ORAL HISTORY OF WILLIAM B. SCHULTZ, ESQ.

This is the twelfth and final 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 Friday, June 17, 2022, in Washington, D.C.

Mr. Pollak: Bill welcome to this interview. Are we ready to begin or do you have anything to say as a preamble?

Mr. Schultz: Let me add something just from the last interview, and then we should start with the Affordable Care Act. Throughout my time at HHS the issue of emails and record keeping was central since during the Obama years the use of emails and texts increased significantly. This raised questions about how the Federal Records Act applied. That statute was written for paper records, but it was very clear by the time I was there that the office in charge of that Act viewed emails as records. My challenge was to get the officials at HHS, and I was particularly concerned with the political appointees, to write official emails on the HHS server. They and others had become accustomed to using Google's Gmail and personal email for both personal and work matters. Periodically at our meetings with the Secretary and all the political appointees I reminded people that they needed to use their HHS email address. If they got a business email on their personal email, they should forward it to the HHS server. I stressed that if you don't do that, the risk is that during Congressional oversight you will be asked for emails, and when it's learned that you're using your personal email for business they are going to ask for everything from your personal email server. That's not really a very satisfactory place to be.

I think it was generally successful, but I was amused at one point when Secretary Burwell, who came during the last two years of the Obama Administration and during the beginning of the controversy as Hillary Clinton's use of her personal email server for business became a huge issue, said, "Well, I thought maybe it was overkill, all the warnings about using personal email, but I now understand the wisdom in what you were saying."

Mr. Pollak: How many people whom you counseled do you think followed the course that Secretary Burwell followed?

Mr. Schultz: I think ultimately, they all did. Early on there were some that were very sloppy about this because I would get emails from their personal email and ask them to use their HHS email address.

Mr. Pollak: Bill, we are turning now to what became known as the Affordable Care Act. I want to ask you to identify the official name of that statute and then to speak generally about your role as General Counsel of HHS in establishing the program. And if there is anything more you want to say about getting the legislation adopted by the Congress which you touched on you should include that. I understand that you will be initially touching high points and expecting me to have follow up questions as needed.

Mr. Schultz: The full name was the Patient Protection and Affordable Care Act. I don't have anything more to say about the legislation, I wasn't there for that. HHS was involved and my Deputy Ken Choe was very involved. I gave advice from the outside on legal issues, but the effort was largely led by the White House. After

the act was passed, they turned the principal responsibility for implementing it over to the Department while staying very interested, very involved, and often very helpful.

The General Counsel's office had two basic roles. One was to provide legal advice in issuing regulations and the other was to participate in the litigation challenging the Affordable Care Act. The statute, as you can imagine, required a complex series of regulations because essentially it was insurance reform. The Department very quickly had to issue regulations that involved a lot of decisions about what the statute allowed. We were constantly making legal decisions and there was no case law to rely on in interpreting the statute. There was obviously case law on administrative procedure that was critical to the entire effort in interpreting the statute, and we had to think about both legal challenges in the courts and the Congressional reaction.

One example of a controversial issue we had to address was the ACA provision on contraceptive services. Under the new law, almost all insurance plans, whether they are covered by the act or not, had to provide contraception coverage and related services, but not abortion coverage.

There were a number of very serious issues about how those revisions would apply to religious employers and other employers who had religious objections, and there was a real division within the Administration, within the White House, about this. At times, it seemed as though the division was between the Catholic men, who were sympathetic to the religious position of the

church and businesses, and the women who were leaders in these various positions and favored provisions designed make contraceptive services available, and so we had a lot of compromises to make in the administration. There were probably 50 lawsuits brought up around the county challenging these provisions that ultimately went to the Supreme Court, which issued a 5-4 decision against our interpretation.

Another tricky issue was coverage for members of Congress. The statute was written to move members of Congress from their government-sponsored healthcare plans to plans under the Affordable Care Act. Interestingly, congressional staff, I believe it was the Senate Finance Committee staff, included a provision exempting staff so staff would stay on the more favorable government healthcare plan. But the Senators and representatives had to go to the exchanges established under the statute.

As you can imagine many were very upset and they wanted a way around this. Fortunately, the issue of whether the statute could be interpreted to preserve members' health insurance didn't come to HHS. It went to the Office of Personnel Management, which had jurisdiction over this particular issue. OPM managed to find a way for members of Congress to be covered by the government healthcare plan, and it was a decision that wasn't challenged in court because no one was complaining.

Another difficult issue had to do with the availability of cost sharing under the Affordable Care Act.

The Affordable Care Act had provisions where if you bought insurance from the exchange, for people who qualified on the basis of income there were premium subsidies and cost sharing subsidies to assist with paying co-pays. Unfortunately, there was a very serious question about whether there had been a congressional appropriation for that provision and it was one that the insurance companies had not focused on. They had all signed up and it was clear under the statute that the insurance companies would have to provide the cost-sharing, whether the government paid them or not.

Running up to the launch of the ACA, this was an issue that could have tremendous impact on the participation of the insurance companies in the program. This was more within the jurisdiction of the Treasury Department than HHS, but it was a wrenching process to work out that involved multiple meetings convened by Dennis McDonough, the President's Chief of Staff, Secretary of Treasury Jack Lew, Secretary of HHS Kathleen Sebelius, in some cases Attorney General Eric Holder, Solicitor General Don Verrilli, General Counsel of the Treasury Chris Mead, and myself. It took three or four meetings to get to a resolution, an agreement. But ultimately Jack Lew, over the objection of his General Counsel, signed off on making this money available, which was a huge relief to everybody.

Later, the decision was challenged, and we lost in the District Court. When the Trump Administration came in, they didn't appeal the loss. But the

cost sharing issue was not a barrier to the launch of the ACA which could have been devastating.

Mr. Pollak: Who chaired these meetings on this topic?

