

ORAL HISTORY OF WILLIAM B. SCHULTZ, ESQ.

This is the tenth in a series of interviews of William B. Schultz conducted by Stephen J. Pollak on behalf of the Oral History Project of the District of Columbia Circuit. This interview was conducted on March 25, 2022, in Washington, D.C.

Mr. Pollak: Good afternoon Bill Schultz. It's Friday, March 25, 2022 and we are in the Pollak dining room and this is interview ten of Bill Schultz's oral history. We are looking at the years after Bill left his position in the Civil Division of the United States Department of Justice where he had been a Deputy Assistant Attorney General in charge of civil appeals.

Mr. Pollak: Bill, as a valedictory to that service, how do you evaluate your experience there as you look over your life and I would like you to say something about the nature and caliber and if you will, you may want to name some of the staff and leadership of the Civil Division in the Department of Justice as you served in it at that time.

Mr. Pollak: What led you to think of leaving this great job?

Mr. Schultz: It was coming to the end of the Clinton administration and --

Mr. Pollak: That being '96 or 2000?

Mr. Schultz: This was summer of 2000. I knew there was going to be a change. I knew that even if Al Gore, the Democratic candidate, won, there would be changes throughout the government and throughout the Department. I didn't want to be hanging on, not knowing who the Attorney General would be or who my colleagues would be and of course I didn't know whether Gore would win. It seemed like the right time to leave.

I wasn't sure what I wanted to do. I had been approached by college friends and others from large law firms in D.C. and was very resistant to that, in part because I didn't want to switch sides. I knew that if I went to a large firm that they would be interested in me because of my food and drug experience and would want me to represent large pharmaceutical companies, and I had always been on the other side. I explored it somewhat, but I was very resistant.

I talked to Judge Bryant and he suggested that I go to lunch with a lawyer named Steve Pollak whom he saw as somebody who had a fabulous career in the government but also really enjoyed private practice in a firm. We had that lunch and it may be the first time we met and I know it was delightful. At some point I ran into a friend of mine from Capitol Hill named Ron Weich on the bike path in Rock Creek Park and he told me that he left the Hill to go to Zuckerman Spaeder. When he described what he was doing, it was all public interest work. He represented the ACLU, and the death penalty project, and various kinds of things that I didn't know you could do at a law firm.

Ron arranged for me to interview with some of the lawyers there. I had breakfast with Bill Taylor, Carl Kravitz, and a few others at the Tabard Inn. I had known Bill from the Public Defender Service when I worked there for a month during the summer of my first year of law school. They described a firm that was very attractive to me. They had a very active plaintiffs' product liability practice. They had an active criminal law and ethics practice, and a

whole range of different things. But they didn't do any lobbying and they didn't generally represent big companies.

Mr. Pollak: I have a number of questions. You indicated that Walter Dellinger who had been in the government as Acting Solicitor General had involvement in your decision-making. Is that right?

Mr. Schultz: This may be after I decided to go to Zuckerman Spaeder. Once I talked to Zuckerman, it was really the only place I wanted to go. The problem with it was they didn't really have any work for me. What I was interested in doing was not what they did. I had this vision that I could represent non-profit groups and then in terms of business, maybe represent generic drug companies. But they didn't have any of that kind of work.

They did offer me a job and I decided to go there. But in thinking about what I was going to do and maybe thinking about law firms, I did ask to meet with Walter Dellinger. Walter had been head of the Office of Legal Counsel in the Justice Department and then Acting Solicitor General. I had worked with him both when we were getting the tobacco regulation cleared through the White House and when he argued the tobacco case in the Fourth Circuit.

He had gone to O'Melveny & Myers, a big national law firm. I went to his office and the first thing he said is, "Well, we can't go to a conference room because the conference rooms are all full because we're helping Ford Motor Company prepare for a crisis at some hearings on Capitol Hill" that had to do, I think, with tire safety or some issue. But we went to his office and I told him

my ideas and so on and he had a great idea which was to develop an appellate practice for trial lawyers.

He said, “There are a lot of trial lawyers around the country and they win very big victories and then they have to go the courts of appeals and don’t know how to do that. You might be well-suited to do that given your background in public interest and plaintiff’s work, and then in appellate work.” I thought that was a great idea. When I went to Zuckerman Spaeder, I went with the idea of a generic drug practice and an appellate practice.

Mr. Pollak: I wanted you to look at thinking through your next steps. Did you consider other kinds of opportunities, teaching or the Hill or in-house counsel or a non-profit organization? Did those come on your screen and you turned them away or had you somehow intellectually come to a conclusion that this was a moment to do private practice? It’s right that you’d never done any private practice?

Mr. Schultz: Just one summer in law school. I thought about all those options, but I had worked on Capitol Hill and by this time Capitol Hill was a different place. The House was Republican and so that wasn’t attractive to me. I had taught but I really wanted to do litigation, to be more active than a teacher. I thought about going to a non-profit, but at that point that would have been an administrative job and I wasn’t interested in that. At various times I got asked to go back to Public Citizen to either run the litigation group or at one point to be president but for whatever reason it didn’t interest me. What I decided to look for was a private law firm where I might like it.

Mr. Pollak: Well, you seem to have found one.

Mr. Schultz: Yes, I was very fortunate.

Mr. Pollak: How big was it when you got there?

Mr. Schultz: It was probably 50-60 people. In the Washington office, there were about 30 lawyers and at that time the firm was a conglomeration of individual practices. It wasn't very cohesive. My office sat between Zuckerman's and Spaeder's offices. I went there the first day and they had no work for me, so I had to figure out what I was going to do and how I was going to get business. I went into Roger Zuckerman's office and said, "Do you have a brochure or a paper of some kind that describes the kind of work the firm does?" He said, "No, but I'll put something together for you," and he proceeded to dictate a description of some of the firm's cases and some of their accomplishments. It was the kind of firm where the senior partner would do that for a new lawyer.

