he wanted to see this himself and I felt…

MR. COHEN: This is all to show that the mining operations are real?

MR. SCHUELKE: Yeah, yeah. 'Cause he, he, he basically believed that this was all bogus, that the tax shelter promoter was raising… had raised all of this money and he raised over a hundred million dollars. He claimed that he was the Roger Maris of tax shelter promoters because he had set a new record over a hundred million. And Goldstein was determined he was going to go visit and he was going to bring a mining engineer that the SEC had hired which he did. So I told him that I would be happy with the assistance of my client to make the arrangements to get him to the mine, and initially, he said, hmm, okay until he heard what the plan was. He was to go to the Grand Hotel in Paramaribo which is the capital of Suriname right across the river where at the appointed hour I would have a driver who would take him to the river whereupon he'd be handed over to a paddler in a dugout canoe who was going to take him across the river where he would be met on the other side by somebody from our company who would take him out this all-weather road to the mine site. Now, I had in fact arranged this. I had actually on one of my trips, done this myself just to check it out, and it would've worked just fine. Well, Goldstein heard about the dugout canoe and "no thank you". So somehow he made arrangements

and he got himself to Martinique and then from Martinique to Cayenne and I met him there. And then we drove up, and I wanted him to experience this road. I didn't want to take him in on the plane. That was much too easy. And so we took him to the mine. And he had his engineer with him and I have pictures of Goldstein and me standing on this barge in the middle of the river with this placer mining conveyor belt on it in this sweltering heat. You know we're in our shorts and what not and I, it's a great picture and I think he's the current custodian for many years now. I would have the picture in my office for a year or two and then I'd see him at some occasion, I'd give it to him and he'd keep it for a couple years hanging on his wall and I think he remains the current custodian. So that's the famous, as one of my partners referred to it, bowling for … mining for tax dollars cause there used to be some show bowling for dollars …

MR. COHEN: That's a great, that's a great story.

MR. SCHUELKE: And it was great fun, great fun and we did the same if… Joe didn't go to Panama but, but I made the trip to Panama also and I remember in order to get to this mine site in Panama at a point we could, you could no longer drive, and we had to hike several miles including crossing a river (small river, piranha infested so we were told) on a fallen tree. Its span was like a creek. And so you had to balance yourself and walk across this which we did. We also had, we had government, Panamanian government 'cause my client had these connections. We had a Panamanian Army helicopter which flew us as close as they could get to the mine site and back. So,

yeah that was great fun. And this guy, I'll think of his name in a minute, the tax shelter promoter one of the smartest and most creative people you'd ever meet if only his creative energies had been devoted to something legitimate. Jerry … his, his operation was paying the legal fees on behalf of my client. You know like a corporation would indemnify an individual for his legal fees. And one day, a group of us were in Panama City in connection with the trip to the mine. And at the time there were numbered bank accounts available in Panama much as they were in Switzerland. And in those days, they were impenetrable basically by U.S. authorities. So, Rogers … Jerry Rogers. So we're having a drink one night before dinner…

MR. COHEN: And that's the name of the tax shelter …

MR. SCHUELKE: Promoter.

MR. SCHUELKE: So Rogers took me aside and said to me I understand that Wayne, Wayne Fowler was my client, I understand that Wayne owes you X. You know you could open a numbered account here in Panama and I'll arrange simply to have it deposited and your partners won't even know about it.

MR. COHEN: Yes.

MR. SCHUELKE: That was Jerry Rogers. No thanks, Jerry. Great stuff.

MR. COHEN: So the accounts were impenetrable even though the United States has long had considerable influence in Panama.

MR. SCHUELKE: Oh yes, but the banking laws, the bank secrecy in Panama, as was the case until very recently in Switzerland, was pretty much impenetrable. So U.S.

tax authorities weren't going to get access to the bank account records. So that's the famous mining for tax dollars case.

MR. COHEN: I once went across the Mekong River on a raft in Laos, which is the closest I can come to a comparable adventure. Well should we talked about your family?

MR. SCHUELKE: Sure. We did that at the outset I believe talking about my …

MR. COHEN: Your birth family, yes.

