ORAL HISTORY OF WILLIAM BARNETT SCHULTZ

This is the third 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 Wednesday, May 5, 2021, in Washington, D.C.

Mr. Pollak: Our last interview, on February 17, 2021, concluded with your responding to questions and speaking about your clerkship with Judge William B. Bryant in the United States District Court for the District of Columbia. I think that you have a few more comments to make about that.

Mr. Schultz: Thanks, Steve. Good to be here. I think I mentioned that Judge Bryant was an outstanding lawyer. I knew this because of his career as a practicing lawyer before he was appointed to the bench. I also saw it in the courtroom often when there wasn't a jury there in a trial. He would, after the lawyer was finished, often take over the cross-examination. His cross-examinations were always better than the lawyers who had preceded him. I may have mentioned this too but during the Watergate trial, I would go watch and he would always want to know everything that happened and then he would tell me how he would do the cross-examination or how he would do the oral argument.

As a result of these experiences, every one of his clerks had tremendous admiration for him. But one of the things that I thought was unusual about Judge Bryant was he didn't have the personality that is often associated with successful trial lawyers of being very aggressive, or very assertive. He had a calm, reflective demeanor and often listened rather than talked. He really didn't assert himself. But behind that was this tremendous, fierce independence. He had strongly held views and, when you got underneath it, he wasn't going to move

from those views. But his demeanor was very, very different. He was a great role model both just in terms of a way to comport yourself, and also as an inspiration to do something with the law that was useful and important.

Mr. Pollak: What do you think formed Judge Bryant? Surely, he was the first lawyer in his family. Perhaps he was the first member of the family to go to college and go beyond. How did he come by his aspirations and his commitments to the law?

Mr. Schultz: It's just a great mystery, frankly. He was an only child. His father left when he was an infant. His mother came to Washington when Judge Bryant was maybe one year old. He lived with his grandfather and grandmother. I think he was very studious as a child. He certainly was the first one in his family to go to college – maybe even to finish high school.

Mr. Pollak: And my recollection was that after he graduated from law school, he held some non-lawyer jobs. Because Blacks found it difficult to make a living in the law.

Mr. Schultz: One of his teachers was Ralph Bunche, who was part of Gunnar Myrdal's famous study on race in America. Ralph Bunche hired him to participate in that and then during World War II, he joined the Army. He didn't practice law until after his service in World War II.

One remarkable thing about Judge Bryant is his family discouraged him from going into the law because African Americans couldn't make anything in the law. They couldn't get any business. Their business was representing people who didn't have money to pay them. He was not encouraged to go in that direction at all. It all came from the inside. Both his choice of a career and his

unusual personality, which I think was closest to Nelson Mandela. They both experienced a tremendous amount of discrimination but survived with no bitterness. The source of that aspect of his character has always been a mystery to me.

The other thing I will say is I was very fortunate because I stayed in D.C. after I clerked for him. The relationship was easy to maintain, and I was in the courthouse frequently the fifteen years after I clerked for him. So often after I had an argument in the D.C. Circuit, I would go and see him and he always wanted to know everything about it and he was always convinced that, no matter what the case was, that I was going to win. He felt I was on the right side.

Mr. Pollak: Would you make some comparisons of Judge Bryant to other judges who were on the District Court bench at the time?

Mr. Schultz: It's hard to do. I think Judge Bryant was so unusual. One thing I will say about him, he was not a compulsive person which was wonderful to clerk for him, but he wasn't perfect. He didn't really pay that much attention to how long, for example, a case was pending or what the status was. The clerk was in charge of all that and how well his caseload was managed, obviously, depended on the law clerk. It didn't bother him, for example, if it took a long time to decide a case.

Mr. Pollak: I think that your oral history might include some memories of unusual sayings or metaphors that Judge Bryant had.

Mr. Schultz: He had this very large number of sayings and they were endless. For example, when I would go back to visit, he would say, "What are you doing down here on skid row?" I wrote them down when I was clerking. Here are a few of the best:

- You choose your friends, but your relatives are thrust upon you.
- Whenever you try to put too much English on the ball you miscue.
- Where a worm comes out of an apple depends on where it goes in.
- It's like putting a shoe on a running horse [to restore irreparable injury].
- You know what they say in the Civil Division, the Justice Department has lost the case when the court gets to the merits.
- The greatest crimes known to mankind are committed in the name of God, patriotism, and justice, in that order.
- That's like going to the goat's house for wool.
- I can't understand a lawyer who makes a canyon out of a hairline crack. He digs a hole for his client.

We had a tenth anniversary party for Judge Bryant the year that I clerked, and one of my co-clerks wanted to do a presentation and include some of these sayings. So, I gave him my whole list and he collected others. He recounted all the sayings, and after that, Judge Bryant never used any of those sayings again. But a whole new group of them cropped up.

Mr. Pollak: Well, so let's fix the time. When did you complete your clerkship with the Judge?

Mr. Schultz: In the fall of 1975.

Mr. Pollak: Had you made preparations for what you would do next?