It was clear that this was not a firm that had a sophisticated promotion component. Instead, each lawyer promoted him or herself. But I will say that the fact that they didn't have work for me meant I had time to spend on business development. I talked to Ron Weich, my original contact at the firm, and one of his clients was the Campaign for Tobacco-Free Kids, so early on I did quite a bit of work for them.

I worked on the legislation at FDA and the Campaign was now working on it from the outside to push Congress to give FDA jurisdiction over tobacco. It took nine or ten years for the legislation to be enacted but I worked on it the

entire time and did other work for them. Slowly I got a mixture of clients, some generic drug companies, and some other types of non-profits.

Mr. Pollak: How did you do this?

Mr. Schultz: I can describe a little bit of the early practice. Two projects early on were to advance things that I worked on at the Food and Drug Administration and on Capitol Hill. One was the work I just mentioned for the Campaign for Tobacco-Free Kids to pass the statute giving FDA jurisdiction of tobacco, and the second was upholding an FDA regulation that required that drugs be tested in children. This is the regulation that I had been in charge of when I was at FDA. I represented the American Academy of Pediatrics and the Pediatric AIDS Foundation. On that case I worked with a young associate named Amit Mehta, who is now a federal district court judge in D.C.

The regulation required drug companies to test drugs in kids. Before this rule was issued, drugs were tested in adults and if a child had the disease, there was no labeling for children and doctors are left to guess whether the drug would work and what the dose should be. The conservative American Enterprise Institute, which receives funds from the drug industry, and others sued the FDA to block the rule. During the Bush administration, FDA lost in the district court and decided not to appeal that loss.

We were following the case. After FDA decided not to appeal, we intervened to appeal on behalf of FDA. I was very surprised to find there was law that supported this. We took that case to the D.C. Circuit and meanwhile we

were lobbying on Capitol Hill to get this program codified. As we started getting some favorable decisions from the D.C. Circuit allowing us to go ahead, Hillary Clinton sponsored legislation on Capitol Hill. Ultimately the legislation passed, and the case became moot but it was a big accomplishment.

I also represented a number of public interest groups, including the Center for Science in the Public Interest, the Pew Foundation, and Trust for America's Health. We did studies for the Woodrow Wilson Center. We did some work for the American Legacy Foundation, a tobacco group formed as part of the big tobacco settlement. I did an increasing amount of work for generic drug companies, whom I represented before FDA and in court.

I also worked on a very interesting opioid case in West Virginia. My friend Steve Annand, with whom I had worked in Alexandria very early in my career, had gone to the firm Cohen Milstein Hausfeld & Toll. They were putting together a case in West Virginia against Purdue Pharma for marketing OxyContin, the powerful opioid, as nonaddictive. They were representing the State of West Virginia, and they were also looking at cases of individuals who had become addicted. This was in about 2001 or 2002, and long before the opioid crisis was recognized for what it is today. But I did quite a bit of work on that and ultimately it had a disappointing result. The state case was settled by the West Virginia Attorney General, kind of on the cheap, and various lawyers in West Virginia got a chunk of money.

In preparing the case we went to rural areas in West Virginia that had been devastated by opioids, which had been unlawfully promoted by Purdue Pharma. Ultimately, Purdue Pharma pled guilty to criminal charges and now they've filed for bankruptcy as a result of the opioid litigation.

Mr. Pollak: Where did you litigate the cases that you brought? Did you select locations that you thought were favorable to your suits?

Mr. Schultz: Most of my cases were administrative law cases and my default was to bring them in the District of Columbia. I had one very interesting case brought in Baltimore, Maryland, by GlaxoSmithKline trying to block the approval of a generic drug. I did a Fourth Circuit appellate argument for another case that lawyers in my firm had done. The West Virginia case was in federal district court in West Virginia. Well over half of the litigation was in the District of Columbia.

Litigation was only part of my work. I also worked to persuade Congress about tobacco policy or generic drug policy or drug pricing policy or trying to persuade FDA on those issues. I liked that part because it gave me a chance to participate in public policy and advocate for policies I believed in.

Mr. Pollak: To what extent were you litigating and to what extent were you lobbying and what was the nature of your lobbying effort? How many years are we talking about?

Mr. Schultz: Ten years. I imagine maybe 20% of my work was lobbying but very little of that was talking to congressional staff. Much of the time was spent preparing

materials or preparing others to testify. I was often asked to testify not for clients but on public policy issues because I had been on the Hill and knew the staff. Maybe 30% was litigation.

I spent a lot of time writing articles or making presentations before the Federal Trade Commission or Food and Drug Administration or other agencies. I spent time working with clients that were trying to get a drug approved at FDA and I was helping them prepare for an FDA meeting or helping them think through what their regulatory strategy ought to be.

Mr. Pollak: Did you have a team that you worked with at Zuckerman? Who were they and where did you find them?

Mr. Schultz: When I came to Zuckerman, no one had done FDA law and the firm had relatively little administrative law experience. I was able to get some very talented associates interested, I think, because the work was so interesting. I worked a lot with Carlos Angulo and Sasha Miller, and then I convinced Peggy Dotzel, with whom I worked in FDA's Office of Policy, to come and work part-time while her children were very young. Lisa Barclay, with whom I had worked on Capitol Hill and at FDA and then recommended for a clerkship with Judge Bryant, had joined a law firm where she was not happy. She joined Zuckerman Spaeder. Andrew Goldfarb, whom I had hired for the Tobacco Litigation Team at the Department of Justice, told me he was interested in leaving DOJ and I persuaded him to apply and the firm to hire him. Those are probably the lawyers I worked with the most. None of them were full-time and I think an advantage

being at Zuckerman Spaeder was I was able to get lawyers where I needed help, but I didn't have the pressure of having to support lawyers if I didn't have work. It gave me the ability to turn down work that I didn't want to do.

