ORAL HISTORY OF WILLIAM BARNETT SCHULTZ

This is the fifth 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 Thursday, June 17, 2021, in Washington, D.C.

Mr. Pollak: Good morning, Bill Schultz. We're still discussing your work with the Public Citizen Litigation Group. I'd like to open by asking you about a major trial in public liability styled *Mink v. University of Chicago.*[12]

Mr. Schultz: I'll start with telling you about the case. Patsy Mink had been a member of Congress and Assistant Secretary of State in the Carter Administration. Before all that she was a student at the University of Chicago Law School in the early 1950s. Growing up in Hawaii she had wanted to go to medical school, but she wasn't able to get into any medical schools. She was never sure whether it was because she was a woman or because of her ethnicity. But she was able to get into the University of Chicago Law School where, incidentally, she was in the same class as Robert Bork and Abner Mikva.

Mr. Pollak: I see. And what was her ethnicity?

Mr. Schultz: She was a native Hawaiian – her name is Patsy Takemoto – and she married John Mink and became pregnant. She went to the clinics at The University of Chicago for medical care. They gave her a pill they said was a vitamin pill that she should take every day, which she did dutifully. The doctors also directed her to return to the clinic periodically for a urine test that turned out had nothing to do with her medical care, but was required to document whether she was taking this pill. She

[12] 460 F. Supp. 713 (N.D. Ill. 1978).

subsequently served in Congress, where she oversaw hearings about a drug called diethylstilbestrol or DES. It was a drug manufactured by Eli Lilly and Company and it was sold for the prevention of miscarriages. It was given to pregnant women who had a history of miscarriages to prevent miscarriages, but in fact there was no evidence that it worked.

This was before Congress passed the Kefauver Amendment requiring that drugs be proven effective before they could be approved by FDA. Previously drugs only had to be proven safe. Lilly thought that this drug was so valuable that maybe it should be given to all pregnant women whether they had a history of miscarriages or not. They enlisted a professor, Dr. William Dieckmann, at the University of Chicago to do a study of all pregnant women to see whether this drug made healthier babies and prevented miscarriages. The trial covered 2,000 pregnant women who sought medical care at the university's clinics. These women became subjects of a medical experiment. None of them was told this even though the experiment occurred after the Nuremberg trials and creation of the Nuremberg Code requiring informed consent in medical experiments.

One thousand women were given DES and 1,000 women were given a placebo, so it was a very well-designed study that incidentally showed the drug had no benefit. In the mid-1970s, there was increasing concern about this drug. In a famous *New England Journal of Medicine* article written by Professor Arthur Herbst in 1971, a study found that the children of women who took DES were developing a very rare kind of vaginal cancer.

There was all of a sudden great concern and other researchers at the University of Chicago recognized that they had the perfect sample to study this, namely the 2,000 women who had participated in Dr. Dieckmann's experiment. They decided to investigate the effects of DES on both the children born to mothers who had been given the drug and the mothers.

The University sent a letter about the follow-up study to the study participants. Patsy Mink had one child, and on her daughter's birthday she received the letter from The University of Chicago saying in effect: You probably didn't know it but when you were a student here and were pregnant, you were part of a medical experiment and now we want you to be a part of the follow-up study. Patsy Mink was furious. She had conducted hearings in Congress on DES and knew about the drug very well and about the study and the risk -- she just didn't know she had taken it. She called Sid Wolfe, head of the Public Citizen Health Research Group, who was nationally prominent in attacking drug companies not only for promoting unsafe drugs but also for not providing adequate informed consent.

She told Sid that she wanted to sue the University of Chicago over this, but that she couldn't find a lawyer to take the case. She had gone to many trial lawyers.

Sid walked across the hall and brought the case to the litigation group. John Sims, Alan Morrison, and I took on the case. Patsy had lined up two other women who were also part of the experiment, Gladys Lang and Phyllis Wetherill,

and each of them had had daughters. We didn't know whether the mothers were at risk and we didn't know what the risk was to their daughters. By this time, it was known that there were abnormal vaginal conditions that could be seen in the daughters and we knew there was an established very rare cancer. The Litigation Group generally did not handle traditional product liability cases. We decided to bring a class action on behalf of the mothers but that the daughters needed their own legal counsel. We felt that they could have very substantial cases that lawyers would be interested in bringing. There was nobody else who would bring the mothers' case, so it was really on us. We paired up with a small firm in Chicago, Stack & Filpi. They represented the daughters, and we brought the class action case on behalf of the mothers.