Mr. Schultz: Yes. At some point during that year, I started thinking about jobs. The first thing I thought about was the Legal Aid Society, but I also interviewed with a number of law firms. I met some great people but in those days, lawyers tended to stay at the same firm for their whole career. I met many of the senior partners who had done nothing else, which scared me. It didn't seem like a good path.

Mr. Pollak: Why did it not seem like a good path?

Mr. Schultz: It didn't seem very interesting, frankly.

Mr. Pollak: Right. Were you talking with your dad who was a lawyer and a law professor and a practicing lawyer?

Mr. Schultz: I'm sure I did, but my father was always very careful not to give me direction – that kind of advice. He probably would have loved for me to go to a law firm, but he always said, "You have good judgment." He really didn't push me in one direction or the other. Then one day, somebody from a group I had never heard of had an argument before Judge Bryant and met in his chambers, a guy named Reuben Robertson. He was a lawyer at Public Citizen Litigation Group. Then a friend of Judge Bryant's, Marilyn Moe, who had been at the Public Defender Service, stopped by to say hello to Judge Bryant. At that time, she was the Deputy Director of the Litigation Group. After she visited with him, she talked to me and it sounded so interesting. So, I applied there. Interestingly, by the time I went there, she was gone. Apparently after being a criminal lawyer, civil work was too slow.

The director there was Alan Morrison. After law school, Alan had worked for a New York law firm, gone to the U.S. Attorney's Office in New York, and somehow got connected to Ralph Nader. Ralph Nader was starting a litigation group and Alan came to Washington in 1971 to start Public Citizen Litigation Group. He was a very talented, hard-charging New York lawyer. I'll tell you about him later. He was a wonderful boss.

I called and Alan said, "Well, yeah, come in for an interview." He said, "How about December 31 – New Year's Eve," at the end of the day, "about 5 o'clock," and I showed up at the appointed time.

Mr. Pollak: This is New Year's Eve of 1975?

Mr. Schultz: Yes, 1975. I showed up at the appointed time and Alan said, "Well, I'm in the middle of settling a major case, so you're going to have to wait for a few minutes." In those days, he wrote a monthly report on the group's activities. He handed me the latest report and said, "Read this while you're waiting." I started reading the description of their cases and every one of those cases was a case I would have loved to work on. Alan finished his New Year's Eve settlement negotiations in a securities fraud case, and then he interviewed me. I don't have a lot of memories of the interview.

My great fear was that I couldn't afford to work there. I didn't have any supplemental income. My wife was in architectural school, and we had no money. I thought the salary was going to be maybe $8,000.00 a year. He told me

it was going to be $11,000.00. It was a number I could deal with even though it was probably a 50% pay cut from clerking.

Mr. Schultz: The next stop was to interview with Ralph Nader. Public Citizen was Ralph Nader's organization. He was the president and the Litigation Group was a division. There was also Congress Watch, which was a lobbying division, and the Health Research Group that specialized in health care issues. There was a tax group and a nuclear group. I interviewed with Ralph Nader, who was famous and was essentially the father of public interest law, consumer advocacy. He had gone to Princeton and Harvard Law School but had never worked as a practicing attorney.

After law school, he traveled in South America. He had a friend, I think, who died in an auto accident. So, he got very interested in automobile safety. Then he wrote about the Corvair and he was called to testify before Senator Abe Ribicoff's committee about auto safety and discovered that he was being followed. General Motors had hired a private investigator to try to find dirt on Ralph, but they were unsuccessful.

Ralph sued GM for invasion of privacy and then settled the case for a couple hundred thousand dollars. He used that money to start his organizations, one of which was Public Citizen. In law school in my torts class, the first case we read was this invasion of privacy case that Ralph Nader had brought against GM – this very novel use of the law. He was an ascetic and lived a very minimalist life. I went in to be interviewed and I had a perfectly good interview,

but I felt very inadequate. I felt unable to answer a lot of his questions. For example, he said, "So what are the most important matters facing us as a society and how would you turn those into lawsuits?" And I remember at one point I told him I had done some Freedom of Information Act cases, and he said, "Was the Post Office covered by the Freedom of Information Act?" And I said, "I don't know." He ended up asking me to write a memo on the Post Office issue, and it turned out the answer was yes.

Mr. Pollak: Just to be clear, you were clerking, then and he was asking you for a memo and you delivered a memo?

Mr. Schultz: Yes, he was asking for a little extra help on the side. He wasn't litigating against the Post Office.

I was just sure I was not going to get this job because I felt I didn't have the answers to the important questions he was asking me. And most of them I hadn't even thought about. But I did end up sending him that memo and I also sent him something on five important cases that the Litigation Group could bring. And when I returned from the interview, Judge Bryant very interested in my getting this job. He asked, "How did it go?" And I said, "I don't think it went very well." He said, "Well, how long did he interview you for?" And I said, "Oh, it was forty-five minutes." Judge Bryant said, "They're going to offer you a job. A guy like Ralph Nader wouldn't waste 45 minutes of his time on someone he wasn't interested in." And he was right. Alan Morrison eventually did offer

me the job. At some point, I talked to some of the other lawyers at the Litigation Group. It just seemed like exactly what I wanted to do.

Mr. Pollak: So that all transpired in the middle of your clerkship?

Mr. Schultz: Yes.