Mr. Pollak: Balancing all the demands that one has as a litigator is challenging.

Mr. Schultz: It is. One advantage I had is that most of the litigation I did was not trial work. It was more like what I did at Public Citizen. The cases raised legal issues and were reviewed on the administrative record without a trial. I occasionally took depositions but participated in only one trial the entire time I was at Zuckerman Spaeder.

Mr. Pollak: How did you develop the business? How did it come to you? What was your secret?

Mr. Schultz: Well, there are no secrets. I always used to say to my colleagues that our best method of business development was to do excellent work and let other people see it. A certain amount of it came from petitions we had filed at FDA or other types of work that got our name out there and people saw. I did a fair amount of writing and speaking, which had the same effect. I took my friends out to lunch just to keep my name out there. I never knew where the business would come from and I also never really knew how it got there. But I did learn a lesson early on, which was not to overthink the issue.

Mr. Pollak: Meaning what?

Mr. Schultz: Well, I'll tell you a story. One of my first clients was Barr Pharmaceuticals, and they had some issues before FDA and HHS.

Mr. Pollak: Bruce Downey?

Mr. Schultz: That's correct, he was the president. Around that same time early in the Bush Administration there was a very controversial decision FDA was going to have to make about RU486, known as the abortion drug. It was a pill you could take very early in pregnancy and it would induce a miscarriage. I think it had been approved during the Clinton Administration and there was a lot of pressure on the Bush Administration to change that decision. I wrote an op-ed article in *The New York Times* attacking the idea that the administration would change their decision. After I wrote it, I got concerned. I thought, "Wow, I probably made a big mistake because I don't know if Barr is going to be so happy about me attacking members of the administration." But the net result of it was Barr never said a word about it. Someone whom I had known vaguely from Capitol Hill who worked at Serono, a generic drug company, called me and said, "I read your article in *The New York Times* and it occurred to me maybe you can help us on this matter." I think my business development mostly came from those two sources. Trying to keep my name out there and trying to do good work.

Mr. Pollak: Did you work with your team on those, is that how they developed?

Mr. Schultz: Yes, typically. *The New York Times* op-ed and other articles I wrote myself. Often it would be an article that was co-authored. Peggy Dotzel and I wrote a very detailed chapter about generic drug law in a food and drug law book, which is a reference book for lawyers.

Mr. Pollak: What's become of your team?

Mr. Schultz: Sasha Miller, Carlos Angulo, and Andrew Goldfarb all became partners. Carlos was at the firm when I returned after working in the Obama Administration, but he has since left to become a high school teacher at Georgetown Day School. Sasha and Andrew have gone in different ways and are very successful at the firm. Andrew still does food and drug work. He took over the tobacco work for the Campaign for Tobacco-Free Kids while I was in the Obama Administration. We still work a lot on that and on some food and drug matters. Lisa Barclay became Chief of Staff to Peggy Hamburg when she was FDA Commissioner in the Obama Administration. She left for Boies Schiller and then went into the Biden Administration, first as the FDA Deputy General Counsel and then as the White House Deputy Covid Coordinator. Peggy Dotzel joined me at HHS to be a Deputy General Counsel and then she came back to Zuckerman as a partner when I returned. I still work very closely with her.

Mr. Pollak: Did you engage in teaching during your time at Zuckerman?

Mr. Schultz: Not in a formal way. I was occasionally asked to teach classes and I made a point to volunteer to teach at the law school at Washington University when my daughter was in college there. Once or twice a year I would go to Washington University to teach a class because I knew Rachael probably didn't want me to come just to visit her but if I was there teaching a class, she was glad to spend time with me.

Mr. Pollak: So, this was a period of time from – it's 2000 to 2010?

Mr. Schultz: Yes, 2001 to 2010. I left the Clinton Administration in December of 2000. By the time I left it was clear that Al Gore had lost the election. So once again my timing was pretty good because I had a job, and a lot of other people didn't. I had taken some time off mostly to spend with Rachael, and then started in January. I will say I was very fortunate to have been able to organize my work life in all these years to be centered around Washington. I traveled occasionally but I didn't have to do a lot of traveling out of town. This was very important because my wife Sari was a reporter at *The Washington Post*, which often entailed late hours. I was the one who was usually able to get home for dinner, even if it was a late dinner.

Mr. Pollak: When was Rachael born?

Mr. Schultz: 1991.

Mr. Pollak: I see.

Mr. Schultz: She was born when I was on Capitol Hill and then she was a little girl when I was at FDA and she would come visit and charm everybody there. She grew up while I was at FDA, DOJ, and Zuckerman Spaeder.

Mr. Pollak: Before we close out of this decade, I have two questions. One is to have you speak about your experience in private practice. How would you evaluate it? How did it differ from the experience of working in the government or for the legislature? I would like to hear something about the kind of firm you were practicing with and its leadership and how you integrated yourself into it. It's a number of different questions.

Mr. Schultz: When I was thinking about leaving the Justice Department, it was clear to me that many of my colleagues who came there from law firms were dreading the idea of going back, so I never assumed that I would like practicing in a private law firm. In fact, I truly enjoyed Zuckerman Spaeder and I enjoyed working there because of both the people and the work. I think it's an unusual law firm, where people have close relationships and really care about each other.

Like any law firm it is a business and it was kind of a shock to me initially that people were actually talking about business. But in that context, I think it's a wonderful place. Lawyers there are mostly progressive and it's important to them to use the law to do good work in addition to the practice that supports themselves and the firm financially.

The other thing I would say is that I was very fortunate to develop a practice that was meaningful to me. The generic drug area, which is the core of the business piece, seemed important because generic drugs are a big part of the answer to high drug prices. I was able to do a good dose of public interest work, some of it paid and some of it pro bono. The firm generally left me alone and didn't question what I did.