We had a problem because negligence law in many states, including Illinois, required an actual injury to recover damages. In Illinois we couldn't recover under a negligence theory on the ground that our clients had been wronged unless we could prove actual physical damages and we didn't have evidence of that for these women, so we did a lot of research and we came up with the novel theory that this was a battery. A battery is a tort, an intentional touching or act of force to which the other person has not consented. So if you hit someone over the head you can be sued even if there wasn't actual injury. Our theory was this was an unconsented touching. These women had not consented to taking this drug. Our complaint alleged that the University of Chicago doctors had committed a battery against these women.

The cases were filed in federal court in Chicago and assigned to Judge John Grady.

Mr. Pollak: Who represented Eli Lilly? Or the University?

Mr. Schultz: The University's counsel was James Gladden of Mayer, Brown & Platt and John Menk, a very colorful lawyer local to Chicago. Lilly was represented by Shook, Hardy & Bacon, a Kansas City law firm famous for representing the tobacco industry. The young associate assigned to the case, Steve Parrish, later became very prominent at Philip Morris. I worked with him quite a few years later in negotiating tobacco control legislation, when he represented Philip Morris and I represented the Campaign for Tobacco-Free Kids.

After considering pre-trial motions, Judge Grady upheld our battery theory and said the complaint could proceed. The case was used in law schools as an example of a modern application of battery, and I later saw Judge Grady's opinion reproduced in a tort textbook.

Mr. Pollak: And although Patsy Mink and others had consented to taking the pill, their consent was uninformed, so that was the battery?

Mr. Schultz: That was the theory that Judge Grady accepted. The young women had consented to taking the drug. Although we won on the battery issue Judge Grady denied the class action, so we had to proceed only on behalf of the three individual women. These rulings were followed by years of depositions of leading experts. We deposed Arthur Herbst from Harvard, who had written the article identifying the

link between DES and vaginal cancer in daughters. Dr. Dieckmann, who had done the experiment, was dead.

We also identified a lot of other women who had been part of this experiment, and it was scheduled for trial in the early 1980s. We all went to Chicago in the middle of winter. John Sims and I represented the plaintiffs.

Mr. Pollak: What year had you initiated the case?

Mr. Schultz: I filed the complaint in 1977. I think the trial was 1983. We were pretty inexperienced. We had never done anything like this. Neither of us had ever done a jury trial before but that didn't stop us. I did the opening argument. When I was telling my sister she said, "You mean they were just guinea pigs?" So I used that in the opening argument, and John Menk, a very colorful trial lawyer, attacked me on it. He made fun of the term "guinea pigs" and said these women were getting the finest medical care known to mankind. And of course, we were attacked for not being local, being out-of-town lawyers, but the case was front page news in *The Chicago Tribune* and the local newspapers because we were taking on the University of Chicago. Lilly had been dismissed because its only role in the case was that it supplied the pills for free, but it turned out that the company was not part of the medical experiment otherwise.

A few things stand out about the trial. First of all, when we were close to trial it turned out there were a lot of disclosures that hadn't been made to us by the lawyers for the University of Chicago. We learned they had played fast and loose with the rules because later we became friendly with one of their paralegals

who told us they had withheld documents that we had legitimately asked for in discovery. When we complained to the judge that we hadn't had a chance to depose newly named witnesses, the judge ordered that we could take the depositions during trial. We would be trying the case during the day and take depositions in the evening or on Saturday. But we managed.

We called about twenty mothers who had been part of the experiment as witnesses. One of the challenges in the case was that the medical records were a mess and it turned out the medical records reflected that some of these women had been informed. Our clients clearly had not, and we thought it was very helpful to get other women who had been part of the experiment to tell the same story as our clients were telling. On a day we referred to as Mother's Day, we called a parade of twenty women including the wife of a professor at the University of Chicago. A number of them were associated with the University, which is why they had privileges at the health clinics.

One expert was a psychiatrist and a professor, and we wanted her to testify about damages because our only damages were emotional. She had interviewed extensively each of our three plaintiffs and then provided helpful testimony. She later told us that her experience as a witness was the most terrifying experience of her life. It made me realize that we're all used to the combat of a courtroom and seeing a jury but to somebody who has never had this experience, it can be terrifying. She did perfectly well. The cross-examination had not been particularly brutal.

We stayed in the Union League Club because it was right across the street from the courthouse. Our three clients also stayed there, and their husbands came to visit periodically. This was an exclusive club and we would often see the lawyers for the other side having lunch in the same dining room.

As we neared the end of the trial, they made a settlement proposal. We settled the case for $225,000 in damages and some relief for the class, even though it wasn't a class action. The University agreed that all the women in the class would receive free medical exams and I think free medical care for the rest of their lives. *Mink v. University of Chicago* was quite an experience.

Mr. Pollak: Have you had other jury trials in your career?

Mr. Schultz: Two.

Mr. Pollak: They're rare.

Mr. Schultz: While I was at the Litigation Group I represented another plaintiff in a jury trial, which we lost. It was a case on behalf a man who died from the drug Macrodantin. The drug had been prescribed by his urologist, who didn't understand the drug's side effects.