Mr. Pollak: But when did you go to work at the Public Citizen Litigation Group?

Mr. Schultz: When I interviewed at the Litigation Group, there were seven lawyers there and they were in the process of expanding it to ten. Alan called me and said, "It's really too much for me to have three new lawyers come on at the same time. Would you be willing to wait until January"?

Mr. Pollak: I see. January of 1976?

Mr. Schultz: January 1976. I said, "Sure." In the interim, I did two things. One is my wife and I bought a house in Alexandria that we wanted to renovate. The house was a completely rundown house and we bought it for $21,000. I was planning to do most of the work myself, but I also needed an income. So, I got a job at a small Alexandria law firm called Cohen, Vitt & Annand, which was a firm that started out as a plaintiff's environmental law firm. They did some civil rights work, they did some prison work, which is how I heard about them. Geoff Vitt appeared in our courtroom in a prison case. Bernie Cohen, the founder of the firm, was famous because as a very young lawyer he argued *Loving v. Virginia* in the Supreme Court. This is the case declaring Virginia's anti-miscegenation law, which criminalized interracial marriage, unconstitutional. I worked there for three months. It was a wonderful experience.

Mr. Pollak: It declared the barring of miscegenation unconstitutional.

Mr. Schultz: Right. It was brought by a couple, a Black and Native American woman and a white man. There are documentaries on this. Events in this case were actually filmed as they were doing it. The white husband looks like a southern redneck, but he fell in love with this Black and Native American woman. It was in an area of Virginia where the races mixed. They went to D.C. to get married because they couldn't get married in Virginia. They came back to Virginia, where it was illegal for them to live. Their house was raided. They were brought into court for being married, and they were told by the judge, you have to get out of Virginia or otherwise I have to put you in jail. So they moved back to D.C. where the wife was very unhappy and, in desperation, she wrote a letter to Attorney General Robert F. Kennedy. He referred it to the American Civil Liberties Union (ACLU), which referred it to Bernie Cohen. Cohen was a very young lawyer, but was doing cases for the ACLU. He won a great victory in the Supreme Court.

I made two close friends, Geoff Vitt and Steve Annand, who were just a year or two older than me. They became lifelong friends. I participated in two or three trials just in those three months. They wanted me to stay, which was tempting, but I decided to abide by my commitment and go to the Litigation Group.

Mr. Pollak: I see. Where was the Litigation Group situated?

Mr. Schultz: We were located on the top floor of the headquarters building on Dupont Circle.

Mr. Pollak: How many of you?

Mr. Schultz: There were ten lawyers and probably two secretaries. When I started in January 1976, we didn't have computers. Everything was done on typewriters. The core of what we did was litigation, which meant we had to deal with court deadlines. We were always competing for secretaries because they had to type the legal papers. I remember a year or two later, we got two IBM Selectric typewriters that were self-correcting, and that was a big deal. But what really changed the whole atmosphere was when we got the first computers. This allowed us to control our destiny and the fights over secretaries weren't quite as intense.

Alan Morrison, who was the director, would write a brief by dictating the entire brief to a secretary who could take shorthand. He continued to rely on the secretaries but the rest of us were free.

I started on January 5. I remember that date because in those days we were paid by the month – at the end of the month. I was supposed to start at the beginning of January, but January 1 was on a Thursday. So, Alan suggested that I start on the following Monday instead of coming in that Friday. All of the finances were handled personally by Ralph Nader, and when I got my monthly paycheck Ralph had deducted five days of pay because I started on the 5th rather than January 2.

Mr. Pollak: Were you living still in Alexandria and you commuted?

Mr. Schultz: Yes, we renovated a house on South Payne Street. We initially lived at Huntington Towers. I parked on the street and I remember I got many, many

parking tickets, which only cost $5, so I came out ahead compared to a parking lot.

It was a group of ten lawyers. Many of us were about the same age, or very close. We not only worked together, but we went out to lunch together every day. We played squash after work. We often worked late into the night. We socialized over the weekend. It was just a wonderful close-knit group of outstanding lawyers.

Mr. Pollak: You want to name them?

Mr. Schultz: Three of us came at the same time. John Sims also had gone to Harvard Law School like Alan. Both had been on the Harvard Law Review. Linda Donaldson had been the editor-in-chief of the NYU Law Review. Gerry Spann came right out of Harvard Law School. Gerry, John, Linda, and I were all graduated from law school the same year. Larry Ellsworth, also a Harvard Law School graduate, stayed for about five years. Mark Lynch stayed for a few years and went to the ACLU and then Covington & Burling.

Mr. Pollak: You mentioned Reuben Robertson earlier.

Mr. Schultz: Reuben B. Robertson III, who was closer to Alan's age, had gone to Yale Law School and to Covington & Burling, and then went to work for Ralph at the Center for Law and Social Policy before coming to the Litigation Group. Arthur Fox, who specialized in labor law, represented union members who challenged the unions. It was quite a group.

Typically, new lawyers spent a year doing Freedom of Information Act cases, then went on to other things.

Mr. Pollak: And why was that?

Mr. Schultz: It was a high priority. It was a way to get into court quickly because those cases went quickly, and the legal issues were not complex. They were good cases for a young attorney, but I didn't do them in the beginning.