I was always appreciative that they were very supportive of the generic drug practice, which meant in some cases turning down engagements from large pharmaceutical companies because it was clear we could not do both. Having said that, it wasn't as though Zuckerman Spaeder was going to become Covington & Burling to pharmaceutical companies. The work we were offered

was local counsel work, a small amount of work, but there were often battles within the firm about that, and the leadership was very supportive of me and my practice. I never felt I was at the core of what the firm did. The core of what the firm did was criminal work, securities work, investigations, lots of trials. My practice was separate and very different, but they were very supportive of it.

Mr. Pollak: What do you say about that comparison between being a lawyer in private practice in Washington, D.C., and being a lawyer in the Department of Justice or a lawyer on the Hill?

Mr. Schultz: When people ask me to compare the two, I always say that the difference is in private practice you work on things that were not important enough for you to get to in the government. For me there is no comparison. The government jobs are wonderful. You get to work on big, important, challenging issues in much the way you do as a public interest lawyer. But in government there's a much greater opportunity to have an impact than as a public interest litigator. I'm not saying that private practice isn't interesting and rewarding, or that you can't work on important matters in private practice.

Mr. Pollak: Did you have time for your non-work life than you had had in the government or on the Hill?

Mr. Schultz: It varied. When I was on the Hill, there were slow times and very intense times. During the summer, for example, or if Congress was out of session, you could devote more time to your personal life. Most of the time I was on the Hill, at FDA, and the Department of Justice, I had a young daughter as well. Most of

my time was spent working or with my family, and I didn't have a lot of leisure time. That was true at Zuckerman Spaeder, too. I always tried to make my wife and daughter the priority but what I didn't get to do as much as I would have liked is to play tennis or get other kinds of exercise. In government I felt I was sometimes shortchanging seeing friends in a way I didn't have to at Zuckerman Spaeder.

Mr. Pollak: That concludes my preparatory work respecting this decade at Zuckerman – almost a decade. The time of George W. Bush is concluding. Did you participate in the campaign of any candidate?

Mr. Schultz: That's a great question. I was enamored with Barack Obama from the very beginning because I had read his book *Dreams from My Father*, and early on was asked to participate in his campaign. When they talked to me and I told them I was a registered lobbyist, they said that disqualified me from helping because he had made a pledge not to accept money from lobbyists and not to have anybody who had worked as a lobbyist on his campaign, so I did not work on the campaign.

Mr. Pollak: What was the moving force that brought you into the staff of the Obama Administration? Did you talk your way into identifying something or did they come to you with a proposal?

Mr. Schultz: I think it was a mixture of both. I was very interested in working in the administration if there was something appropriate. The two jobs I was interested in were Commissioner of the FDA or General Counsel of Health and Human

Services. I realized the FDA job was a long shot because I was not a medical doctor or scientist, but I had many friends who were in key places in the administration, including the White House. At HHS, initially the President nominated Tom Daschle to be the Secretary of Health and Human Services.

Mr. Pollak: And who was he and where was he? When was this in time?

Mr. Schultz: The fall of 2008 after Obama was elected. Daschle had been a Democratic senator from South Dakota and Majority Leader in the Senate. I had a number of friends who were going to be in the administration who worked with him, and he was an early supporter and confidant of President Obama. He was going to be either the President's Chief of Staff or Secretary of Health and Human Services.

The Secretary of Health and Human Services was going to be a very important job because President Obama's number one priority after dealing with the economy was national healthcare. It became clear early on that the Deputy Secretary was going to be Bill Corr, my close friend, whom I've talked about. I took Bill's place on Congressman Waxman's staff, and it was Bill who introduced Sari and me and with whom I worked very closely over many years. During the George W. Bush administration, he had been executive director for the Campaign for Tobacco-Free Kids, so a lot of the tobacco work I did at Zuckerman Spaeder was with him.

Ultimately, Senator Daschle was nominated to be Secretary of Health and Human Services and his Chief of Staff was going to be Mark Childress,

whom I also met while working for Congressman Waxman. At that time, he worked for Senator Kennedy. He went on to have a key position with Senator Daschle when he was majority leader and he was very, very close to Senator Daschle. Bill and Mark both talked to me about being General Counsel. Mark set up an interview with Senator Daschle. I interviewed with him and then he offered me the job.

Mr. Pollak: Was this before January 20th when the new President was sworn in early on?

Mr. Schultz: Yes. I was not nominated but that was the plan.

Mr. Pollak: Was the plan fulfilled?

Mr. Schultz: No, because Senator Daschle was never confirmed to be Secretary of Health and Human Services. He had a very messy confirmation situation due to some antagonism between him and Montana Senator Max Baucus, Chair of the Senate Finance Committee, one of two senate committees charged with confirming the Secretary of HHS. It turned out that Senator Daschle had been given access by a client to a chauffeured car and his South Dakota accountant hadn't known to report that on his taxes. So it was a messy confirmation situation, and his HHS nomination was withdrawn.

The President then nominated Kansas Governor Kathleen Sebelius, who was finishing up her second term. About April of 2009 she was confirmed and became Secretary of Health and Human Services.

Before then, it had been a mess. Mark Childress represented HHS at various White House meetings. There was a void and there was really no

leadership because Bill Corr, who was going to be Deputy, had not been confirmed. But this situation is not unusual at the beginning of an administration. Anyway, Kathleen Sebelius started, and Mark did not want to stay as Chief of Staff, but he stayed for a period of time to help her and Bill Corr get confirmed.

Bill set up an interview for me with Kathleen, and she made it clear that she wanted to hire me to be General Counsel. There was a problem, which is that the Obama Administration initially had an uneven position on whether a registered lobbyist was going to be able to serve in the Administration.