It turned out he was the only urologist in the entire community in a small town in North Carolina. Every male on the jury could have expected to go to him at one time or another. We thought we had a strong case, but we lost.

Mr. Pollak: Do you have any comments on how the jury performed in the Mink case?

Mr. Schultz: We didn't see the jury perform because the case settled near the end of the trial.

After the verdict we talked to Judge Grady, who had never seemed particularly receptive. But he didn't seem hostile to the case either, which shows he was a good judge. When we talked to him afterwards, he said he thought the settlement was a little light. So he obviously thought it was a strong case. We had run into some problems, though. We did one cross-examination where we had the medical records in front of a witness, and we missed some damaging stuff in the medical records that came out.

It turned out that these records did reflect that there had been some consent, not for our clients, but for some of the women. In the middle of the trial, Sid Wolfe, the Director of the Health Research Group who had brought the case to us, was in Chicago for a TV interview. We sat down and showed him all the medical records we planned to use in the case. He went through them with us and interpreted them. Medical records in those days could be impossible to interpret particularly with a doctor's handwriting, which can indecipherable. He deciphered them for us.

We were concerned the defense would argue that the records showed all the women had been given informed consent. This seemed weak since the women, including our clients, had testified that they didn't consent. But it was impossible for us to know what the jury would do or how they would value our clients' damages.

Our schedule was brutal, as trials are. Our typical day would start at 6:00 a.m. preparing for the day and then we would go to trial. After trial we

would often play squash at the Union League Club, have dinner, and then work until 2:00 a.m. every night, every weekend. At some point near the end of the trial, my watch band broke and I needed a new one. I went into a shopping mall in Chicago, and it felt so strange because all we had been doing or thinking of for three straight weeks had been this trial and this case.

Mr. Pollak: Well, that was a great experience.

Mr. Schultz: It was a great experience. It was an amazing case. Let me mention one other thing. Patsy Mink was such an interesting person and had such an interesting career. She had been elected to Congress in 1965 and lost a race for Senate in 1976. She served as an Assistant Secretary of State during the Carter Administration, then returned to Hawaii with her husband. She served on the Honolulu City Council and then returned to Congress in 1990, where she served until her death in 2002. I got reacquainted with her when I was on Congressman Waxman's staff, and we worked on a couple of things together.

Mr. Pollak: I remember her as a capable member of Congress.

Mr. Schultz: She was a true liberal with a lot of guts. At the time there were very few women members of Congress. She once told me that there was a gym on the Hill with a male-only swimming pool, and the men all swam nude. She and Bella Abzug from New York and one other female member decided to integrate the Congressional swimming pool. They simply showed up, read the sign that said, "Members Only," and as members walked in. She said all the men ran, but after

that women members could swim in the pool, too. I assume everyone wore swimsuits then.

Mr. Pollak: That's a fascinating commentary. Well, you also engaged in lobbying to some extent during your time with the Litigation Group. What part of your days were spent lobbying, about what, and how does that fit into your history?

Mr. Schultz: Public Citizen had a lobbying group, Congress Watch, and the lawyers and professionals there were full-time lobbyists. But they relied on the expertise of the members of other groups. If they were lobbying on a health issue, they would rely on the Health Research Group. If it was a nuclear power interest issue, they would rely on Public Citizen's nuclear power group. But as lawyers at the Litigation Group, we gained a lot of expertise in a range of areas. As a lawyer, if you're litigating a case you are required to become expert in the area in order to do a good job. As a result, Congress Watch often asked other groups frequently to join them in lobbying efforts.

I was proud to be a registered lobbyist because I was working on what I thought was the right side of public policy issues. Later on, I'll tell you about how that came back to haunt me. I looked it up, and I testified more than twenty times in Congressional hearings during those years. I also spent considerable time lobbying, not every day or every week but there were times when it was intense. I think the three biggest matters I lobbied on were the Hatch-Waxman Act, nuclear power, and food safety legislation.

As to food safety, in 1981 after Ronald Reagan was elected President and the Senate turned over, there was a very significant effort to weaken the food safety laws. I also worked on the Bork nomination near the end of my time at the Litigation Group, in 1987.

Mr. Pollak: I see. Who headed up the lobbying activities for the Nader group?

Mr. Schultz: Congress Watch was founded by Joan Claybrook in the early 1970s, but in 1976 when Jimmy Carter was elected President, she became head of the National Highway Traffic Safety Administration. At the end of Carter's term she returned to Public Citizen as its president.

After Joan, Mark Green, a longtime Nader associate who went on to run for Congress and Mayor of New York, ran Congress Watch. But much of the time it was Nancy Drabble, and she's the one I remember working with the most. She married my close friend John Sims, a colleague at the Litigation Group. We were counsel in the Mink case.