MR. SCHUELKE: I was married in 1968 while I was six months or so into my four-year tenure as an Army JAG officer. I was married to a woman whose name is Ginny Traina and we had two children. My daughter Ginna (Virginia) Schuelke Neyens was born in October 1969. My son Hal who's Henry F. the Fourth, was born in '73 – turned 40 years old today as a matter of fact. Ginny and I were divorced in 1974. We have certainly while the kids were minors had a very agreeable cooperative relationship in the interest of the kids. They spent every weekend with me. She lived in Chevy Chase so it was quite convenient. I lived in Georgetown for most of that time, and we had a grand good time. I had as I may have told you, I had a friend who moved to Telluride [Colorado] in the early '80s and I was traveling back and forth to the West Coast on business quite frequently and so I would stop to visit in Telluride which is how I became introduced to Telluride. And then each Christmas for five or six years when the kids were still young, we went to Telluride for a ski holiday over the Christmas Holidays which is how the two of them got introduced to Telluride.

MR. SCHUELKE: When my daughter graduated from college at the University of Wisconsin in Madison and was contemplating graduate school, she decided she wanted to take the proverbial year off and be a ski bum. So she went to Telluride. That was 1971. She remains in Telluride, now married, has two little girls who are five and three years old and she and her husband, Mark, are doing wonderfully well. They love life in Telluride and they're never leaving the mountains. My son…

MR. COHEN: What do they do for a living?

MR. SCHUELKE: He is an electrical contractor who has a terrific business which even throughout the recession since 2008 has done reasonably well. As you undoubtedly know as a part-time resident of Telluride, the construction of mega homes has been extensive over the last 20 years, and it is pretty much unabated. And so his company does all the electrical work for these, you know, 15,000 square foot mansions that are being built up in the mountain village and…

MR. COHEN: What's the name of the company?...

MR. SCHUELKE: His name is Mark Neyens, NEYENS and the company is Pinnacle Electric. And what…

MR. COHEN: I don't have such home but I may need it.

MR. SCHUELKE: Well, he'd be he'd be happy to help. One of his clients is Jerry Seinfeld. And not only did he do all the electrical work on these two homes he built up outside of Telluride, but it's like a lifetime sinecure because Seinfeld's wife wants to change everything like every two months.

MR. COHEN: I've been through there because actually the neighbors on both sides of him are good friends of ours.

MR. SCHUELKE: Yeah, I understand it is on the market. My daughter who did, before she was married, virtually everything a young person could do in a ski town, waitress, bar tender, ski instructor, ski patrol and so on, works for Telluride Property Management Company, one of several that do property management maintenance for largely absentee homeowners because many of them are there for a couple of months a year and the homes are rented.

MR. SCHUELKE: And that's been great for her because she can, with the little children, she's able to do much of that from home. They did, until about a year ago, they lived down in Rico, and Rico is about 27 or 28 miles from Telluride. Actually, it's probably 27 or 28 miles from what they call Society Turn. And so that's a long commute particularly in winter weather conditions when Lizard Head Pass is closed and so now they're in Telluride proper. So she can take the kids to school and spend a couple of hours in the office and so on so they're doing great. My son, Hal, and his wife, Wight, a good Atlanta, Georgia girl…

MR. COHEN: …Wight!...

MR. SCHUELKE: …Wight. It's a family name, W I G H T. Sarah Wight. Her maiden name was Sarah Wight Floyd and so, of course, a lot of people who remember Pink Floyd have always referred to her as Wight Floyd. She was in Telluride for a couple of years after college, was a good friend of my daughter, Ginna. Hal, my son, went out to visit a couple of times, met

Wight and for a couple of years they had a long distance relationship. She then relocated to Atlanta. He went to college at the University of Oregon, and then they both decided to move back to Telluride. And so they moved back to Telluride and spent about three years. And then he came back East because he always wanted to pursue his lifelong interest in the culinary arts, so he got a degree from Johnson & Wales in Charleston, and they lived outside of Charleston on Sullivan's Island while he was doing that. And then he got an internship, which is a requirement of the last semester at the Grove Park Inn in Asheville, North Carolina, which is a beautiful place.