I should back up and say that I had been able to do a lot of work on the transition. Initially, the HHS transition team was run by Kevin Thurm, who had been Deputy Secretary and Chief of Staff of HHS in the Clinton Administration. He asked me to be on the team, as did Bill Corr and other former colleagues. At some point there was an article in *The New York Times* about how Obama had attacked lobbyists. And even though he had said in his campaign that he would have no lobbyists in his Administration, now there were lobbyists working on his transition and he was appointing registered lobbyists to positions in government. He reacted with a firm rule that he wasn't going to have any registered lobbyists in his government.

By this time, I had ceased all lobbying. As a lobbyist you are required to register so who you are working for is public. I registered as a lobbyist at times when it was not required because I didn't want to take a chance that I was

breaking a rule. I didn't want anybody to ever accuse me of violating the registration requirements, so in this context it was a little bit messy.

Even though I was no longer registered, the new administration had a general rule that you couldn't have been registered for two years. It didn't seem to matter who your clients were. It didn't matter if they were a public interest group such as the Campaign for Tobacco-Free Kids or Ford Motor Company. But when I talked to Kathleen Sebelius about this, she said, "Well, I can take care of it. I'm really not asking the President for anything so I don't think it will be a problem."

It turned out to be a big problem. There were a number of lobbyists who had gotten announced before this absolute rule was adopted. There were some lobbyists who were able to get appointed because they weren't Senate confirmed. But the General Counsel of Health and Human Services had to be confirmed by the Senate and I had registered for a significant number of organizations, mostly public interest groups and a generic drug company. Ultimately, the top White**Error! Bookmark not defined.** House staff decided that I could not be nominated until I had not been registered for two years.

Kathleen Sebelius then decided that she was going to wait, which was extraordinary, particularly after the Affordable Care Act was enacted in March 2010. They certainly needed a General Counsel. But she made the decision to wait, and she has told the story publicly many times about how the people at the White House kept sending her candidates, whom she would interview and reject.

During the wait and after the Affordable Care Act was passed, she convinced Mark Childress to come to HHS as acting General Counsel. He had a great relationship with many of the key players in the White House at that point and occupied the job for a period of time, until I was cleared. This is the same Mark Childress who had briefly been her Chief of Staff. After that he went to work with Senator Kennedy on the Affordable Care Act. When Senator Kennedy died, he worked for Connecticut Senator Christopher Dodd or whoever was the lead of that committee.

Since this was after March 2010 when the Affordable Care Act was enacted, it would have been particularly difficult to keep the job of General Counsel open. The ACA required some regulations providing healthcare money to be adopted very quickly, and after those were adopted, and my two-year waiting period had passed, Mark left HHS. He went to work at the Justice Department and ultimately back to the White House as a Deputy White House Chief Counsel and I got to work with him again on Affordable Care Act and other matters.

Mr. Pollak: The story now is that you're in the toils of being barred from the administration, having been a lobbyist. You continued at Zuckerman Spaeder?

Mr. Schultz: I did.

Mr. Pollak: And what happened?

Mr. Schultz: I continued there. I had plenty of work. The lobbying wasn't such a big part of my work anyway. I could still do everything except talk to people on Capitol

Hill. Early in the administration, for the first six months, I was an informal advisor to HHS. They would call me with their legal issues between Obama's election and inauguration. Probably for nine months, I spent a third to half of my time working for the transition team and as a volunteer for the administration. After I was disqualified from that voluntary position, Mark Childress put me in charge of managing executive orders for the Department of Health and Human Services that would be adopted in the first days of the Obama Administration.

I had a team of volunteers who drafted a whole range of executive orders. One of those we drafted was the first executive order that President Obama announced, which reversed the Bush administration's ban on stem cell research. Stem cell research was very controversial because it relied on fetal tissue and tied in with the abortion issue, and the Bush Administration had severely limited the National Institutes of Health's funding and authority in this area. One of the President's first executive orders directed the National Institutes of Health to reverse that prohibition.

Once the Administration was in place, after January 20, 2009, Bill Corr and others in the Secretary's office would frequently call me about various kinds of legal issues. Ultimately, they got enough of a legal team in place that they needed to rely on me less. They did this by hiring some of the Deputy General Counsels in advance of my getting there.

The Office of General Counsel at HHS is set up so that in addition to the General Counsel, there are political Deputy General Counsels who do not

require Senate confirmation and can be hired quickly. Typically, the General Counsel selects those after he or she arrives, but it didn't make sense to wait for all those jobs to be filled until I came, so they hired after consulting me. I was asked to make recommendations, so some of my deputies started before I did.

Mr. Pollak: The reality was that Childress came in and filled in for a while and there were other actings, but Sebelius was committed to you from the first so it was a question of running out the bar timer.

Mr. Schultz: Right.

Mr. Pollak: That was a credit to you?

Mr. Schultz: I would never have predicted it, that's for sure, that they would hold the position open, particularly after the Affordable Care Act was enacted.

Mr. Pollak: You had known her?

Mr. Schultz: No. I think she relied on Bill Corr and Mark Childress and I think there were others that she worked with that I knew very well.

Mr. Pollak: Describe what happened. You got word that time ran out on your two-year bar?

Mr. Schultz: Time ran out on my two-year bar in the fall of 2010 because I had de-registered to work on the transition. At that point under the lobbying rule, I was eligible but there still had to be White House personnel clearance and an FBI check. It's a big black frustrating box, and Mark Childress left, he said, in part because he thought that would put pressure on them to process my nomination. Two years before, they had started the FBI check and as part of the FBI check, an FBI agent comes and interviews you. I had had that interview and two years later, another

interview was scheduled, and the same agent came to interview me. She looked at me and said, “Why am I interviewing you again?”