Mr. Pollak: Set the stage. What is the food safety legislation and how did it fit in?

Mr. Schultz: In 1980, along with Ronald Reagan's election there were devastating losses of prominent Senate Democrats, including George McGovern and Frank Church. But most significantly the Senate changed from Democrat to Republican. The Chair of the Senate Health Committee that covered the Food and Drug Administration had been Senator Ted Kennedy but Senator Orrin Hatch assumed the Chair. Early in Reagan's term Senator Hatch developed a bill with the food

industry that would have brought major changes to the food safety laws, significantly weakening them.

For example, the Delaney clause that I mentioned, and which banned carcinogens in food additives, would have been changed. There were numerous revisions, and this was devastating. The public interest groups organized to lobby against it and I wrote a paper analyzing the bill, the title of which was "Easy On, Hard Off." My thinking was this bill would make it easy to get new food additives on the market and difficult to take dangerous ones off. The first thing we did was meet with Senator Kennedy who was going to be our sponsor in the Senate.

Mr. Pollak: How did you get your knowledge to write this article, and did you write it at the front end of the campaign?

Mr. Schultz: I wrote it at the beginning because we needed to analyze the bill.

Mr. Pollak: And the beginning was when?

Mr. Schultz: Early 1981.

Mr. Pollak: I see.

Mr. Schultz: Reagan came into office in 1981 and this issue arose right out of the box. I think the food industry lawyers had been working on this for some time. I had been at the Litigation Group for five years and by that time a significant portion of my practice involved FDA, including many food issues like color additives and food additives. We met with Senator Kennedy and he was completely depressed. He

said, “I don’t know what I can do. Senator Hatch is in charge. Tell me if you want me to do anything but I’m not optimistic.”

And then somebody gave my paper to *The Washington Post*, which assigned a reporter named Paul Taylor to look into the issue. He called me and we met at my office to talk about it. It turned out that Paul Taylor was a friend from college. We recognized each other and I explained the whole thing to him and told him what was behind it. He wrote a front-page article in *The Washington Post*. The theme of the article was that this bill had been written by food industry lawyers. It had been written by Peter Hutt at Covington, Stuart Pape at Patton Boggs, and other leading food and drug lawyers.

After the *Post* article, we met with Senator Kennedy again. He was in a totally different mood. He said, “I don’t know who got that article in the paper but that was terrific.” He was completely ginned up and ready for the fight. Meanwhile we were in discussions with staff and I remember one staff member in particular, a David Kessler on Senator Hatch’s Committee staff. David Kessler had gone to both Harvard Medical School and the University of Chicago Law School. He then did his residency in pediatrics at Johns Hopkins. On the side during his residency, he moonlighted for Senator Hatch on this bill. I briefed him; we gave him our paper.

In the end, the bill died. It never got marked up in committee. There may have been a hearing, but we killed it. That was very satisfying.

Mr. Pollak: So, the merits prevailed?

Mr. Schultz: Yes, and the press was a critical factor.

Mr. Pollak: And where did Senator Hatch stand in the end?

Mr. Schultz: That news story about how his bill had been written by these industry lawyers was devastating. Senators don't like that, and it was embarrassing. Senators are supposed to write bills, not the industry.

Mr. Pollak: So that was a great experience.

Mr. Schultz: That was fun.

Mr. Pollak: And did you work closely on that with any other senators beyond Senator Kennedy?

Mr. Schultz: Not that I remember. On the House side, I'm sure we were in contact with Congressman Waxman's staff.

Mr. Pollak: And how did vacancy on the Supreme Court come about?

Mr. Schultz: Justice Powell retired.

Mr. Pollak: I see. Tell us about the nomination and how you became involved, what your role was, and when it all happened.

Mr. Schultz: I think it was July 1987. Traditionally, Justices announce their retirement at the end of the term and Justice Powell announced his retirement. He was seen as somewhere near the center of the Court. Everybody was afraid that President Reagan might nominate Robert Bork but were hoping that the White House would see him as too controversial. Sure enough, he nominated Judge Bork in July 1987. At that time Alan Morrison, the Director of the Litigation Group, was

on an extended trip to China where he was doing some teaching for the summer, and I was acting director of the Litigation Group. Right after the nomination I went to the law library at Georgetown University and started researching Judge Bork's cases. We were very familiar with Judge Bork because the Litigation Group argued in the D.C. Circuit all the time.

Mr. Pollak: Why don't you pause a minute and say something about who Robert Bork was?