Mr. Schultz: Chief of Staff Dennis McDonough. His job was to get the issue resolved in a way that would allow the subsidies. He was successful and very, very skilled.

There were many other issues. They didn't all come to me, but I think the staff was very good at identifying the ones I ought to be involved in deciding. It was a huge number.

Mr. Pollak How did you inform yourself? Would you have meetings and a group of you go, or what were the mechanics?

Mr. Schultz: Typically, we would sit at the conference table in my office with Ken Choe, my Deputy for CMS and the Affordable Care Act, and various other people, sometimes a large group. My goal is always to reach an agreement. Sometimes I had one view and I would spend time to see if I convinced my staff or they could convince me. I think we usually ended up agreeing, or at least with everybody feeling comfortable with the decision.

Mr. Pollak: You and your staff were interacting at the time with people outside your office.

Mr. Schultz: No, initially we were formulating the position of the Office of General Counsel. Then we would communicate that to the program and in some cases, we would communicate that to the White House if they were interested. Sometimes they were not happy with what we were deciding, and they would push back. We would have meetings with them and explain our position. I occasionally

changed their mind, but not too often. They understood that we had the final say.

If Secretary Sebelius was interested in the issue, I would explain it to her. I should mention that technically the Secretary was the final decision-maker, so she could overrule the General Counsel on a legal decision if she disagreed. But that never happened in my tenure. The White House, on the other hand, had a lot of very bright lawyers. Many of them really didn't know this area. But the White House never wanted to be out front, so they never wanted to own the decision. They always wanted us to be accountable for any legal decision.

Mr. Pollak: Was that a good thing?

Mr. Schultz: Yes, I think so. I think it was because we tried to adhere to the law. Consistent with what is my philosophy, that our job was to figure out what the law was, what the best reading was, what were defensible readings, and what were the risks of going through those readings and explaining that to the client and making a recommendation. That's the way we always tried to do it. In many cases the client might have wanted to do something, and maybe there were a lot of legal risks, but we could identify a different way to accomplish the same result. And to me that's the best lawyering that a government lawyer or institutional lawyer can provide.

Mr. Pollak: Tell us your view and high points of the litigation that ensued over the Affordable Care Act, over the regs that were issued, and your role and how it came out.

Mr. Schultz: I should say up front, if I haven't mentioned it, that I felt very strongly that we should in general be conservative in our interpretations because we didn't want to get a reputation with the courts of playing fast and loose with the statute. As I mentioned, we ultimately lost the contraceptive cases 5-4 in the Supreme Court, but I believe as to other issues we were very, very successful.

On one issue, we adopted an interpretation that made some of my friends in the civil rights community unhappy. There was a civil rights provision in the Affordable Care Act, section 1557, that everyone agreed was very poorly drafted. It was a single paragraph put in the Senate bill at the last minute as a placeholder. That paragraph referred to several other statutes and the assumption was that it would get worked out in the House bill and in conference. As I've mentioned, because of the Massachusetts Senate election that occurred after the Senate bill was passed, there were only 59 Democratic senators left, and because of the filibuster, a revised bill could not pass in the Senate. So the original bill that the Senate passed before it lost its 60-vote majority had to be passed by the House, which included the poorly drafted placeholder civil rights provision, and that is the version of the ACA that the President signed. As a result, the civil rights community knew exactly what was intended, but unfortunately that differed from what was written on paper.

Mr. Pollak: And what was intended in the original?

Mr. Schultz: I think it's too complicated to get into, but it had to do with civil rights protections with regard to the provision of healthcare plans and non-

discrimination plans, and it carried out in a whole lot of areas. There were a lot of difficult conversations, but I think everybody respected where we were, and sometimes we found a way to go further than where we started.

Mr. Pollak: You didn't tell what happened in the litigation over that poorly drafted civil rights provision. Was it struck down and HHS didn't appeal?

Mr. Schultz: No. There are many aspects of it but there was one issue about how it applied to transgender patients that I think was struck down during the Trump Administration. None of it was struck down when I was there and I think most of our interpretations survived.

Mr. Pollak: What about other litigations?

Mr. Schultz: The big case was *NFIB v. Sebelius*,[21] which was the culmination of a number of early challenges to the Affordable Care Act based on the Commerce Clause. Every piece of legislation that Congress enacts must be tied to a provision in the Constitution. If it's a tax bill, there's a taxing clause in the Constitution. If it's a civil rights bill, it may be based on the Fourteenth Amendment. But most regulatory legislation and even some civil rights legislation is based on the Commerce Clause – the ability of Congress to regulate commerce between the states. This was the Constitutional basis for the Affordable Care Act.

After the statute was enacted, there were half a dozen or more court challenges across the country arguing that Congress could not force people to buy health insurance. There was no question that Congress can regulate

[21] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

insurance and that's clearly commerce, but for the Affordable Care Act to work there had to be a strong incentive for healthy people to buy insurance in order to create a larger pool of people paying premiums and allocate the risk and costs among a greater number of people. Without that incentive only sick people would buy insurance and healthy people would wait until they became sick, increasing the cost of coverage overall. The Affordable Care Act guaranteed that everybody could get insurance, regardless of employment or health status. It took away the insurance companies' ability to look at how sick somebody was and evaluate health in pricing an individual's insurance. The argument opposing the ACA penalty was that the Commerce Clause did not support the penalty assessed when someone didn't purchase insurance.

Most scholars and other experts who are familiar with this kind of litigation thought these cases were very weak and had little chance of success. But when we began receiving decisions from the courts of appeals, we realized we had a more serious problem than we thought. The appellate courts were split. We lost in the Fifth Circuit, and we won in the D. C. Circuit. The Fourth Circuit found a way not to decide the case. I went to a number of these arguments and I was very involved in helping frame the arguments in courts. Ultimately the case went to the Supreme Court and again the experts were all predicting we would win easily.