The first day Alan assigned me to two cases.

One was a case challenging a Food and Drug Administration program called the "over-the-counter drug review." In 1962, Congress had directed FDA to review all drugs for efficacy, including over-the-counter drugs. It was now 1976, and FDA had adopted a regulatory process that made the review literally endless. Sid Wolfe, the director of Public Citizen's Health Research Group, wanted to figure out a way to challenge this. I was asked to do that. We eventually did bring a challenge, and to show you how long litigation can go on, I left fourteen years later and a version of that case was still pending. We won some major victories but never got very good satisfaction.

The second case Alan assigned me was a challenge to the Price-Anderson Act. The Price-Anderson Act is a law that Congress passed that limits the liability of nuclear power companies in case of a nuclear accident. That limitation in those days was $560 million dollars. Ralph Nader had become a prominent advocate challenging nuclear power on the ground that it wasn't safe. He had a group dedicated to challenging nuclear power as a matter of policy, but

he wanted to find a way to challenge the statute. So I was assigned to research it and try to find out a way to do it.

Three days later, we got a call from a lawyer in North Carolina, George Daly, who was also challenging the Price-Anderson Act, and he said, "We brought this case to court before Judge McMillan," who they thought might be favorable; he had issued progressive decisions in several very important civil rights cases, including *Swann v. Charlotte-Mecklenburg Board of Education*.[1] George said that Judge McMillan had ordered a trial on whether we have standing to bring the case. The basic issue was whether the statute could be challenged before a nuclear accident had happened. In other words, the issue was whether someone had enough of an injury from nuclear power plants to bring the case, or were the plaintiffs required to wait for a nuclear accident. George said that the judge had ordered a trial and his small firm didn't have the resources to handle a trial. They were not getting paid and needed help. We ended up joining forces with the North Carolina lawyers, but basically handled the case.

The first case I was assigned was still going on fourteen years later, and I argued the second case in the Supreme Court two years after starting.

Mr. Pollak: You got a lot of responsibility right away?

Mr. Schultz: The deal at the Litigation Group was that in exchange for a very low salary, even by public interest standards, Alan offered his lawyers as much responsibility as

[1] 311 F. Supp. 265 (W.D.N.C. 1970), *vacated*, 431 F.2d 138 (1970), *Ct. App. judgment aff'd in part, Dist. Ct. order aff'd*, 402 U.S. 1 (1971).

they wanted for their cases. If the case went to the D.C. Circuit or even if it went to the Supreme Court, we got to argue it. That was a very attractive feature.

Mr. Pollak: We should explore this case.

Mr. Schultz: It was about the Price-Anderson Act. The name of the case was *Carolina Environmental Study Group, Inc., v. United States Atomic Energy Commission.* [2] The Carolina Environmental Study Group was organized by advocates in North Carolina who lived near a nuclear power plant built by Duke Power Co. and wanted to challenge the limitation on liability. They brought the case against Duke Power Co. and the U.S. Atomic Energy Commission, now known as the Nuclear Regulatory Commission.

My assignment after that Wednesday was to figure out how to organize a trial to show that we had injury in the case and that it was ripe for judicial review. Our trial was not about the merits, which was whether the Price-Anderson Act was constitutional.

Mr. Pollak: And that was the issue that went to the Supreme Court?

Mr. Schultz: Both standing and the merits went to the Supreme Court. I started putting the case together and we enlisted scientific experts to testify about the likelihood of a nuclear accident. One was Henry Kendall, an MIT professor and co-founder of the Union of Concerned Scientists. We enlisted other prominent scientists who had written about the risks of nuclear power plants.

[2] 431 F. Supp. 203 (W.D.N.C. 1977), *rev'd, Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978).

I also contacted insurance experts. We planned to argue that our clients could not get property insurance against the risk of a nuclear accident because every insurance policy contained a standard clause excluding damages caused by a nuclear accident.

I tried to find an insurance company that would sell insurance against a nuclear accident so we could argue that the cost of insurance was an injury sufficient to give us standing. I contacted Lloyd's of London which supposedly sold insurance against any risk, but no insurance company would sell this type of insurance. We were able to use that as an argument – that the risk of a nuclear accident must be more than trivial if the insurance companies wouldn't sell the insurance at any price.

The defendants ended up calling an insurance expert who testified that the risk was so trivial it would be irrational for anyone to purchase insurance, even if it were available. I cross examined him on several issues and then asked whether it would be irrational to purchase such insurance even if it cost one dollar. He said, "Yes it would be irrational." I had gotten the answer I wanted but went further and asked, "What if the cost were only one penny?" He said that would be irrational also. Later Alan told me that he would have stopped at one dollar.

At some point in the trial, one of the experts was explaining a mathematical concept. Judge McMillan didn't understand and began asking questions, but the expert couldn't explain it to him. It was a situation where

everyone else in the courtroom understood but the judge didn't. During the judge's exchange with the witness, a member of the audience stood up and said, "I can explain it." There was dead silence in the courtroom as the audience member attempted to explain the concept to the judge. After he sat down, there was more silence, and then the exchange between the judge and the witness continued.