Mr. Schultz: Robert Bork had been a been an antitrust professor at Yale Law School. He was very well regarded as a teacher and scholar, but early in his career he wrote a number of very provocative articles including a famous one in the University of Indiana Law Review where he challenged one Warren Court decision after another.[13] He also questioned the legitimacy of *Roe v. Wade* and all the Supreme Court's decisions based on the right of privacy. While his academic work was highly regarded, he periodically published newspaper and magazine articles that were all very controversial and very conservative.

He was Solicitor General under President Richard M. Nixon. As part of the Watergate investigation, Archibald Cox was named special prosecutor. Cox sought access to White House tapes of incriminating conversations by the President, as evidence of obstruction of justice in attempting to block prosecutions related to the Watergate break-in.

Nixon didn't want the tapes released and Archibald Cox took the case to the Supreme Court. When Cox insisted on releasing the tapes, Nixon directed the

[13] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

Attorney General to fire him. In what was called the Saturday Night Massacre, Attorney General Elliot Richardson and Deputy Attorney General William Ruckelshaus resigned rather than follow Nixon's directive to fire the special prosecutor. Next in line after Richardson and Ruckelshaus was Solicitor General Robert Bork, who became Acting Attorney General and carried out Nixon's order to fire Archibald Cox.

When we looked into his performance, we found that he had a stellar record as a law professor and little basis to criticize his performance in the Solicitor General's Office. We talked to career prosecutors and other people who were mostly complimentary.

Bork was nominated and confirmed for a position on the D.C. Circuit, but he hurt his case to be on the Supreme Court by campaigning for the position when he was on the D.C. Circuit.

Mr. Pollak: How did he do that?

Mr. Schultz: He spoke at the Federalist Society, a very conservative legal organization. He gave speeches that were very regressive and right wing, attacking various cherished Supreme Court doctrines. These speeches were recorded. They connected the present day to the past articles that were so provocative.

Mr. Pollak: He told the Society what the Society wanted to hear?

Mr. Schultz: Yes, but I don't think he was just telling them what they wanted to hear. He was also expressing his own view, and this was a preview to his likely performance

on the Supreme Court. We knew enough to know that public interest law would suffer if the country traded the more centrist Louis Powell for Robert Bork.

The Litigation Group had a policy never to oppose a Supreme Court nomination because it frequently litigated cases before the Supreme Court. I was the acting director and I got everybody together to discuss what to do. We decided we wanted to take on Judge Bork. We had the full support of Joan Claybrook, President of Public Citizen, and Ralph Nader, the founder and still very much a presence at Public Citizen.

First, we analyzed all his opinions. He had sat on about 400 cases. We examined how he had voted and how his votes compared to other members of the court. In law school I wrote a law review article on voting patterns in which I rated Justices from liberal to conservative, comparing how they voted with each other.[14] We wanted to do the same analysis here. How did he vote? How often did he vote with Abner Mikva, a liberal on the court, or Patricia Wald, also a liberal?

We found that Judge Bork very frequently voted with liberals on the court. This surprised us, but the reason is that a high percentage of the court's cases were unanimous, so of course he voted with liberals in those cases. So we didn't use our analysis of how often he voted with the liberal members of the court, but it did please me that it took the White House a month to do the same thing. A month later the White House came out with the same analysis, arguing

[14] William B. Schultz & Philip K. Howard, *The Myth of Swing Voting: An Analysis of Voting Patterns on the Supreme Court*, 50 N.Y.U. L. Rev. 798 (1975).

Bork wasn't an idealogue because he voted with Abner Mikva 80% of the time overall.

Meanwhile we began analyzing the split decisions, the 2-1 decisions with a majority and a dissent. These were the cases where Judge Bork's vote made a difference. Looking at it that way was very revealing. He was part of something like 58 split decisions. About fifty of them could be categorized in ways that were revealing: as either for or against access to the courts, for or against business, for the environmental group or for the government, for or against consumer groups, labor, and so on. We classified the cases in those categories and counted them up. It turned out 96% of the time Robert Bork had voted against environmental groups, against labor, against consumers, or for business. We did what lawyers do: We wrote a report and every lawyer in the Litigation Group worked on it. It was a complete team effort.

We divided it up into categories, depending on people's expertise or what they wanted to work on, and we put out a 90-page report on the judicial record of Robert Bork in the D.C. Circuit. Then we got very involved in the lobbying campaign, which was led by Ralph Neas, director of the Leadership Conference on Civil Rights.

Ralph was a very skilled coalition builder and lobbyist. It was a fascinating experience to work with all the civil rights groups involved. The NAACP and Joe Rauh also played a part.

We had many meetings, and the effort was quite well-organized. We looked at challenging Judge Bork from every angle. We looked at making a big deal about his firing Archibald Cox but decided that it probably wasn't the way to go. We conducted deep analysis of all his writings, but our role was to evaluate his judicial record in the D.C. Circuit, which was quite relevant. The organization People For the American Way used our work to produce ads opposing Bork's nomination.