Mr. Pollak: What was the style of the case?

Mr. Schultz: *NFIB v. Sebelius*. This was such a big case that the Supreme Court divided the oral argument into four separate sessions. Typically, an argument in the Supreme Court is an hour, and in this case they divided it into four arguments, an hour each, over two days.

Mr. Pollak: Who argued?

Mr. Schultz: Don Verrilli argued the main parts of the case. I think Don argued the jurisdictional issue on the first day; the key Commerce Clause issue on the second day; and an issue about severability the fourth day. The severability issue was whether, if part of the statute was determined to be unconstitutional, the entire statute would fail, or just the unconstitutional portion. Ed Kneedler, a Deputy Solicitor General, argued the Medicaid issue on day three. Paul Clement argued for NFIB and I think he did every argument.

I went to the argument with Secretary Sebelius. We were able to drive into the parking lot of the Supreme Court and go up an elevator and I ended up sitting between her and Attorney General Eric Holder. Tickets for the argument were very precious and it was full of members of the House and Senate, people from the administrations and so on. We went each day and saw the entire argument.

The day jurisdiction was argued, the Court wasn't very interested, so it seemed clear they were going to decide merits. When it got to the key argument on the mandate, it was clear we had some problems. Don Verrilli paused at the beginning of the argument; he may have gotten something caught in his throat,

every oral advocate's nightmare. But once he got going, he did well. The problem was that too many of the Justices seemed skeptical.

The reviews of the argument were devastating. After the argument, Jeffrey Toobin, a CNN commentator, ran out of the courtroom, ran to his network, got on camera, and described Don's argument as a "train wreck." Kathleen and I went back to the Department after the last argument and everybody had heard how discouraging it was. We had a meeting of hundreds of people from the Department that were interested, and she gave her impressions. Then I told a story intended to convey some hope.

Years before I had written an amicus brief in the Supreme Court in *Motor Vehicle Manufacturers Association v. State Farm*,[22] a challenge to the Reagan Administration's decision to revoke the airbag rule that had been issued by the Carter Administration. The rule requires that over a period of time cars be equipped with airbags.

The automobile insurance industry, which likes airbags because airbags saved them money by saving lives, challenged the administration's decision, won at the D.C. Circuit, and then the Supreme Court accepted the case for review.

I attended the argument and came out of the argument convinced that the insurance companies, whom we had supported, would lose 9-0. It didn't seem a single Justice was interested in overturning this decision by the Reagan

[22] *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29 (1983).

Administration, which would have required the Supreme Court to find that the decision to rescind the airbag rule was arbitrary and capricious. In those days, it was very rare for a court to invalidate an agency decision on those grounds.

As I told the assembled group at HHS, when the decision came out months later it was 9-0 against the Reagan Administration. Exactly the opposite of what I had thought, and other people who saw the argument thought the same thing. Years later, when I was in the Justice Department, I talked about the case with a friend of mine with whom I was working and who had clerked on the Supreme Court at the time of the *State Farm* decision. I told him the story and I said, "I was just always baffled at what happened there." And he said, "Well, you were right." After each argument session, the Justices have a conference and go over each case and take an initial vote. He said the initial vote on *State Farm* was 9-0 in favor of the Reagan Administration and the case was assigned to Justice White, who was going to write an opinion upholding the Reagan Administration's decision.

Justice White started writing the opinion and reading the record, and he became convinced that the rule was arbitrary and capricious. He wrote the opinion with that holding, circulated it, and every other Justice signed onto it. That's how the case went from 9-0 in one direction to 9-0 in the other. I told this story in our meeting to say that you never know what's going to happen after an argument. Even if what happens at the argument is an indication of where the

Justices were at that time, they can always change their minds, and sometimes they do.

In fact, that appears to be what happened in our case. We had three or four months of anxiety and I spent a lot of time with my friend Mark Childress, who was working at the White House preparing for what we would do if we lost and what kind of measures President Obama could take to minimize the damage. There was, of course, the possibility that we would lose the constitutional argument and lose on severability, in which case the entire statute would fall. There were many permutations, and we spent a lot of time working on them, what were we going to do if we lost, and this was all happening the summer before the 2012 presidential election.

It was believed that this decision would have a big impact on whether President Obama won a second term. I'm sure Don Verrilli was anxious because he was going to be blamed for the loss.

The announcement of the decision was also dramatic. Usually, the public has no information on when a Supreme Court decision is going to come out. But the Court traditionally saves the biggest cases' decisions for the end of the term, and it usually saves the biggest case for the last day. They do tell you when the last day will occur, and often they will decide in every case except for the biggest case before the last day. So, we knew what day this decision was going to be released.

When the Court convened at 10 a.m., a group of us gathered in my office. Deputy Secretary Bill Corr was there, as were my deputies, other HHS lawyers, and various other officials from the Department. Chief Justice John Roberts began reading his summary of the decision. The press was at the Court outside the courtroom. At some point the clerk's office releases the decision, the press runs and gets the opinion, and then the reporters rush through the decision and compete to be the first to announce the decision to the public.

Also relevant is the website SCOTUS Blog that reports on everything the Supreme Court does. We knew they would be one of the first to report on this decision and in fact they purchased extra computer capacity because they knew their traffic would be extremely heavy that day. We knew that CNN and other TV outlets would report on it.

We had a lawyer from HHS at the court in a side office the Solicitor General has so she could hear the Justices' summary of the case and report to us by email what was being said in the courtroom.

I made the decision that in my office we were not going to watch TV because I had seen the experience in the *Bush v. Gore* presidential election when the Supreme Court case decided that George Bush was the President over Al Gore. When that decision came out, the TV reporters read it too quickly, and they reported that Gore had won the case. Only five minutes or so later, they had to correct themselves to say Bush won. So, I said to those gathered in my

office that we're not going to watch TV. We'll watch the SCOTUS Blog and look at what our colleague is saying.