MR. COHEN: That's where they hold arts and crafts fairs.

MR. SCHUELKE: Yes, and they also have this elaborate Christmas time gingerbread house national competition. I've stayed there many times since they have lived in Asheville, and it's a very nice place. When he finished his internship, they offered him a job, he took the job, he worked as a *sous chef* for a couple of years, got very tired of that, went to work for a very nice upscale restaurant in Asheville, was a sous chef for another couple of years, had intended one day to open his own restaurant. But once they decided to raise a family, he decided no, he did not want to be at the restaurant until 2:00 o'clock in the morning every night. And so he went and got a residential real estate license and he's been selling real estate in Asheville and doing, doing well. They have two boys, Henry Frederick V and I'm doubly honored because they call him Hank, who's now – he'll be seven

in October. And his little brother, Hyde, which is another of Wight's family names. Thomas Hyde is his name and they call him Hyde and he's five. And they're both terrific kids. They're great fun. And as I told you earlier, they went out to Telluride yesterday to celebrate Hal's birthday and so all the cousins are together and they had a great old time together.

MR. COHEN: I've told you I too have a seven-year old grandson Henry.

MR. SCHUELKE: You did.

MR. SCHUELKE: After Ginny and I were divorced, I was single for ten years. I met my wife, Julie, through my partner, Larry Wechsler, actually. She had earlier been married to a guy who is also a friend of mine. His name is John McCarthy. And Wechsler and McCarthy went to GW Law School together. And McCarthy and Julie were married while they were still – while he was still in law school. So Larry had known her since they were kids in law school. And one day in 1987 sometime, Julie was making a career change and went into the commercial real estate business with the Julien Studley Company here in Washington. And she was doing a little marketing among potential law firm clients. So Larry buzzed me one morning and said I'm going to have lunch today with Julie McCarthy; do you want to join us. I said, "No no no, I'm too busy." And then I happened to be walking through the reception area of our office while she was sitting there waiting for Larry and I said, mmm I think I have time. And it was actually several months after that that we started dating. But we did and we were married in October of '88. And I had two years

earlier bought property south of Annapolis on the bay and moved from my house in Georgetown and it's two and a half acres on the water. The house was an 1876 frame farm house which I loved and actually was a quite charming little house. I told Julie when we were getting married that living on the bay was nonnegotiable for me; she lived in northern Virginia at the time. She said okay, but she always from the beginning had a plan to do something about this house because while it was charming it was an 1876 structure with no closets to speak of and she's quite the cook and the kitchen wasn't to her liking and so on. So we spent about ten years actually looking for alternatives. We looked at a lot of property on the Eastern Shore, which probably would have meant that we'd have to get a place in town as well. And you know we'd find property that I liked and a house she didn't like, or we'd find a house she liked with a property I didn't like and never actu—we made offers on a couple of them that never were consummated. And then finally, now eight years ago we decided, because we liked the current property, to build a new house on that property. And so we built a house which is to her liking. She basically designed it, working with an architect, of course, on a different site from the original house. We lived in the old house while the construction was underway and after we moved to the new house we tore the old one down and there we are.

MR. COHEN: An 1876 house and you tore it down?

MR. SCHUELKE: Yep. It was not protected by any kind of historic easements. We actually did what's called deconstruction of the house. We engaged a firm that specializes and they—and they basically take the house apart to salvage everything that can be donated to a 501(c)(3) like Habitat for Humanity. So all the windows, doors, fixtures, hardwood floors, even some timbers from the house all were donated and we had a substantial tax deduction from the donation.

MR. COHEN: Hmmmm.

MR. SCHUELKE: And the cost of the deconstruction was also tax deductible. And so by the time they finished, all that was left of this house was the foundation, a couple of chimneys. And so we had another contractor came in and leveled that and graded the area. So you would never know now that there had been a house there.

MR. COHEN: Why's the cost of the deconstruction deductible?

MR. SCHUELKE: Because that's the cost of the donation.

MR. COHEN: Okay, good. Did you, did you buy the original house because you're a sailor?