We tried to find something other than his political philosophy to use in opposing him. We desperately wanted to find something in his professional life that was negative, a conflict of interest or inappropriate behavior. But we found nothing and were left with fighting this nomination based on Judge Bork's philosophy, based on the argument that he was an extremist. I think it was the first time in modern history that a Supreme Court justice was defeated on that basis. Previously there had always been a conflict of interest or some other kind of problem because there was a belief that the President got to pick a justice whose philosophy was consistent with his own.

We had initial discussions about whether we could get Senator Ted Kennedy and others to filibuster but there was general agreement that it was not something the Democrats would be willing to do.

When the Bork nomination was announced, Senator Kennedy immediately put out a very strong statement of opposition referring to the return of back-alley abortions and that the world of Robert Bork would be a disaster.

Senator Kennedy met with our group many times and told us he made such a strong statement because he wanted to freeze his colleagues from endorsing Bork and it worked.

I attended all the hearings, and they were fascinating. We had a war room in the Senate where our experts waited to be called upon, so for any question we could immediately give information to the Senate staff to pass on to the members for further questions. If you remember, Joe Biden was chair of the Senate Judiciary Committee and running for President at the time, which was complicated. Ultimately, he dropped out of the Presidential race, but this was all going on concurrently. Senator Kennedy once again was our champion.

Mr. Pollak: Do you want to say a word about your role in preparing the book?

Mr. Schultz: I directed it. A lot of people worked on it. I probably conceived of it, we figured out the areas to study: Administrative law, constitutional law, criminal law, access to courts, and then we agreed who was going to do each chapter. I wrote the introduction and then edited all the chapters. We didn't list a principal author. All the attorneys at the Litigation Group were listed as contributors.

Mr. Pollak: And is there a conclusion?

Mr. Schultz There's a story about that. When we finished, Ralph Nader read the book and asked, "So, what's the conclusion? The conclusion has to be – he should be defeated?" But we had given this issue serious thought and had decided against reaching that conclusion. We just wanted our work considered in the confirmation process.

Ralph said, "You have to have a conclusion." So I agreed to the following conclusion which I'll read it to you: "In our view, Judge Bork's record on the D.C. Circuit raises serious issues that should be addressed before any Senator votes on his nomination to the Supreme Court." That was our conclusion. We didn't make a recommendation. It probably would be hard to get away with this kind of conclusion today.

Mr. Pollak: It was a different time.

Mr. Schultz: I will tell you my impression of the hearing. The reason we won was because of Bork. I think when the American people and the Senators saw him, he didn't come across as honest or likeable. He really hurt his own case.

The most famous question came from Senator Alan Simpson, who supported Bork and was trying to be helpful. Senator Simpson asked Judge Bork, "Why do you want to be on the Supreme Court?" and the judge answered that the discussions about law with colleagues and attorneys would be "an intellectual feast." It was an honest answer, but it was an admission that he didn't seek the job to do good, but rather for the intellectual challenge.

Mr. Pollak: So how did you distribute the book, the product of your work?

Mr. Schultz: Initially it was probably typewritten, and we gave it to the staff and everyone working to oppose the nomination. Ultimately, we printed it as a book. It was also published as a law review article.[15]

[15] Public Citizen Litigation Group, *The Judicial Record of Judge Robert H. Bork* (1987), reprinted in 9 CARDOZO L. REV. 297 (1987).

Mr. Pollak: Did you testify?

Mr. Schultz: No.

Mr. Pollak: Did you lobby Senators?

Mr. Schultz: I'm sure I did. As to testifying, there was going to be a day of public groups testifying and Biden nixed it, so I don't think any of the groups testified. I think we submitted written testimony.

Mr. Pollak: How would you categorize the report? What was the tenor?

Mr. Schultz: It was very critical because we were saying this judge voted against the little guy almost every time. If it was an environmental group against the government, he voted against the environmental group, or consumer against the government, he voted against the consumer. If it was about access to courts, he voted against access to courts. Every time it mattered to the public interest, he voted against it. The 2 to 1 panel decisions are a good subset to study because those tended to be the most important cases. Those are the ones in which somebody takes the trouble to dissent.

It was an extraordinary revelation. The chapters in the book analyzed the cases and explained both sides. You really get a sense that we felt his decisions were wrong. In every one of those cases, there is a judge on the court that agreed with us.

Mr. Pollak: Would you comment on the relation of those hearings to the recent proceedings for nominee Brett Kavanaugh or nominee Amy Coney Barrett?

Mr. Schultz: Bork's nomination was the beginning of modern-day Supreme Court battles. I think it was the first major public campaign against a Supreme Court nominee and it certainly opened up the question of challenging a nominee based on judicial philosophy. There's been a lot of criticism about how these hearings and this effort changed judicial confirmations and made them hyper-partisan and bitter, but it's legitimate to oppose a nominee based on an extreme philosophy. By any measure Judge Bork had an extreme philosophy.