As it turned out, Chief Justice Roberts, who wrote the majority opinion, read the summary so that it was necessary to wait to hear the actual decision. He started with jurisdiction. He said the Court had jurisdiction, and then he got to the issue of the mandate. He first talked about the Commerce Clause and said that the Commerce Clause could not support upholding the mandate, rejecting the government's main argument that the ACA was constitutional.

At that point, CNN reported the President had lost the case. I later learned that during all this President Obama was leaving a meeting, and as he walked down the hall, he walked by a TV and saw the report that he had lost the case. He then went to his office, I suppose, to grieve, and to begin to think about what's next.

We were oblivious to that report and we were watching the SCOTUS Blog, which had by this point gotten the opinion. Because they were concerned about making a mistake, they had adopted an arrangement where they had two separate lawyers reading the opinion, and they were not going to report anything until both lawyers agreed on what it said. After Chief Justice Roberts got through the Commerce Clause, there was a second argument that this mandate could be upheld under the taxing power of the Constitution. He found that the penalty was really a tax, which made sense since it was a penalty that people identified on their tax forms and paid with their taxes. It is an argument the government made that one or two judges in the lower courts accepted. It had

been seen as a difficult argument because the ACA's legislative history said over and over this is not a tax. Taxes are very unpopular, and it was said not to be a tax. But Justice Roberts decided it qualified as a tax, so he upheld the statute on that basis.

This was a real vindication of Don Verrilli, who spent ten minutes of his oral argument arguing the tax issues, something he was roundly criticized for by Jeffrey Toobin and other commentators, but a decision that turned out to be absolutely right. It was a great victory.

There was another aspect of the decision that was complicated. The Affordable Care Act vastly expanded Medicaid beyond single mothers and extremely poor people so that anyone earning under 133% of the poverty level was eligible for Medicaid and 90-100% of that was paid for by the federal government. This was a vast expansion of the program. Chief Justice Roberts held that this was a violation of a different provision of the Constitution. Instead of striking down the provision, the Court ruled that Medicaid could not be expanded unless the individual state agreed. This was certainly a serious blow. I think today almost 40 states have finally decided to accept Medicaid expansion, but there are still states like Florida and Texas that have millions of people without health insurance because of the decision.

Mr. Pollak: Wasn't there follow-on major litigation on the constitutionality or legality of the Affordable Care Act or the regs that was just as contentious?

Mr. Schultz: There was a second case that also went to the Supreme Court called *King v. Burwell*.[23] This was a case about the statute. The statute set up something called an exchange, which is where people who are eligible for Medicaid can buy their insurance under the Affordable Care Act, and it is also where they could get subsidies. If you earn under four times the poverty level, you would get a subsidy in the form of a tax credit. But the statute referred to the subsidies as going through an exchange established by a state.

This case argued that the subsidy could only be given in connection with insurance purchased at state exchanges. Most of the exchanges, it turned out, were set up by the federal government. Congress felt that most states would want to have control, but in the end the states didn't. The argument was that only those people who obtained their insurance through a state-based marketplace were eligible for the subsidies or tax credits. This would be a serious blow to the availability of subsidies since most people receiving them purchased their insurance on the federal exchange.

That case also went to the Supreme Court and given the previous vote of 5-4, we were quite nervous about it. In the end we prevailed 6-3, the different being that Justice Kennedy, who voted against us in the Commerce Clause case, *NFIB*, voted in our favor in *King v. Burwell*. We escaped.

Before the decision, I had spent a lot of time trying to figure out how we could have managed if we lost the case. This would have meant that subsidies

[23] 576 U.S. 473 (2015).

could only be given by the state exchanges, and at that time there were only about ten. There were many, many meetings with the lawyers in the White House, with the leaders in CMS trying to figure out whether we could quickly set up these state exchanges, and in particular whether we could do them even if the states didn't want them. There was tremendous tension between the goals of the lawyers, which were to survive legal challenges, and the goals of the policy people, which were to get these exchanges set up as quickly as possible so people could start getting subsidies. We struggled through that and did the best we could. Fortunately, we never had to use that plan.

Mr. Pollak: What was your role generally in the cases?

Mr. Schultz: We reviewed all the briefs, and sometimes had significant comments on them. We were involved in the major policy decisions that had been made in the briefs, such as to what extent do you make the argument about the tax clause.

For example, in crafting the arguments about the severability of the penalty, there were critical decisions about what provisions were so intertwined with the penalty that they would have to fall if the penalty were declared unconstitutional. As I said there were four arguments in the Supreme Court in the first case, and that meant there were eight moot courts, so I was very involved in all of those. The lead in the Supreme Court cases as always is the Solicitor General's Office, but we worked very closely with them.

Mr. Pollak: Did you personally write some of those briefs?

Mr. Schultz: Not the first drafts but I was very involved in editing the briefs.

Mr. Pollak: Let's move to the launch of the implementation of the ACA, which you have identified as October 1, 2013.

Mr. Schultz: After we won the key Supreme Court case, we still had to launch and manage the program. The Affordable Care Act had become a very controversial program and was disliked by large numbers of people. By the time we were ready to launch, the White House communications staff was very reluctant about ever having the President talk about it. But HHS wanted to get the word out so people would know about the availability of tax credits and health insurance. As it turned out, once this issue got to the President, he was in favor of doing whatever he could to tell people that October 1, 2013, was going to be a very important day when the Affordable Care Act launched.

The government's budget authorization expired on that date, too, and the government would have to be mostly shut down unless Congress passed a new appropriation. Congress did not do that because the Republicans in the House who opposed the Affordable Care Act wanted to use the budget as a way of preventing the Administration from launching the program. On one side there was a determination to launch it on October 1, and on the other side there was a determination to block it.