MR. SCHUELKE: I'm a power boater and a fisherman, and I had a boat which I kept down there not too far from there while I lived in Georgetown. And that was fine. But I became increasingly tired of living in the city. I lived only a block from the Georgetown University campus; 35th and N, and parking was impossible. I had the largest collection of parking tickets in history, I think. I actually had two cars for a couple of years, which I had to park on

the street. And I had this lovely carriage house with a courtyard and every Saturday and Sunday morning there'd be broken beer bottles in the courtyard because the kids toss them in there and I just got sick of it and I have always had the attraction to the water. I grew up in New Jersey and spent most of my summers at the Jersey Shore and have been boating since I was a little kid. And I had never really formulated much of a plan to do this. But one weekend my parents were down visiting and I took them out on the boat and I had never been up this particular creek before, but we were just kind of cruising around. And I went up this creek, here's this house, for sale sign on the dock, and I thought, hmmm. And I went back a week or so later, that was at the end of the summer, early fall, all excited, I was going to buy this house. And I tied up at the dock, went up to the house, very nice couple, they said no, no it's under contract. So much for that. But by that time I was convinced I wanted to do this so I engaged the real estate broker down there to look for properties. And to make a long story short I learned in the spring that their contract had fallen through, and so I bought the place, did a fair amount of renovation to it, which all went when it got torn down, of course. But Julie and I lived in that house for, yeah, ten years. Ten? No, a little more than that. Twelve, I guess, before we built the new one.

MR. COHEN: And you, to this day commute, essentially every day from there.

MR. SCHUELKE: I do, I do.

MR. COHEN: How long does that, does that take?

MR. SCHUELKE: An hour. You know, at off times you maybe you can do it in forty-five minutes, at the worst time it can take you an hour and fifteen minutes. But I came in this morning, left home about ten after nine, took an hour exactly.

MR. COHEN: But it's this side of the bridge.

MR. SCHUELKE: It's this side of the bridge. And I've been doing it so long that I'm completely inured to it, you know it really doesn't bother me.

MR. COHEN: Do you listen to books, or music?

MR. SCHUELKE: No, no. I am, I mostly listen to the news on NPR and some music, yeah. So, and for many years, you know, Julie and I would always drive separately because we wanted to have the flexibility not to have to wait for the other, you know? And we'd spend most of the time driving home on the phone, talking to one another all the way home.

MR. COHEN: So she continued to work in Washington in real estate?

MR. SCHUELKE: Yes, yes.

MR. COHEN: Does she still do that?

MR. SCHUELKE: She is mostly retired. She has one project she's working on for a big firm in town and she plans to retire completely when that's concluded. So she only comes into town now maybe once a week. So I don't have her as my chauffeur in my current crippled state. [At the time of this interview, HFS was recovering from Achilles tendon surgery.]

MR. COHEN: What, what other adventures should we talk about? You are a motorcyclist.

MR. SCHUELKE: Well, yes, my two recreational passions are boating, I have a forty foot sport fishing boat, and I've done a lot of offshore fishing, billfishing.

MR. COHEN: Say that again, bill?

MR. SCHUELKE: Billfishing, it's sailfish, marlin, and we belong to the Ocean Reef Club in Key Largo, Florida which has a spectacular marina. And for ten years Julie and I ran that boat down to Key Largo every fall and back in the spring in the fond hope that we'd have the time to spend some meaningful time down there during the winter, which never materialized. You know, we'd go down for a week and I'd have some business crisis and I had to come back. And actually that happened on most of the trips down and back as well. And for me it became somewhat tiresome because I—there wasn't much of an adventure left in it because I'd done it so many times, and I was tired of, you know, getting to Charleston and having to leave the boat for two weeks because I had to be back here or in Houston or in some place only to return a couple weeks later and make another leg of the trip. So I tired of it and we haven't done it now in three or four years, about which Julie is not happy because she loved that trip. She's a great, she's a pilot, her license is no longer current, but she has been a licensed airplane pilot. And so she's an accomplished navigator and she loves doing that on the boat as well. And she loved getting away because she would sort of pretend that she was unreachable by clients or what not, and so she really enjoyed that. But I still have the boat right at home. It's literally in my back yard and, and we do some cruising on the bay. And you could spend