Mr. Pollak: Was it decided on summary judgment?

Mr. Schultz: No, Judge McMillan held a four- or five-day trial in Charlotte, North Carolina. At the end of the trial, he wanted to take a tour of the nuclear power plant. Prior to the trial, there had been a near miss at the Browns Ferry Nuclear Plant in Alabama. An electrician was using a candle while doing electrical repairs and the electrical system burned out, almost causing a nuclear accident. We were able to use that to show that this is something that could really happen. Part of our effort was to convince the judge that this was not just a theoretical risk.

As we went on this tour, Judge McMillan said, "Well, don't anybody light a candle." So we knew we had gotten through to him.

Mr. Pollak: Did it go to the Fourth Circuit and then to the Supreme Court?

Mr. Schultz: No. After the trial, the judge heard closing arguments, and then some months later I got a call that there was a decision. We had won the case. He not only ruled for us on standing on what the trial was about and that the case was ripe, he ruled on the merits, which had been briefed before we were brought into the case.

Apparently, Judge McMillan feared if he only ruled against the government on standing, either the government or Duke Power would persuade the Fourth Circuit to take the case and he might never have a chance to rule on the merits. So he decided the entire case and held that the statute was unconstitutional. In those days, when a law was held unconstitutional the government had the option of appealing directly to the Supreme Court and that is what they did, skipping the court of appeals.

Mr. Pollak: Talk about that experience of preparing for and arguing this case in the Supreme Court very early in your career. And maybe you can at least allude to whether over your long career and many, many, many arguments later your practices changed.

Mr. Schultz: I'll tell you as much as I can remember.

Filing the brief was an interesting experience. In those days, before office computers, Supreme Court briefs had to be typeset by a printer. The brief would be typed in the office and then typeset by the printer. Once the printer did its work, the page proofs came back and I and others in my office would read the brief and make corrections. This went through several rounds. We were very, very careful about this. Several lawyers would read it. We wanted it to be perfect and we would catch everything.

At the very end, when there were a handful of corrections, I took the brief to the printer and waited so that I could review the work. At that point the corrections were minor and only on a few pages so it wasn't necessary to read the

whole brief. I looked at the page where they were supposed to make the corrections and made sure they made them. I submitted it and it was all done. I probably went out and got an ice cream cone.

When the work was done, the brief was produced in small booklets which I always thought were just wonderful. We filed the brief with the Supreme Court.

My wife and I were driving to North Carolina to visit some friends that weekend and I packed the brief to show my friend because I was so proud of it. Before putting the brief in my suitcase, I randomly opened it up to a page and I started reading a paragraph and it was gibberish. My heart sank.

I later figured out what had happened. In those days, when the printer made a correction, he or she retyped the entire line of print and pasted it on the brief. If the error was on page 51, when they gave me the page to review, I would have seen that the error hadn't been corrected and then the correction would have been made. But in this case, the printer had taken that line and pasted it on the opposite page by mistake, say page 50, which had been a perfect page up until that point and I thought needed no review. The Court permitted me to file a corrected brief, but only by pasting the corrected page on the existing brief. It looked terrible, but it was the only option I had.

Prior to my Supreme Court argument, I had one argument in the D.C. Circuit. I might have had a small number of district court arguments.

But my main advocacy experience was probably that trial, which is obviously very different from arguing in the Supreme Court. To prepare, I'm sure I went and watched some Supreme Court arguments.

Mr. Pollak: You were the respondent?

Mr. Schultz: I was the respondent. I'm sure I read every case that was cited in all of the briefs and did my best to figure out what my best argument would be -- how to present the argument. We had a terrific practice of moot courts, and we would typically have two for an appellate argument. Three or four other lawyers participated, and they always prepared intensively.

This was the most important part of the preparation. My colleagues would try to anticipate all the questions that I could get, and after the moot court everybody would make suggestions and I would take very careful notes and get ready for the next moot court. That was basically the preparation.

The one thing I did differently later is to try not to sketch out my argument too early. And I view the preparation as a time to get your head in the case and spend time just thinking about what all the questions might be and what the answers are. I feel that once you sketch out your argument, you limit your ability to think expansively about the case and tend to focus on refining the argument.

Of course, the argument you sketch out bears little relationship to the actual argument that after a few minutes is typically determined by the answers you give the judge or Justices. But by sketching out the argument, you're able to

identify most of the points you want to make. Now that we have computers, I often type out possible questions and notes on how I would answer it. I find reading the record, the cases, the brief, and thinking about questions and answers, as the most effective way to prepare for an oral argument.

As was true with the Price-Anderson Act case the records were important. I'm sure I spent a lot of time re-reading the record. There was a whole trial in that case. Since the issue was going to be standing, I needed to have a command of the portions of the record that supported injury and we certainly understood that this was a very unusual kind of claim to say that we had a right to bring this case before the accident actually occurred.

Mr. Pollak: And do you remember anything about the argument and the Justices and their questions?

Mr. Schultz: Yes, I do.

First of all, Duke Power Co. was the principal defendant, but the U.S. Government was as well. Typically, in the Supreme Court each side gets half an hour to argue. But the Solicitor General asked to argue separately, and he was given fifteen minutes. Duke Power Co. still got their thirty minutes and I got forty-five minutes.