The Administration stood its ground, and the program was successfully launched on October 1. On that day, I came to my office but there were very few people there because when there's a government shutdown, only those designated as 'essential government employees' can come to work. One of the

General Counsel's responsibilities was to decide who in this huge Department was essential and who wasn't. We had been very occupied with those kinds of decisions running up to October 1.

October 1 was a quiet day, and I sat at my desk and opened my computer. I tried to go on the website for the exchange to see if I could go through the steps to buy insurance. I had health insurance, but I just wanted to see how this was working. I opened the website and went to the D.C. exchange and started the process for purchasing insurance, but everything went blank. I couldn't even get into the D.C. website.

I called Bill Corr, who was the Deputy Secretary of HHS and a close friend, and said, "I think there's a problem because I can't get into the website." And he said, "Well, we're working on it. It's something temporary." But as it turned out, the launch of the Affordable Care Act website was a disaster. President Obama recently, in a speech, described it as the low point of his presidency.

It couldn't have gone worse. This went on for a couple of months and I remember being in airports during that time and I would look up at a TV screen in the airport and the only thing I saw were stories about the catastrophic launch of the Affordable Care Act. There were many efforts to try to figure out what happened and why this happened, and in hindsight it was both understandable and avoidable. We were clueless at the time, but some of the reviews later

showed that many key elements of the site were unfinished and just not ready to be launched on October 1.

The other thing I'll mention is that the Affordable Care Act was modeled after a healthcare program that had been adopted in Massachusetts when Mitt Romney was governor. That program had been seen as very successful, but it had a similarly difficult launch. There was one key difference, which is in Massachusetts relatively few people tried to sign up. There were months to sign up and it didn't get the same notoriety. I don't know if we were even aware of the problems in Massachusetts when we launched our program. In our case, the President of the United States had been publicly encouraging people to go on the website and something like a million people tried to sign on the first day. That crush of traffic was a factor in crashing it but there were also very avoidable problems.

It's hard to know what would have happened if the Secretary and the President and other key players had known how unfinished the website really was and decided not to launch on October 1. It's unclear as to what would have happened or what Congress would have done or what we would have been able to do. Ultimately, the White House sent Jeff Zients, who is now well-known as the coordinator for the Biden coronavirus program, because he had a lot of experience in management. He and a team of computer geniuses, who volunteered to help, were detailed to the Department.

The first question Jeff and his team had to answer was could the website be fixed or did we have to start over. He determined that it was fixable, and early on the administration announced that it was going to be fixed by the end of November, which took some pressure off. And in fact, by the end of November it was operational. There were still improvements to be made, but it was operational. Under the program, during the first year people had until April 1, 2014, to sign up, six months in. In the end, more than eight million people signed up for insurance, a little bit more than was projected. I'm not sure we lost a lot by the October disaster in terms of signups, but we lost a lot in terms of the Department's credibility and the President's credibility.

Mr. Pollak: You say there were not consequences?

Mr. Schultz: In terms of people signing up, I don't think there were. It had been projected by the Congressional Budget Office that eight million people would sign up. I think we thought that was optimistic, but in fact about eight and a half million people signed up. I don't know that people were deprived of insurance because of this. The insurance wasn't to become effective until January 1, 2014, but it was a disaster.

Mr. Pollak: What was the follow-up?

Mr. Schultz: During this time, between the crash on October 1 and the closing of the exchange for that year in April, there were regular meetings at the White House. The President personally held meetings every two to three weeks asking for detailed reports on progress; detailed reports on the numbers. They were led

initially by Chris Jennings, but he left pretty quickly. Chris was replaced by Phil Schiliro, who had been Congressman Waxman's Chief of Staff when I worked on the Hill and then was President Obama's legislative chief for the first two years of the Administration. But the President was very engaged in these meetings. He had lots of questions. The White House was determined that there would be no surprises after the big surprise on October 1.

Mr. Pollak: Tell us when and what influence it had on your experience as General Counsel of HHS when Secretary Sebelius left the Department.

Mr. Schultz: In April 2014, Kathleen Sebelius resigned as Secretary and was replaced by Sylvia Burwell, who had been the director of Office of Management and Budget and was someone who had the confidence of the White House. I had been through other transitions at FDA when David Kessler left, and knew that in government, transitions can be very anxiety-producing for many of the people there. The main thing I did was to talk to my deputies and other people, to warn them and tell them it's something to get through. There's a lot uncertainty.

I was very involved in preparing Sylvia Burwell for her confirmation hearings, so I got to know her a little bit through that. My recollection is that she was confirmed easily in June 2014.

Shortly after she began, in a meeting with her, I said, "Look, you get to pick your own General Counsel and I understand that needs to be a close relationship. It's your choice." She said she appreciated that and at some point

later she told me that she wanted me to stay. We always had a good working relationship.

She had a very different style and very different background from Kathleen Sebelius. She did not have a political background. She did not have much of a background dealing with the press, and she hadn't ever managed such a large organization; of course, few people have. She was very bright, very hard working, very prepared for everything she did. Very responsive to Congress.

Mr. Pollak: Were there differences from Secretary Sebelius?

Mr. Schultz: She managed in a very different way. She was preoccupied with reserving enough time so she could prepare, which left less time to meet with the leadership in the Department. I always felt that I had access to her when I needed it but she was less extroverted and more worried about her own preparation and her own reading, and had less of an understanding of the importance of the political side of things and media side of things. She had a very good relationship with the White House. She replaced a lot of people in the senior leadership of the Department.

Mr. Pollak: Did she have a family?

Mr. Schultz: Yes. She had a husband and two young children, but her husband stayed at home.

Mr. Pollak: Before she became OMB director, what was her line of employment? What was her last position?

Mr. Schultz: Prior to entering the Obama Administration, she had been in charge of charity programs for the Walmart Foundation. She previously worked at the Gates Foundation, in the Clinton White House, and for McKinsey & Company. She came from a small town in West Virginia, went to Harvard, was a Rhodes Scholar. She was a person who had excelled at everything she had ever done.