Bill Corr and whoever at HHS did what they could to move it along. There was one unfortunate aspect to it because the Supreme Court granted certiorari in a generic drug case where I was counsel. The Court scheduled oral argument, which would have been my first time arguing in the Court since 1989 when I was at Public Citizen Litigation Group. The job did ultimately come through and I did explore the idea of waiting until the Supreme Court argument, but Bill Corr wasn’t sympathetic to that idea. They worked so hard to get it cleared saying it was an emergency, they needed me right away. My client was very understanding, and I made various arrangements and quickly closed things out and made the transition.

Mr. Pollak: Well, I knew you personally at the time, and I had some idea that you served as Acting General Counsel for a period of time.

Mr. Schultz: Yes. Since I hadn’t been confirmed by the Senate, arrangements were made so I could be appointed as a Deputy General Counsel and Acting General Counsel. In March 2011, I started at HHS as Acting General Counsel. I was not confirmed for two years.

Mr. Pollak: It took two years?

Mr. Schultz: Yes.

Mr. Pollak: Was there some hang up, or just Senate games?

Mr. Schultz: It wasn't personal. The Senate was Democratic. During that two-year period, no HHS official was confirmed, and it all related to the controversy over the Affordable Care Act, which had become a political hot potato.

I think the problem was again that Senator Baucus, who gave Senator Daschle trouble, was nervous about the confirmation and felt he had to have the ranking Republican members sign off. Senator Hatch, who was someone I had a good relationship with, at that point was in a very tense campaign to get re-elected. Senator Baucus was not willing to push for confirmation until after Senator Hatch got re-elected and cleared the hearing.

Mr. Pollak: What was the job you took and how do you describe it?

Mr. Schultz: The title is General Counsel or Acting General Counsel of the Department of Health and Human Services. The Department has seven or eight operating divisions, such as the Food and Drug Administration, the Center for Disease Control, the National Institutes of Health, and the Center for Medicare and Medicaid Services. It also has divisions that run major programs, such as the Administration for Children and Families. The General Counsel's Office has about five hundred lawyers and it's divided into Associate General Counsels and Chief Counsels. Associate General Counsels are assigned to each of these divisions. There is an Associate General Counsel for the Food and Drug Administration, for example. There are also ten regional offices and there is a Chief Counsel for each regional office.

Mr. Pollak: Those all report to the General Counsel?

Mr. Schultz: Yes. The regions report directly to the career Deputy General Counsel, and the Associates report to the General Counsel. In the General Counsel's immediate office, there was a career Deputy General Counsel, David Cade, and he had been acting for much of the time they had been waiting on me. There are also political Deputy General Counsels.

To go back in history a bit, when Jodie Bernstein, a prominent Washington lawyer, was General Counsel in the Carter Administration, there was one deputy. When Harriet Rabb in the Clinton Administration was General Counsel, there were two deputies. When I arrived, Ken Choe was the Deputy for CMS and the Affordable Care Act. He had been a young lawyer in the Clinton Administration, very junior, but afterwards he had litigated for the ACLU for ten years in New York. He came back to be Deputy for CMS and the Affordable Care Act. I had recommended him.

We needed a Deputy for FDA and I convinced David Horowitz, a lawyer I worked with at FDA, to take that job. He was Deputy for FDA and some of the public health programs, the Assistant Secretary for Health, the Centers for Disease Control and Prevention, and so on. There was another Deputy, Sally Howard, who came with Secretary Sebelius from Kansas. Very shortly after I began, she left to be the Secretary's Chief of Staff. I had her position to fill and then created another Deputy position. I hired Gia Lee and Peggy Dotzel.

In addition, the Secretary's office wanted me to hire somebody to do oversight. I interviewed a number of experienced lawyers and hired Gemma

Flamberg, who had been doing oversight for the National Institutes of Health. I always told her that I hired her because when I interviewed her, she told me she loved to read documents.

This was an absolutely fabulous team. Every single one of them was enormously talented and collegial. Gemma, who had been in the Department for all of her career, described it as the dream team. I can't imagine a better group. There was an administrative structure to deal with budget and personnel issues.

The most important aspect of the job was to represent the Secretary. That would be in matters at HHS in the Department, and very often with the White House or the Department of Justice. The office also represented all the heads of all the divisions in the Department.

And it's a massive Department. I'll give you an example. Even though I had been at FDA and had been at many meetings at the Department, I didn't really know what the Administration for Children and Families did. Early on I was briefed by the Associate General Counsels, who were in charge of each of these departments, and in some case by the heads of the department so I could begin to understand the scope of the job and what the key issues were. I was briefed about the Administration for Children and Families, which manages programs such as Head Start, fuel assistance programs, and various other social service programs. During the briefing, I asked the innocent question of "what's the budget?" of this agency that I knew nothing about. And the answer was 50 billion dollars a year. That's larger than all but a few states and many countries.

I'll tell you about another conversation that gave me information about what was at stake. Early on there was an issue about state claims for money under the Medicaid program. Medicaid is the program that provides insurance for people with low incomes, particularly pregnant women. The Medicaid program is run by the states and is paid for roughly 50/50 between the states and the federal government. It's part of CMS – the Centers for Medicare and Medicaid Services. There are some Medicaid patients who are also Medicare patients, the health insurance program generally for people 65 and older. They qualify for healthcare through Medicare, but based on their resources and needs they may qualify for Medicaid as well.

For years there had been a problem where the states were covering health insurance services that should have been covered by Medicare. It ended up costing the states about two billion dollars and there was litigation over this, but for reasons that I won't go into it wasn't successful. There was an effort in the Affordable Care Act to make good on this but that didn't happen.