The Chief Justice was Warren E. Burger in those days. The argument started at 10:00 a.m. and then at 12 noon, the Court recessed for an hour lunch. Justice Burger's practice was if somebody was arguing and the clock struck 12

noon and there were two minutes of time left, he would say, "It's time for lunch and you come back and do the last two minutes after lunch."

Sometimes the Court opens by admitting new members to the bar, which means that the second argument will extend past lunch. We were the second case, and I believe there were court admissions.

The Duke Power Co. lawyer did his argument, the government lawyer, Solicitor General Wade McCree, presented their argument, and there were almost no questions. I don't think the Duke Power lawyer got any. Even as a very young lawyer, I knew that was a very bad sign for me. If they had no questions, it was likely that they agreed with the industry and government lawyers.

But after their arguments, the Court recessed for lunch, and Alan Morrison and I adjourned to the Court cafeteria.

Mr. Pollak: Could you eat anything?

Mr. Schultz: I'm sure I ate something and I'm sure he encouraged me to eat something. We knew what was about to happen. It was a very quiet lunch. Not much was said.

Then I went back and got up to argue in this very, very formal setting. My practice then and has always been, in terms of notes, not to write out the argument but to have notes. But, in this case, underneath my pad I had the whole argument written out just in case I panicked. I could pull that out and have a written argument to read. I never had to use that for reasons that will become obvious in a minute.

My general experience in arguing was that I would be nervous until I got the first question, when the nervousness disappeared. Here I probably got two sentences before Justice Thurgood Marshall asked the first question. His question made it clear that he did not think much of my case. I don't remember the question, but it wasn't friendly. From then it was just rapid-fire questions, one after another.

As you can imagine there were many amicus briefs on both sides. Duke Power Company and the industry made it clear that they were very concerned we would lose on standing so the Court would rule for them but never get to the merits. In that case, the only judicial opinion on the constitutionality of the Price-Anderson Act would have been Judge McMillan's opinion holding the law unconstitutional. This could have made it difficult to raise funds to build additional nuclear power plants.

Duke Power wanted the Court to find standing and to reach the merits. But there were lots of questions about both. At one point, Justice White said to me, "So Mr. Schultz, isn't it true that you would rather lose on standing than lose on the merits?" It was a mean but perceptive question, and one that I didn't want to answer. I hesitated for just a moment and another justice asked a question, so I never had to answer Justice White. I remember Justice Burger had a couple of questions written out and he read them and then never followed up. But the others were very willing to follow up.

My dad and mother came to watch the argument. My father had gone to law school with two of the Justices, Justice White and Justice Potter Stewart. Justices sometimes write notes and have the assistant in the Court give them to somebody in the audience. Each of them wrote a note to my father. The notes represented their personalities. White's note was, "Chips and blocks and things like that. Congratulations." And Stewart's note was, "It makes me feel old to realize that this lawyer is your son. He did a good job under very heavy fire." I still have those notes.

I don't really know what else to say about the argument. One thing about arguing in the Supreme Court, as opposed to the circuit court or district court: When you're in a lower court, you know that you can spend enough time on it that you really know your case and the law as well as, probably better than, any judge. You can be very confident if you do the work.

But that's not true in the Supreme Court. The Supreme Court handles cases in a narrower range of issues and often they have written the leading opinions over twenty years or more. The issue in the case typically turns on the law, not on the facts, as is often the case in the lower court. It's also nine Justices. In a court of appeals of three judges, you have a chance of controlling things. With nine Justices in the Supreme Court, there's usually no chance of controlling the flow of the argument. You just have to answer the questions and hope you make all of your points. When it was over, I didn't have any regrets. I felt I had

made all my points. There wasn't anything I had forgotten to say or wished I had said differently, but I knew I was going to lose.

We went outside and were greeted by many press cameras, but as a lawyer you can't really say much. This case in the district court and then the Supreme Court had massive attention from the press. The press came from all over the country to cover the trial and was there to cover the argument in the Supreme Court.

Mr. Pollak: It was a great way to start your appellate life.

Ms. Schultz It was. In writing the brief, there must have been a hundred Supreme Court cases on takings. I read every one of them. I decided when I was working on the brief that the due process argument made in the district court was not our strongest argument. It wasn't a very good argument.

Mr. Pollak: And that was the ground that the district judge had rested on?

Mr. Schultz: That was the main argument he relied on. The argument in the district court was that it was a violation of due process for Congress to limit the remedy in that way. It was essentially an effort to revive substantive due process which had been so popular in the 1930s but had little currency by the 1970s. But the taking argument, I had decided, was a real argument. And that argument was that if there was an accident and somebody's property was damaged, and because of this limitation on liability they only got ten cents on the dollar, that was a taking of property by the government without just compensation in violation of the Fifth Amendment to the Constitution. We argued it was comparable to the state

deciding they want to build a road over an individual's property; the Fifth Amendment requires that the individual be compensated.

There were a couple of very old cases I found that were helpful. There was a case where the Supreme Court held that pollution from a train that devalued somebody's property was a taking. I thought that was a pretty good argument.