Mr. Pollak: Thank you. So, you said she replaced a lot of people?

Mr. Schultz: Yes.

Mr. Pollak: How did she accomplish that and when, and what was your role?

Mr. Schultz: I had no role in it. She didn't touch my office. She brought in two people whom she had known for a long time and I had known for a long time. One was Kevin Thurm, who had been the Deputy Secretary in the Clinton Administration and who I worked very closely with there, and so it was a delight to have him back. He was a senior counselor and he's just first rate in every way. He was only there for a year, but it was a total plus to work with him again.

The other was Leslie Dach, whom I had known early in our careers. He had been at the Environmental Defense Fund. He then went on to a career in consulting and public relations and ended up at Walmart, and Sylvia worked for him at Walmart. He was brought in, really, to oversee press and outward-facing matters. I think Kevin Thurm was brought in to do some of the management.

It was very uncomfortable for Bill Corr, who ultimately left. She then appointed a new Deputy Secretary, Mary Wakefield, who never got confirmed. Kevin did the policy piece and Leslie did the outward facing piece. Sylvia

replaced the Chief of Staff. She replaced some of the counselors. Ultimately, the person in charge of press left. A lot of changes, kind of what you'd expect, nevertheless producing the anxiety and uncertainty these kinds of transitions always engender.

Mr. Pollak: Did you consider leaving?

Mr. Schultz: No, I wanted to stay to finish up what we had started and support the staff, support my deputies. All but one of them stayed to the very end of the term. It was remarkable, really. They all came with me or before me and with one exception stayed all the way through, even past the time I left.

Mr. Pollak: When did you leave your position as General Counsel?

Mr. Schultz: June of 2016. I told Secretary Burwell several months before, and I recommended that my Deputy, Peggy Dotzel, be named Acting General Counsel, which Secretary Burwell agreed with. Ken Choe had left, and we brought in another Deputy, Kate Heinzelman, who had been at the White House Counsel's Office and who was terrific.

Mr. Pollak: So, leaving at that time was a time of your selection?

Mr. Schultz: Yes.

Mr. Pollak: And why did you decide to leave?

Mr. Schultz: I stayed for two years of Sylvia's term, but I decided that it would be great to have the summer not working so I could spend time with Sari. I wanted to take some time before I took another job. I could take the summer and the fall and think about what I wanted to do. In addition to that, I also was very aware that

at the end of the administration in a presidential election year it's hard to get much done. If you lose the election, people try to jam things through after the election. Generally, before presidential elections it's hard to get things cleared through the White House because of the potential political consequences. So it seemed like a good time to leave even if people were kind of surprised.

Others in the government made the same decision, although I didn't know it when I made mine. Solicitor General Don Verrilli also left in June. We ended up in Italy at the same time that summer, where we had dinner together.

Mr. Pollak: Had you had meaningful discussions with anybody about future employment before leaving the government or before making your decision to leave?

Mr. Schultz: No. I just don't believe it's possible to do so and comply with the intent of the ethics rules.

Mr. Pollak: How long were you without employment after leaving the government?

Mr. Schultz: I left in June of 2016 and I started at Zuckerman Spaeder in the middle of November.

Mr. Pollak: What did you do in those five months?

Mr. Schultz: Sari and I went to Italy for two weeks and then we spent the rest of the summer in Nantucket. We bought a house in Nantucket in 2010 and we had barely used it because most of that time I was in the government. We used it typically for two weeks each summer and a few weekends, but this was a chance to spend more time there.

Mr. Pollak: During that period before rejoining Zuckerman Spaeder, were you consulted by HHS or anyone in the government?

Mr. Schultz: I may have been called about one or two things, but I don't remember anything significant. It's important to make a clean break and I have to say I left my office in terrific hands.

Mr. Pollak: Who ran it after you left?

Mr. Schultz: Peggy Dotzel was Acting General Counsel until the end of the Obama Administration, and as I mentioned before, all the deputies stayed, which was wonderful and made it much easier for me to leave.

Mr. Pollak: How did you come to move to Zuckerman Spaeder after leaving the Department in 2016?

Mr. Schultz: Initially I didn't think I would go back to the same firm. I thought I would do something different, and so I talked to a number of other firms and had job offers. But in talking to my friends at Zuckerman, I was really moved by how much they wanted me to come back. I also thought a lot about the fact that when I had been there before, I had always gotten to do what I wanted. I was never asked to do something that I was uncomfortable with. I knew if I went to a new firm I may not have that kind of flexibility and so I ended up deciding that this was the right fit and it was absolutely the right decision.

Mr. Pollak: And did you return as a partner?

Mr. Schultz: Yes.

Mr. Pollak: Yes, and what have been the main areas of practice in which you engaged both for pay and pro bono, if any?

Mr. Schultz: When I left there in 2011 my main practice involved Food and Drug Administration issues, particularly generic drugs. I did a lot of litigation representing the generics against FDA and the brands. I also did a considerable amount of lobbying on the generic side and for various public interest groups including the Campaign for Tobacco-Free Kids.

When I came back, part of the practice involved generic drugs. We represent the trade association, and a very interesting company named Amphastar. We have also done other projects for different companies and that is one piece of it. We continue to represent the Campaign for Tobacco-Free Kids, which is a paying client, although with some of our paying clients we don't charge for all the work we do. I continue to do that work. Now the big issue is how to implement the tobacco law we worked to enact, and particularly how to regulate e-cigarettes.

The practice has expanded to other kinds of healthcare clients. We do a fair amount of work for individuals and for one non-profit involved with IG investigations, that's the Inspector General of the Department of Health and Human Services. For example, we have represented researchers at the National Institutes of Health, and we represent the National Organization for Rare Disorders, which has programs financed by contributions from drug companies to give away drugs to people with rare diseases.