your life doing that. I mean there are so many interesting places on the Chesapeake that I've yet to see. The shoreline of the Chesapeake Bay is eight thousand miles and you could spend several lifetimes exploring it, and I fish. And I particularly enjoy being able to do that without having to devote an entire weekend to it. So I could get up on a Saturday morning and decide I want to go fishing and go fishing for a couple hours and be home at noon and do something else. I also as you mentioned have a collection of motorcycles both vintage and modern. Although I'm particularly interested in the vintage bikes and I've always been a bit of a gearhead. I do my own work on them which I enjoy. It's great mental therapy. And Julie rides as well, and so we've had a number of fabulous trips, we particularly like the Rockies and the far West. And most every summer for the last five or six years we would do a ride out west. A couple of times we took our own bikes, not, we didn't ride them out there…

MR. COHEN: So I should picture you on separate bikes?

MR. SCHUELKE: Separate bikes, yes. Julie is the epitome of the independent woman. She's not riding behind.

MR. COHEN: Or in front?

MR. SCHUELKE: Or in front. Although she'd rather ride in front if I were the passenger, I suppose. So a couple of times we trucked or trailered the bikes out west. But that became sort of a waste of time. You know, it'd take you three days to drive to Salt Lake City, for example, which we did once. And then

rode for two weeks in Idaho, Montana, Wyoming, and then you're going to drive back three days. So in the last ten years or so there are good, reputable folks who rent motorcycles most every major city. So you can fly, rent a bike. So that's what we've been doing. So we've rented bikes in Salt Lake, rode through southern Utah into southwest Colorado making Telluride kind of a home base because my daughter was there. We've done that from Grand Junction. We've done it from Denver, one…

MR. COHEN: Have you ever been to Gateway, where there's the old car museum?

MR. SCHUELKE: Yes. It's just barely east of the Utah border, along the Dolores River. Fabulous ride from Telluride. I've done it many times. It's owned by the guy who was the founder of the Discovery Channel.

MR. COHEN: And it's a beautiful place. And we've stayed there, it's a beautiful hotel. Gateway.

MR. SCHUELKE: Gateway. So we've done that a number of times. One trip for example we went Denver, Leadville, Telluride, Moab, couple other stops in southern Utah, visited a couple of National Parks, Arches, for example, Sedona, and ultimately Phoenix, and turned the bikes in and flew home from Phoenix. Great trip. Another trip we did L.A. to Bend, Oregon, rented bikes in L.A., rode up the Pacific Coast Highway all the way to Bend, flew back from there.

MR. SCHUELKE: But I love riding in southwest Colorado and southern Utah. The weather in the summer, as you know, is fabulous. You rarely get any rain. It's maybe, in the high country, you know, it's seventy, maybe seventy-five

degrees and some of the desert in southern Utah can be eighty-five or ninety. But it's dry and it's pleasant. The roads are great and there is no traffic.

MR. COHEN: You ever spend any time in Grand Staircase Escalante?

MR. SCHUELKE: Yes, we have ridden…

MR. COHEN: Fabulous place.

MR. SCHUELKE: We've ridden through there. And so that's a, that's sort of what I do for, for fun. I have a brother outlaw, I call him, my first wife's brother who has been a buddy of mine since we first met in 1968. Lives in northern New Jersey. Also has a collection of vintage bikes. One of which is in my garage where it's been for five years since he bought it because I arranged the purchase because the bike was down here. And he has been meaning, of course, to get it back, but never has. So he comes every month or so, and we tinker on the bikes, and we ride, and I live five miles from pretty much undeveloped, minimally developed, rural countryside in southern Anne Arundel county. So within five miles of my home I'm out on this lovely two-lane black top country road with very little traffic, I know every bend and every road in south Anne Arundel County. And so we can go on a Saturday afternoon and ride for an hour and a half, stop and have lunch somewhere, ride an hour and a half back, and it's just great.

MR. COHEN: Terrific, good.