Mr. Pollak: Does it cut both ways? Would that test apply to someone who had an extreme philosophy at the other end of the spectrum?

Mr. Schultz: Well, it should, yes. I have to say I think the Democratic nominees to the Supreme Court in my lifetime have been moderate, particularly when compared to some of the appointments in the 40s, 50s, and 60s. I think it's legitimate to have the debate about whether the candidate's philosophy is extreme, and I have no doubt that Robert Bork's philosophy was seriously out of step with the decisions of the Supreme Court over the previous 40 or 50 years.

Mr. Pollak: Did you look into the views of judges who served on the D.C. Circuit with Judge Bork, and did that play a role in your commentary?

Mr. Schultz: We didn't have any way of determining their views, or if we learned anything to make public use of it. The only way we could measure their views was to evaluate their judicial opinions. From what I could tell, Judge Bork was personable, and he had a sense of humor. His character was never the issue. The issue was his judicial philosophy, and Public Citizen felt that as much as we

disagreed with what he did on the D.C. Circuit, it's not really a measure of what's going to happen on the Supreme Court because a circuit judge has to follow Supreme Court precedent. Many of the most important issues never get to the appellate court but they do get to the Supreme Court.

But his writings and speeches for the Federalist Society were devastating in terms of making the case that this was an extremely dangerous appointment for the Supreme Court. The analysis of his performance on the D.C. Circuit showed a consistency of what we saw as voting the wrong way. It fit into the entire picture.

Mr. Pollak: In terms of the preparatory work that you've done, we've come to the end of this lengthy period where you were a member of the Public Citizen Litigation Group. I would invite you to look again, identifying major people with whom you served in that group, and to provide a coda on what it all taught you and where you wanted to go after you moved from there and indeed what brought about your move from there? What caused you to leave?

Mr. Schultz: I'll begin with Ralph Nader who began it all, started modern-day public interest law and figured out that the public interest lawyer's role wasn't just litigating but also lobbying, working with the press, and so on. From the time he graduated from law school he dedicated himself to making the United States a better place. He led this monastic life where he worked all the time and created these organizations that paid very low salaries but drew very talented people. The three people he attracted as the leaders for his key groups were extraordinary.

Joan Claybrook was the original head of Congress Watch, Sid Wolfe was the head of the Health Research Group, and Alan Morrison was the director of the Litigation Group. With Ralph Nader, these are four of the most talented, dedicated, hard-working people I have ever known professionally.

Alan was a phenomenal lawyer. He was smart, extremely hard-working, and very creative. He really knew how to push the law. After law school, work at a law firm, and a stint as an Assistant U.S. attorney, he somehow became interested in Ralph Nader and came to Washington to start the Litigation Group almost fifty years ago. He immediately developed a very sophisticated practice with the lawyers of the Litigation Group who frequently argued in the Supreme Court and always in the courts of appeals. We always were given the time and the room to do the very best legal work we could possibly produce.

Alan created a collaborative atmosphere in the Litigation Group with people who had spent their whole life competing and achieving and yet as colleagues always supported each other. There was very little of the destructive competition that you may see elsewhere. Because of the salaries, people in most of the Nader groups stayed for two or three years, which is probably what I expected to do when I started. But the lawyers in the litigation groups stayed for a long time. They found a way to do it and they stayed because they couldn't figure out how there was anything else they could do that they liked more, or a place they could work with people they liked more.

Sid Wolfe graduated from medical school and then worked as a researcher at the National Institutes of Health, where he had done some work with Ralph. Around the time Alan founded the Litigation Group, Sid founded the Health Research Group. HRG very quickly became the major group challenging FDA decisions and pushing FDA not only on drugs but also on food additives and medical devices. He worked a lot to promote worker safety. He's done a ton of work on informed consent and on monitoring doctors and criticizing state and local boards for their failure to protect patients against doctors who have long histories of committing devastating mistakes.

Sid was a master of media coverage, but he was also a serious scientist. Most scientists are very, very cautious and Sid was willing to reach his conclusions and state them in a way that was clear that could be reported by the media, but no one should mistake that he was serious about getting the science right.

Joan Claybrook was an unbelievably effective lobbyist. These were all strong personalities but she's probably the strongest and I mean that in the best way. She would push and push on something. She had terrific relationships with congressional representatives, senators, and staffers on Capitol Hill, and she was great at pushing anybody she was working with to do more. All these people were totally dedicated to public interest. It started with auto safety and that was Joan's interest, but it obviously spread to many other areas.