We work for public interest groups, some of which are paying and some of them are paying in part. We do a lot of work with the Waxman Group, which was founded by Henry Waxman after he left Congress. They do a lot of foundation-funded work on controlling drug prices; we have also filed briefs for them before the Federal Circuit on generic drug issues. We represent various small startups on issues at FDA or HHS

We've recently done some very interesting work for the Commonwealth Fund, which established a commission on a national public health system. The commission is chaired by Peggy Hamburg, the former Commissioner of FDA, and has nationally prominent members and staff, several of whom I worked with closely when I was at HHS. We were hired to be the legal counsel. The recommendations were developed over a couple of months and the report was issued in June 2022.

The report recommends, in light of the experience with the Covid pandemic, that the federal agencies be restructured and the relationship between federal agencies and state health departments be changed. The report explains how all this ought to be funded and how everything, particularly at the state level, should be upgraded.

We represent the University of Pittsburgh and interestingly, our biggest client group has been hospitals, particularly the American Hospital Association, in a major battle having to do with drug prices. I would not normally think I would be representing hospitals, but in this case the hospitals are against the big

pharmaceutical companies. I always figure if I am on the other side of pharmaceutical companies or the tobacco companies, I am in the right place.

These cases involve a program called 340B, which grew out of legislation sponsored by Henry Waxman the year I started working there. This program requires the drug companies to give deep discounts to community health centers and non-profit hospitals, and it's grown to involve billions of dollars a year. We've brought two types of cases. One was against the Trump Administration, which decided not to give the discounts to non-profit hospitals that were seeking reimbursement for Medicare, cutting Medicare funds to hospitals by $1.6 billion dollars a year. We won that case in the District Court but lost 2 to 1 in the D.C. Circuit. It went to the Supreme Court, which in June 2022 ruled 9-0 in our favor.

We also have another set of cases for hospitals about what's called contract pharmacies, where again the drug companies are trying to severely limit the program. And those cases are in three different courts of appeals now.

Mr. Pollak: Have you dealt with what you were doing on small startups?

Mr. Schultz: For example, we represent a company called Cara Pharmaceuticals. They have developed their first drug for pruritus or itching, a serious problem for people on kidney dialysis. The kidney dialysis is paid for by Medicare, so there are complex issues about how the price of this drug will be set and the terms under which Medicare will pay for the drug.

Mr. Pollak: Have you found that you have more time for yourself or for other things, or has the empty space, if any, been filled?

Mr. Schultz: I definitely have more time. I think I work hard, but it's not like the government. I try not to work on weekends or much in the evenings.

Mr. Pollak: And what about the non-profit boards you have served on?

Mr. Schultz: I spend a lot of time on matters that I don't get paid for. Some of it is for public interest organizations. I am also on five non-profit boards, and I'm a member of the National Academies of Sciences, Engineering, and Medicine's Committee on Science, Technology, and Law. This committee is chaired by Judge David Tatel, who asked me to be on it, and by Dr. David Baltimore, a Nobel Prize winner and former President of Cal Tech. It's a committee of eminent scientists and eminent lawyers, many of whom are judges. In addition to various substantive projects and reports, twice a year we have a two-day meeting with presentations. Half are on fascinating scientific issues that I barely understand, and half are on legal issues that I do. For example, we've done a lot of work on forensic science and have issued studies challenging the use of various kinds of forensic scientific evidence in criminal cases. These reports for example, assess the quality of bite mark evidence, finger printing, and DNA evidence. I've spent a lot of time on projects for that committee.

I'm on their executive committee, so I help set the agenda. I've also run several programs including one on FDA's emergency use authorization, the pathway under which FDA approved or authorized Covid vaccines, Covid tests,

and Covid drugs. I've also directed a project on the approval of the new Alzheimer's drug Aduhelm, and on a new type of approvals called accelerated approvals, where critical evidence isn't gathered until after the product is approved. It's been fascinating.

Mr. Pollak: Identify the other five organizations.

Mr. Schultz: One is the National Health Law Program, which sponsors Medicaid litigation. Their mission is to improve the lives of Medicaid patients. I'm a member of the Historical Society of the District of Columbia Circuit board of directors, and have been treasurer or a member for 15 or 20 years except when I was in government. I'm on the board of the Center for Science in the Public Interest, which is the major food advocacy group in D.C. I represented them when I was at Public Citizen Litigation Group, and I was president of their board before entering the Obama Administration. I'm on the Leadership Council of the Yale School of Public Health. And then finally, and maybe the most interesting, I'm on the Board of Trustees of Partners in Health, which is Paul Farmer's international healthcare group that employees 14,000 people in Africa, South America, on Native American reservations, and elsewhere around the world to provide healthcare to the poorest people in the world.

Mr. Pollak: A couple of general questions. What do you think your most important contribution was during your time in government? What's the area?

Mr. Schultz: That's a hard one.

Mr. Pollak: Pick two or three.

Mr. Schultz: One would have to be tobacco, which I worked on for Henry Waxman, at FDA, and at the Justice Department, and then back at Zuckerman Spaeder. But we ended up getting legislation that set up a tobacco program at FDA that someday may eliminate nicotine in tobacco, but in any event will control the kinds of claims that can be made on tobacco as to whether a product is safe or whether it is beneficial in some way. I believe FDA will ultimately use this new authority to eliminate menthol cigarettes. The law also gave the agency the authority to control new products, such as electronic cigarettes, although they haven't used it effectively yet.

Second would have to be the Affordable Care Act, which is so important to healthcare and which I had a role in implementing and defending. I think that the Nutrition Labeling Act is somewhere up there. It's hard to believe, but 30 years ago when you bought food, there was no labeling or no way to know how many calories were in it or how much salt. And there was very little regulation over claims that it was good or bad for you. So that's three.