MR. SCHUELKE: And I'm looking forward to doing southwest Colorado again this summer, and God willing I'll be able to do that.

MR. COHEN: The cast that's currently on your leg will be gone by then.

MR. SCHUELKE: It will be gone by then, and hopefully I will have completed my therapy and I'll be good to go.

MR. COHEN: Terrific. Well, why don't we cut it off here.

MR. SCHUELKE: Well great. Well you've been very kind.

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Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, 35-36

Tax Reform Act of 1986, Pub. L. 99-514, Oct. 22, 1986, 100 Stat. 2085, 1042, 307

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Curriculum Vitae

Professional Experience

1979-present: Founding partner, Janis, Schuelke & Wechsler, Washington, D.C.

Nationally renowned practice of criminal defense representation in "white collar" cases with focus on the representation of corporations and their officers and employees in grand jury proceedings and criminal prosecutions, primarily at the federal level. As a corollary to that work, the firm often represents clients in situations involving parallel civil and administration proceedings and congressional investigations.

Since 2006, specialized in the representation of the Boards of Directors of publicly-trading companies and their constituent audit, management oversight and special litigation committees in matters involving the Foreign Corrupt Practices Act, the Food, Drug and Cosmetic Act, federal securities law as applied to public company accounting and shareholder demands for pursuit of derivative actions.

Illustrative representations:

- The Board of Directors of Halliburton, its management Oversight Committee and its Audit Committee.
- The Board of Directors of Boston Scientific Corporation and its Special Litigation/Legal Affairs Committee;
- The Audit Committee of the Board of Directors of Ingersoll Rand PLC.

Special Prosecutor appointed by the United States District Court for the District of Columbia to investigate the conduct of the U.S. Department of Justice prosecutors in *United States v. Theodore F. Stevens*, 2009-present;

Special Counsel to the District of Columbia Commission on Judicial Disabilities, 1982-present;

Counsel to the United States Senate Select Committee on Ethics, 1989-1991;

Counsel to the United States Senate Committee on Foreign Relations, 1980-1981;

General Counsel, the National Society for Autistic Children, 1980-1990.

1972-1979: Assistant United Stats Attorney and Executive Assistant United States Attorney, United States Attorney's Office, District of Columbia.

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Bar Admissions

District of Columbia Court of Appeals, 1968;
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Since Henry Schuelke's departure from the United States Attorney's Office for the District of Columbia as Executive Assistant U.S. Attorney in November 1979, Mr. Schuelke has represented scores of clients—corporations and their directors, officers and employees, members of Congress, Committees of the Congress, Executive Branch officials, and law firms—as a founding partner of the Washington, D.C. boutique firm, Janis, Schuelke & Wechsler.

Mr. Schuelke's practice has included representation of senior corporate executives in diverse criminal matters, including accounting fraud (Sundstrand Corporation, United Technologies), securities fraud (Enron), Foreign Corrupt Practices Act ("FCPA") violations (Monsanto), criminal tax (Credit Suisse), environmental crimes (Koch Industries, Alcoa), criminal antitrust (Hoffman LaRoche, Philip Holtzmann, Ingersoll Rand), and healthcare fraud (Health South). Many of these matters involved parallel SEC enforcement actions.

A significant portion of Mr. Schuelke's practice in recent years has been the representation of the boards of directors of publicly traded companies in the course of their oversight responsibilities with respect to FCPA, healthcare fraud, and accounting irregularity investigations (Halliburton, Boston Scientific, Ingersoll Rand). This representation has included the conduct of internal investigations, the supervision on behalf of the boards of settlement negotiations with the DOJ and the SEC, the provision of advice on corporate governance issues, and the investigation into and response to shareholder derivative actions and demands.

For many years, and in diverse subject areas, Mr. Schuelke has conducted internal investigations on behalf of the United States Senate Ethics Committee (then-Senator Alphonse D'Amato of New York), law firms (Greenberg Traurig—the Abramoff scandal), the United States District Court for the District of Columbia (criminal contempt investigation of the conduct of the DOJ prosecutors in *U.S. v. Senator Ted Stevens*), and has, since 1982, as counsel to the District of Columbia Commission on Judicial Disabilities and Tenure, investigated allegations of misconduct in office by judges of the District of Columbia courts.