The states hired a longtime Medicaid expert at the law firm of Covington & Burling, who came up with an idea that we could use to accomplish this, administratively without legislation, under Medicaid's authority to waive certain requirements. After hearing the states' legal arguments, I wanted to hear from the program, so we met with Don Berwick, head of CMS, Cindy Mann, head of the Medicaid program, Jon Blum, the head of Medicare, and various other key people. At the meeting, the head of the Medicaid program

wanted us to find a way to give the states this money because it would improve her relationship with the states. Others at the meeting express various views. Then I asked Don Berwick, the head of the whole program, what he thought. He said, with reference to the \$2 billion that it would cost Medicare, “Well, it’s not that much money.” It was then that I realized I was in a different realm, giving legal advice to a program that spent about \$2 billion each day.

In the end we ruled that the Department didn’t have the authority to give the states the money and so it never happened. If we could have found the legal authority, we would have because the programs firmly wanted to do this and because the states had paid money they shouldn’t have paid. That’s an example of what’s at stake and why this isn’t the easiest job in the world. You sometimes have to say “no” to a client when you want to say “yes.”

Mr. Pollak: It’s daunting to consider five hundred lawyers. There are many law firms that have five hundred lawyers, but they’re all broken into smaller pieces.

Mr. Schultz: This was daunting for another reason. I had very good knowledge on food and drug law, and good knowledge of administrative law, and good litigation experience and experience on Capitol Hill, so I covered a lot of areas. But I had very little knowledge of the Medicare and Medicaid programs. What I knew about the Affordable Care Act was what I was able to read while I was waiting for the job. There is a big learning curve, but the other side of it is there are just fabulous lawyers there, dedicated lawyers, who were willing to teach me.

Mr. Pollak: So, things were served up to you that were well founded and papered, and you could make decisions based on them?

Mr. Schultz: Yes, and the person in charge has to delegate. I ultimately learned to trust people who need to know which decisions to make, and which decisions have to come to me. I should mention that one other aspect of the job that was very time-consuming is the litigation. There are hundreds of cases across the country and many of them are done in the regions that I wasn't involved in.

There was also a very active Supreme Court practice when I was there, and we can talk about some of this in detail later, but the Supreme Court has 60 or 70 cases a year. There was one year when we had ten cases in the Supreme Court and in other years we always had several. The Supreme Court usually reserves the last day for its most important case of the term and there were probably three years when the case announced on the last day was one of our cases. I spent a lot of time with the Solicitor General and with the lawyers in the Solicitor General's Office on cases in the Supreme Court that were of vital interest to the Secretary.

Mr. Pollak: You managed in a way that would make it a cohesive office. How did you do that?

Mr. Schultz: Well, as you say, that's a huge, spread-out organization.

There are ten regions across the country. There had not been a permanent General Counsel since 2003 or 2004. The last General Counsel to be confirmed was Alex Azar in 2001. He then became Deputy Secretary during

George W. Bush's second term and was the Secretary of Health and Human Services in the Trump Administration.

Republican administrations I believe tend to value civil service less than Democratic administrations. Just as an example there had been a tradition of having award ceremonies when Harriet Rabb was General Counsel in the Clinton **Error! Bookmark not defined.** Administration but between the time she left and the time I got there, there had not been an award ceremony. This is a ceremony where a select number of lawyers in the General Counsel's office are designated as deserving an award because they had accomplished something very important or worked on a team that had. We set up a fairly elaborate system for awards. I think the first year half of the General Counsel's office was nominated because everybody wanted to try to reward their lawyers. The government lawyers' salaries are low compared to the private sector and there are very few opportunities to reward people financially. But this was an opportunity to award people in a way that wasn't financial.

We established a very rigorous system for selecting people for awards. If somebody who worked outside Washington received an award, we paid for them to come to Washington. An award ceremony was the one time we were allowed to use our budget to buy food and drink. We had a very nice ceremony. I think for the first one the Secretary probably spoke, but we always had someone prominent in the Department speak.

I organized monthly meetings of the Deputy General Counsels that were held in my office, and I insisted that they be in person. Associates were all around the Washington region, which meant people had to travel sometimes from Baltimore or Rockville if they wanted to attend. I also insisted that there would be no cell phones in the meetings.

I don't know if you could get away with that today. I didn't insist people come but I said if you're going to participate, you have to participate in person. There won't be anybody participating by phone. They all came for every meeting to the extent they could. I made a point to visit the ten regional offices around the country, which took several years to do. Many of them had not seen a General Counsel for a very long time.

Then I got the idea of having a speaker series, where we would have prominent officials from around the government come and speak to the Office of General Counsel lawyers. I think it was very successful. I know that people liked it. We got great speakers. We had David Tatel, for example, from the D.C. Circuit; Larry Silberman, a conservative judge from the D.C. Circuit; and Royce Lamberth, a conservative judge from the district court in D.C. but who had had a career in government and was a very dedicated public servant.

Early on I had Justice Elena Kagan from the Supreme Court. As we discussed her talk, she said, "Instead of my giving a talk, why don't you just ask me questions?" So that's what we did, and it was so successful that's what I did for subsequent speakers. It made it easier for people to accept and probably

much more interesting for the audience. We had Solicitor General Don Verrilli, Secretary of Treasury Jack Lew, and Secretary of Labor Tom Perez, who had directed the Office of Civil Rights at HHS during the Clinton Administration. We had two White House Counsels, Kathy Ruemmler and Neil Eggleston. We had two former General Counsels from the Office of General Counsel, Harriet Rabb and Jodie Bernstein, who was probably the funniest of all. We had Dr. Anthony Fauci. I don't remember the whole list, but it was a fascinating group of people that came to speak to the lawyers at the Office of General Counsel.

Mr. Pollak: How is it different from your FDA policy job?

Mr. Schultz: That's a great question. It's very different because in the FDA job my assignment was to decide what the best policy is. What new initiatives should FDA take on? What should we do about food safety? How can we make over-the-counter drugs more effective?