Mr. Pollak: Okay, it's a good start. You don't need to cover the waterfront on these questions but speak about the rewards first generally of government service, and secondly, compare it to the rewards of private service and what you can do with public concerns when you are in private life.

Mr. Schultz: I think government service offers great opportunities to make a difference. I remember when I was in Public Citizen Litigation Group, we were always

fighting the good fight always on the side I wanted to be on, and it was case by case and often took many, many years, and at the end we might lose the lawsuit.

In contrast, when I was on Capitol Hill working for the Chairman of the Health Subcommittee, a letter from him on the right topic could accomplish as much as a lawsuit could accomplish. Writing new legislation, or even drafting the committee report, can have far more impact than a lawsuit.

I loved litigation, and I loved the process. But in terms of impact, it was such a huge opportunity to work in the executive branch positions. In each position, I had a staff of very talented, very dedicated people. Any impact isn't from a single person. Instead, the impact can come from a large number of people working together. And it was fun. I always enjoyed the people I've worked with.

In private practice, I was very fortunate. Many of my friends in the Justice Department at the end of the Clinton Administration were dreading going back to their law firms, and it made me pretty skeptical of whether I would like it, but I have really liked working at Zuckerman Spaeder. It's because I've been fortunate enough to get to choose what I wanted to do and be able to feel like I am on the side of things I want to be on, with respect to everything I work on. Some of the work I would regard as neutral, but there is a lot of what we work on that moves things forward, where we are advocating for the public policy that we believe in.

When people ask me what's the difference between private practice and government one of the things I say is, in private practice you are working on things that you wouldn't have time to get to in government. In other words, the work can be very important to a client and very interesting but in terms of their public impact, typically the same issue doesn't rise to the top of heap of somebody in a high-level government position.

Mr. Pollak: Did you ever want to be a judge?

Mr. Schultz: Judge Bryant always had that vision for me and he always thought I should be on the D.C. Circuit. I guess I had an interest in it, but it was never my primary goal, and looking back, I feel that what I did was so exciting, I'm not sure I would have liked being a judge as much. One thing I will say that influenced me is that even though Judge Bryant was a great judge, he didn't like being a judge as much as he liked being in private practice.

As it turned out, it wasn't much of an option, because those 12 years of Bush and Reagan were probably the years I would've been eligible in terms of age and by the end of George H. W. Bush's Administration, it just really wasn't possible. Although it was never a major goal, I won't say I didn't think about it.

Mr. Pollak: Do you want to say a word about the comparative satisfaction of private practice and pro bono, government service and Hill service?

Mr. Schultz: It's very hard to compare. When I clerked for Judge Bryant, I thought I would never have a job as good as that, but I loved working at Public Citizen Litigation Group and stayed 14 years. Although I never envisioned myself as working on

the Hill, that turned out to be a terrific job. The FDA job was amazing. Under David Kessler, the agency was more productive and more exciting than at any time in my lifetime. And it was great to get back to being a lawyer and arguing appellate cases when I was at the Justice Department. Being General Counsel of HHS was a dream job and I felt it used all the skills I had gained in my previous jobs. I don't think private practice offers the same opportunities to make a difference as those other jobs, but it's a great job.

Mr. Pollak: What worlds, public or private or personal, are you looking to conquer or what mountains are you looking to climb now?

Mr. Schultz: I just never lived that way, Steve. I never planned ahead, so I'm just hoping to continue to enjoy working but also have time to play tennis, go sailing, bike ride, spend time with Sari and Rachael, and travel.

Mr. Pollak: Tell us, who are wondering, whether this life in the rough first class has for you created stress of an unusual kind or not?

Mr. Schultz: Could you say that again?

Mr. Pollak: Whether you think a life like you've lived creates a special level of stress as you make decisions, this way, that way, and the other way?

Mr. Schultz: Well, for whatever reason, I think, I've always dealt with stress well, and I remember at HHS, Howard Koh, the Assistant Secretary, used to tell me he didn't understand how I remained so calm in the middle of such tornadoes and hurricanes. I've always been successful, I think, in making my family the priority, of making Rachael and Sari the absolute priority, so if they ever called,

I would take the call no matter what. When I got home from work and had dinner, I would always, or almost always, spend time with Rachael and Sari until everyone went to bed and then I would go back to work, often working very late. When I was at FDA I typically worked until 2 a.m. and got up at 6 a.m. But I've learned not to do that, and I have had far fewer back problems since I started getting more sleep.

Mr. Pollak: How much sleep do you seek to get?

Mr. Schultz: Well since Covid, I don't even set my alarm clock.

Mr. Pollak: That is an evasion, what's the answer? How much do you seek?

Mr. Schultz: It's really varied, but I try to get 7 hours and these days usually succeed.

Mr. Pollak: Are there any questions that you have that you would like answered?

Mr. Schultz: Yes, did you ever want to be a judge?

Mr. Pollak: I never did, but I always wonder whether that was a mistake. I worried that I couldn't write meaningful opinions.

Mr. Schultz: You would've been a great judge.

Mr. Pollak: Bill, here's the coda. I like to see you laugh, and that happens frequently. I thank you for doing your history. I think it's a unique contribution to history, legal history and public history. I know it will be in demand to read by so many. I invite you to suggest persons you ran across whose histories we should consider taking. I thank you for letting me do it. I've not had any other greater pleasure. So, you're going to Nantucket with your wife right away. I hope you have a wonderful time and I look forward to our next meeting.

Mr. Schultz: Well, Steve, thank you. You are an outstanding interviewer and you've made me remember things that I had forgotten. I've gotten to think about things I haven't thought about in a long time. Even as I go back and read these interviews, I can't believe that I remembered that, but that's because of your questions. And it was wonderful spending this time with you.

Mr. Pollak: When are you going to join with Sari and she with your help, write your biography?

Mr. Schultz: No, this is it; you're the author.