The government did come back and say, "Well, if there's a taking, you have a remedy under the Tucker Act." In other words, if we were right, there is a system for the government to offer compensation and therefore the Price-Anderson Act wasn't unconstitutional.

In the end, the Court held we had standing and reached the merits. They said we lost on due process and that the taking issue did not have to be decided at the time because the Tucker Act provided a remedy if there was a nuclear accident. We didn't really lose that. They just didn't decide it.

In terms of the goal of the case, which was to make it much more difficult for the nuclear industry to finance the construction of nuclear power plants, we lost. We didn't get what we wanted. The Price-Anderson Act was created because it was believed the nuclear industry couldn't get the financing without that protection. There weren't any nuclear plants built after the decision for other reasons. They became too expensive and too uneconomical.

Mr. Pollak: Did Mr. Nader talk to you about the case afterwards?

Mr. Schultz: Yes, and he attended the argument. Ralph Nader was notoriously late. I had given him a ticket to the argument, and he obviously had a real interest in it. I remember when the case was called, the name, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, grabbed my attention. The thought that went through my mind was I wished it was a different name because it sounded like a bunch of small-time do-gooders challenging nuclear power.

Ralph Nader arrived very late, about ten minutes into my argument. I remember the Justices all looking up from watching me to see this celebrity, Ralph Nader, coming into the courtroom as if to say, "Oh, so that's what this case is about." I'm sure I talked to him about it. I don't remember what he said. He probably thought I should have argued it differently and talked more about the compelling risks of nuclear power rather than the legal issues before the Court.

While we're on Ralph Nader, I ultimately had a very good working relationship with him. There are times when we testified together on various issues and I remember I learned that if the hearing was going to be at 10:00 a.m., I would tell him 9:30 a.m. One time I did that he got annoyed at me, but he was there on time and wouldn't have been if I had not said that. He was late to everything.

One of his most famous cases arose because of his lateness. It was called *Nader v. Allegheny Airlines*. Nader sued Allegheny Airlines because it had refused to board him on a flight. He was traveling to give a speech and being paid an honorarium, so the lost honorarium was his damages. When he arrived at

the last minute, as he always did, the airline officials said, "Oh, sorry. The plane is full. We overbooked. We mistakenly overbooked and sold too many tickets. So, there is no room for you." Well, this happened to him several times and he became convinced that this overbooking wasn't a mistake but was intentional. It's what the airlines did to ensure that their flights were full. So he brought a case against them and he won at the Supreme Court.[3]

As a result, the airlines changed their practice. They still intentionally overbook but if they have too many people for the flight, they'll pay passengers to agree to take another flight through a bidding system. That was Ralph Nader.

Mr. Pollak: I think you might move from your experience with the case testing the Price-Anderson Act constitutionality to your trajectory within Public Citizen Litigation Group. Did you continue developing cases? Did you specialize in an area? You spent fourteen years there. The oral history should reflect the organizational framework for that period of your life.

Mr. Schultz: I mentioned two cases I got that first day. One was the over-the-counter drug case for the Health Research Group. Through no plan, I ended up doing a lot of work with the Health Research Group. During those fourteen years, half of my practice was a food and drug practice, and I gained an expertise in that area.

Part of the work was litigation, but there was also a lobbying component. I had a lot of interaction with Congress opposing bad legislation or supporting legislation and I testified on the Hill many times. It wasn't all FDA but that was

[3] *Nader v. Alleghany Airlines*, 426 U.S. 290 (1976).

a very big component. I did a lot of speaking at FDA conferences. I also had a lot of interactions with the agency.

The other half was a mix. I had gained some nuclear power expertise and I spoke frequently about that case and testified on the Price-Anderson Act. I litigated cases on auto safety because Nader was so interested in it. I litigated a number of voting rights cases.

Mr. Pollak: And what were those voting rights cases? How did they develop?

Mr. Schultz: Ralph Nader had a particular interest in initiatives and referendums because it was a way in which individuals could challenge the government.

My client was Jack Phelan, a local activist who wanted to challenge the District of Columbia government's decision to build a convention center. The District of Columbia's Charter contained the right of initiative and referendum. Jack Phelan was an economist with the federal government, and he thought appropriating money for a convention center was a very bad economic decision. He collected signatures to support a referendum to challenge the appropriation of the District of Columbia government.

The problem was that although there was this right in the Charter, there was no implementing legislation or regulations. So there was no legislation to tell him how to do this or what the form should be. Jack had collected the 10,000 signatures, which we submitted to the Board of Elections of the District of Columbia government. The Board turned us down and so we filed a case in the D.C. Superior Court. We ended up bouncing back and forth between the court

and the board until there were three separate cases before Superior Court Judge Norma Holloway Johnson. We argued that we had a right of referendum and it was a right in the charter, but ultimately, I think the City Council issued regulations and accepted the signatures. So the issue was whether this type of question could be put up for a vote under the initiative/referendum charter provision.

Ultimately Judge Johnson ruled against us, and I appealed it to the D.C. Court of Appeals. We lost with a dissent, but the Court granted our motion for a rehearing before the entire court.