As General Counsel that wasn't my job. When I was at FDA, I felt that there were many lawyers that didn't understand that, and whenever I spoke to our lawyers, particularly new lawyers, I tried to explain this. Our job was to decide whether those policies were lawful. To help make them as strong as we could to protect them against a legal challenge in court or in Congress, to identify the most legally sound policy. It was to explain the risk to our clients. If the client wanted to do something that was blatantly illegal, we obviously had to say no. But if the client wanted to do something that had very serious legal

risks, where there is a legal rationale but a significant chance it would be overturned, our job was to explain that risk to the client and let the client decide.

A good government lawyer will try to find a way to do what the client wants with less legal risk. That's the challenge, but it's a very different kind of role. There's no reason a lawyer can't suggest policy nuances or suggest policies, but it's not their job to make policy.

Mr. Pollak: Who was your team when you started out, on whom did you rely, and what did it look like?

Mr. Schultz: The core of my team was the deputies. The career Deputy was David Cade, who oversaw all the regions and the office of general law, which was responsible for contract and grant issues, the Freedom of Information Act, the Advisory Committee Act, and various other issues. David Horowitz, Ken Choe, Gia Lee, and Peggy Dotzel were the political deputies, although David and Peggy technically had career status since they had previously held high level career jobs. I also hired Gemma Flamberg as the link between our office and others in the Department who were responsible for congressional oversight.

Below that were eight Associate General Counsels. They were all career except FDA. When I started, a number of lawyers at the FDA's General Counsel Division, whom I had known for years, asked to meet with me and proceeded to tell me that the person who was the FDA Chief Counsel was just very unsatisfactory, that he mistreated FDA's lawyers and that he had no interest in learning FDA law.

Mr. Pollak: They came to see you?

Mr. Schultz: They came from Rockville.

Mr. Pollak: They were complaining about the General Counsel?

Mr. Schultz: About the Chief Counsel of FDA, about their boss. And these are all people I had known for years and people that I trusted, so it became clear he had to be replaced.

Mr. Pollak: That's a hard thing to do.

Mr. Schultz: Yes, and particularly hard because it's hard to find a Chief Counsel of the FDA from the outside. Most people who know anything about FDA law work for companies and have conflicts. There were a few people I tried but I couldn't convince them. I ended up doing a great thing, which was to appoint Liz Dickinson, an FDA career attorney, who had worked for me at Public Citizen Litigation Group when she was in law school.

I recommended her to Judge Bryant. After clerking for him, I recommended her at FDA, and she had been at FDA for maybe twenty years. She's a person of very sound judgment and a very good lawyer. She had worked mostly on generic drug issues, and in the pecking order she was well below the level of the FDA deputies. But I convinced her to do this and the decision was really a joint one between me and FDA Commissioner Peggy Hamburg. When I told Peggy I wanted to get rid of the existing chief counsel, she said, "We need to have a replacement." We had Liz ready to go and it turned out to be a terrific success.

Mr. Pollak: How did you get the one in office to leave?

Mr. Schultz: We told him.

Mr. Pollak: Did he serve at the pleasure of the Commissioner?

Mr. Schultz: Yes. The Commissioner and the General Counsel. Yes, it was a hard thing to do but it was the right thing to do.

Mr. Pollak: What were the diversity numbers? Five hundred or whatever slice you wanted to change?

Mr. Schultz: We had a very good mixture of men, women, people of color. I don't know what the numbers were in the offices. My personal office was quite diverse.

I was very proud of the fact that in terms of longevity, the record of the office was very, very impressive. When we did the awards ceremony, I included something on the back that had the number of people that had been there forty years or more, thirty years or more, twenty years or more. It was a job people loved.

Mr. Pollak: The last item on your outline was the specification of your goals as General Counsel. Do you want to speak to that?

Mr. Schultz: Yes. Obviously, the number one priority of the Department was the Affordable Care Act. It was enacted in 2010 and I started in 2011. It was extremely controversial. It required numerous complicated regulations and it was clear that there were going to be many, many lawsuits about it. I preached to my staff that we had to write these regulations so we didn't lose the lawsuits because we didn't want a reputation in the courts that we were sloppy, we weren't paying

attention to detail, or we weren't paying attention to the law. Generally we were successful in that. There were of course the constitutional lawsuits about the Affordable Care Act, and I couldn't do anything about those.

One of the lawsuits that went to the Supreme Court, *King v. Burwell*, involved interpreting the statute and a treasury regulation. That was out of my hands and I think the regulation was issued before I came. There were lawsuits about the contraception mandate that went to the Supreme Court. We knew what we were getting into there. We ended up losing 5 to 4. In terms of the details in the other regulations, I don't think we lost a lawsuit. In many cases, where we were doing something controversial, the lawsuits weren't even brought. So that was number one.

Number two, I wanted to support the FDA Commissioner, particularly as to tobacco, which was a longtime interest of mine. Number three, I wanted to do whatever I could to support the staff of the Office of General Counsel and to keep the lawyers there as long as I could and make their jobs as fulfilling as possible.

Mr. Pollak: Those are worthy objectives. What do you think you're batting average was?

Mr. Schultz: I think on the Affordable Care Act it was great. We won the two big Supreme Court cases. I obviously don't take all the credit for that, but we won those, and I think in terms of the regulations, they held up very, very well. I can't give you a batting average at FDA. The tobacco program had some rough beginnings, but

it did place strong leadership there and I helped FDA through some difficult controversies.

I'm proud of what I did in terms of the OGC staff. As one small example, we started a program where staff could more easily move from division to division, where they could go for a year and then come back. I did try to give people opportunities to do other things, get other experiences, and get to know each other better. I think the monthly meetings we had and the speaker series and the award series were also good. I think they all knew that I cared about their well-being. We talked a lot about balancing family versus work.

Mr. Pollak: You were the head acting or confirmed head for how long?

Mr. Schultz: More than five years.

Mr. Pollak: That's a long tenure?

Mr. Schultz: It was a great job.