Mr. Schuelke is recognized by *Chambers USA* as a leading white collar crime & government investigations attorney. According to *Chambers*, "market sources enthuse that *'he's an absolute joy to work with'* and consider him *'a really well-respected white-collar litigator.'*"

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Practice

Mr. Cohen's victories before the Supreme Court include such significant cases as the *City of New York v. Clinton* (the Line Item Veto case), *US Term Limits, Inc. v. Thornton* (invalidating congressional term limits), and *Cargill v. Monfort* (predatory pricing under the Clayton Act). Other Supreme Court cases in which he has participated include: *Regional Rail Reorganization Act Cases* (constitutionality of a reorganization statute); *Piper v. Chris-Craft* (interpretation of the Williams Act); *Basic v. Levinson* (materiality issues under the federal securities laws); *Carpenter v. United States* (Rule 10b-5; wire fraud); and *Norwest Bank v. Ahlers* (priorities under the Bankruptcy Code).

Mr. Cohen's court of appeals cases include arguments on behalf of Bear Stearns in *deKwiatkowski v. Bear Stearns* (2d Cir. 2002); Sears Roebuck in *Bolin v. Sears Roebuck & Co.,* 231 F.3d 970 (5th Cir. 2000); Painewebber Group in *Painewebber v. Zinsmeyer Partnership Trust,* 187 F.3d 988 (8th. Cir. 1999); First Commonwealth

Practices

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  - Business Trial Group
  - Government and Regulatory Litigation

Education

LLB, *magna cum laude*, Harvard Law School, 1966

University of Oxford, Wadham College, Henry Fellow

AB, *magna cum laude*, Harvard University, 1962

Bar Admissions

District of Columbia

United States Supreme Court

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Savings Bank in *United States v. John C. York, et al.,* 112 F.3d 1218 (D.C. Cir. 1997); General Electric in *United States ex rel Taxpayers Against Fraud v. General Electric Company* (6th Cir. 1994), and the CBS and NBC television networks in *Schurz Communications v. FCC,* 982 F.2d 1043 (7th Cir. 1992).

On the corporate side, Mr. Cohen has advised clients (including both for-profit and nonprofit firms) in connection with offerings of securities, mergers and acquisitions, purchases and sales of businesses, proxy fights, tender offers, corporate restructurings and liquidations.

Honors & Awards

- Selected by peers for inclusion in the 2005-2006, 2006, 2008, 2009, 2010, 2011, 2012, 2013 and 2014 editions of *The Best Lawyers in America*, in the areas of appellate law, commercial litigation (2006, 2008, 2009, 2010, 2011, 2012, 2013, 2014), M&A (all editions), business litigation, corporate and securities law (2005-2006, 2008, 2009, 2010, 2011, 2012, 2013, 2014)
- Selected for inclusion in the 2012 and 2013 *Washington DC Super Lawyer* lists
- Featured in an *American Lawyer* article identifying leading litigation departments (2002)
- "Highly recommended" in PLC's 2003/04 *Dispute Resolution Global Counsel Handbook* - Public Policy Award
- National Trust for Historic Preservation - Public Policy Award
- *Pro Bono* Advocacy Award, ACLU Foundation of Southern California

Recent Highlights

Mr. Cohen's Supreme Court victories include *Enron Power Marketing, Inc. v. FERC* (2002) (non-discriminate access to the electric grid), and *The Wharf (Holdings) Ltd. v. United International Holdings, Inc.* (2001) (Breach of SEC Rule 10b-5).

Professional Activities

Mr. Cohen is a past winner of the Public Policy Award of the National Trust for Historic Preservation and of the *Pro Bono* Advocacy Award of the ACLU Foundation of Southern California. He is a member of the American Law Institute and the American Academy of Appellate Lawyers. He has served as National Chair of The Harvard Law School Fund. He has taught Corporate Finance courses at Harvard University and Stanford University, and Securities Regulation courses at George Washington University.

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