This is an argument I remember well. I started out by saying, "May it please the Court. My name is William Schultz. I'm here on behalf of the Convention Center Referendum Committee and there are three cases. And for ease I'll call them Convention Center I, Convention Center II, and Convention Center III." And Chief Judge Theodore Newman then interrupted me and said, "Mr. Schultz, let's just call them Convention Center ad nauseam." It was an unusual beginning of an oral argument.

As I remember, by this time and maybe as a result of one of the cases, the District finally issued the implementing regulations. So we won on that issue. But the issue in the case was whether there was a right to have a referendum on appropriation, or limit the determination to an ordinary law. We lost the case 5 to 4. We got all the conservatives on the court and lost the liberals. The liberals

were all very supportive of Mayor Marion Barry and the government, and they wanted the government to be able to make its own decisions.

The outcome to the story is the Convention Center was built. It was a total economic failure, and it has since been torn down. And a much bigger one was built to replace it.

In the FDA practice, I represented the Health Research Group. I also represented Center for Science in the Public Interest and the Natural Resources Defense Council (NRDC), an environmental group on pesticide cases. I had a whole range of clients and the great thing about it was that I didn't have to charge them. And I mostly didn't have to keep track of my time. If we had a possibility of attorneys' fees, we would keep hours but otherwise we didn't.

Mr. Pollak: In handling a case, did you do it all on your own or did you work with somebody generally?

Mr. Schultz: No. There were always three people working on every case. There would be one other person with whom I worked fairly closely and then Alan Morrison, the director, was on almost every case as well. I'm sure I worked with every lawyer there. I did end up getting some of the other lawyers very interested in food and drug law. Kathy Meyer ended up doing a lot of food and drug law.

But mostly we would get a case and ask somebody else to help us on it. It was not a competitive situation. This was a group of real achievers. They certainly had been competitive in school, and you would think there would be a lot of competition for who got the best cases and so on, but Alan had a method of

assigning the cases that really took a lot of that away. For example, I ended up building FDA expertise and forging a very close relationship with Sid Wolfe, the Director of the Health Research Group. Any FDA case I would have some role in, whether I wanted to be in the lead or wanted to be the second person.

Mr. Pollak: Were you litigating primarily in the United States District Court for the District of Columbia and when there were appeals in the D.C. Circuit?

Mr. Schultz: Yes, although I also argued in the Ninth Circuit, the Sixth Circuit, and the Florida Supreme Court. I had trials in Chicago, North Carolina, and Ohio. But we were very centered in D.C.

Mr. Pollak: You want to comment on your observations of the court in the cases that you had? It would be interesting to have your recollections of judges' performances or your experiences in the D.C. Circuit.

Mr. Schultz: In the district court, I mentioned my first case outside of the nuclear case was a challenge to the over-the-counter drug review. That case was *Cutler v. Kennedy*.[4] We represented three individuals who used over-the-counter drugs. We drew Judge John Sirica of Watergate fame, who had the reputation outside of Watergate of being a conservative, government-oriented judge. It wasn't seen as a good draw. The trade association for the over-the-counter drug industry intervened. They were represented by Robert A. Altman, who was a young lawyer in the firm of Clifford, Glass, McIlwain & Finney. This was Clark Clifford's firm. Clifford was the ultimate Washington insider. He had been

[4] 475 F. Supp. 838 (D.D.C. 1979).

counsel to President Truman and Secretary of Defense under President Johnson. Altman later became very famous as a protégé of Clark Clifford in the BCCI bank scandal case and was charged, I believe, with criminal fraud. He was a very hard-charging lawyer and was very confident he was going to win this case because we had Judge Sirica.

The case involved the review of the over-the-counter drugs by FDA. The statute had directed FDA to require that drugs be safe and effective. Congress passed the efficacy requirement in 1962, and told FDA to go back and look at all the drugs on the market. FDA initially looked at prescription drugs, but they also had the obligation to look at over-the-counter drugs or simply act and take the ones off the market that weren't proven. The OTC Review was established under Peter Hutt when he was the chief counsel of FDA, after which he returned to Covington & Burling to practice food and drug law.

Under the regulations that Peter wrote, the National Academy of Sciences reviewed all these drugs and put them into seventeen different classifications. Then FDA would take those recommendations and put them in one of three categories. It was a review of the ingredients and not the drugs. Category 1 was safe and effective, Category 2 was not safe and effective, and Category 3 was we don't know and more testing is required. The theory of our case was Category 1 and Category 2 were fine, but if the FDA was finding that more testing was required, it was finding that the existing evidence did not demonstrate safety and efficacy and was required to take the drug off the market.

It was a legal issue; we didn't need a trial, although there could have been issues raised about standing, and Bob Altman took everybody's deposition. At one point, he even took my deposition because he had a theory that our recruiting the plaintiffs was somehow relevant to standing. Judge Sirica, much to everybody's surprise, issued an opinion that not only ruled in our favor, but was extremely well crafted. In fact, it was so strong the government didn't appeal. So that was a big victory, and something that we were very pleased with.

Mr. Pollak: Do you have more to say about your cases?

Mr. Schultz: Not right now. Fun to recall these days. They were really wonderful.