As I said the Litigation Group was a very close-knit group of people that went to lunch every day, played squash after work, spent time together on weekends. The person I worked with most probably was John Sims, who joined the Litigation Group a few months before I did. He and I tried the *Mink* case I talked about. His mother was a lawyer but had spent her career at the Veterans Administration and had been treated horribly. I helped with a sex discrimination case he brought against the Veterans Administration. We tried the case together. John is a great writer, a great editor, and has a vast knowledge of many areas of the law. He was an incredible colleague to work with who was always ready to help. He had a unique way of looking at things that nobody else did.

David Vladeck came a few years after I started and stayed for twenty-five years, including as director after Alan stepped down. He came from a leftist family in New York. Both of his parents were lawyers, and he was a terrific litigator. Together he and I did the Detroit newspaper Supreme Court case and a lot of others.

I worked a lot with Kathy Meyer, particularly on the FDA cases. She also was fun to work with and an outstanding attorney. She and Eric Glitzenstein, another member of the Litigation Group, eventually started their own successful firm dedicated to animal rights and environmental conservation.

We had a lot of people come through the Litigation Group. I worked with Diane Cohn on the Convention Center and other cases, and with Reuben Roberson on an auto antitrust case. Both were talented and fun to work with. Liz

Dickinson worked with us for a semester during law school and she was terrific. She attended Northeastern Law School. I later recommended her to Judge Bryant and then to the FDA chief counsel's office. When I was General Counsel of HHS and we had to make a change in chief counsel at FDA, I convinced her to take that position.

Chris Mead is another prominent D.C. lawyer who was there for a summer while at Yale Law School. Chris wrote his college thesis on heavyweight boxing champion Joe Louis, which he later turned into a book. I could go on and on. It was a talented, wonderful, and close-knit group of people.

Mr. Pollak: Why did you leave?

Mr. Schultz: I always had this idea I wanted to go into government and in fact I came close to leaving at the end of the Carter Administration in 1980. Nancy Buc, Chief Counsel of the FDA, offered me the job as director of litigation at FDA. In hindsight it would have been a terrible idea because I would have been replacing a very popular person at least ten or fifteen years my senior. But that was her idea and I accepted the job. The night of the election, we were at Larry Ellsworth's, another lawyer at the Litigation Group, watching the returns.

Alan Morrison was sitting next to me and we were watching the returns as Jimmy Carter lost and then one senator after another lost and I just remembered at some point, it occurred to some of us, "Oh my god, we might lose both the presidency and the Senate." It was a shock.

Alan came over and sat next to me and said, "So, you're thinking about changing your mind?" and I said, "I don't know." But I changed my mind that night and the next day I told Alan I wanted to stay. He posted a big sign on the bulletin board – "Schultz Staying." Reagan's eight years were followed by Bush's four, but at some point a position opened for director of Senator Metzenbaum's Antitrust Subcommittee. It was suggested that ultimately Senator Metzenbaum would be chairman of the Judiciary Committee so it could lead to being the Judiciary Committee staff director. I applied for and didn't get it but my good friend Bill Corr, who worked for Henry Waxman, did.

After Bill got the job, he sat down with me to convince me to take his job. I was disappointed by the job I didn't get, and initially was not interested. But Pat McLain, a close friend who worked for Michigan Congressman John Dingell, also talked to me. I thought about it and decided I'd been with the Litigation Group for fourteen years, so I really didn't have anything to lose. I believed I could always go back. It didn't seem like the executive branch was necessarily going to be available any time soon, so I decided to move to Capitol Hill.

Mr. Pollak: I have two other questions. I wanted you to do a brief evaluation of the total experience at the Public Citizen Litigation Group. What it meant, what you've drawn on as you've gone on in your career, how it influenced you when you were General Counsel at HHS. I also wanted to ask about your personal life during all this period.

Mr. Schultz: When I started in 1976 at Public Citizen, I had been married for five years. Our marriage came to an end about 1980 or 1981. I met Sari in 1986 and we married in 1988. So all of those things happened during this period of time.

Mr. Pollak: You had time for that?

Mr. Schultz: Yes. I didn't have any kids during that time, so I was able to work as much as I wanted. I loved it so I worked a ton. I did other things. We didn't make any money so we couldn't go skiing or take fancy trips, but I never felt deprived.

Mr. Pollak: Where did you live during that period?

Mr. Schultz: My first wife Cathy and I had bought a house in Alexandria on South Payne Street, which we then completely renovated. I did most of the work on it, including rewiring the house, demolition, and carpentry. Then about 1979 or 1980 we made a huge mistake. We bought a house in D.C. in Woodley Park near the zoo but hadn't sold our house in Virginia. Then interest rates started rising. Rates gradually went to 18% and you couldn't sell a house. We were in dire financial straits. I think this is the reason I was interested in going into the government at the end of the Carter Administration.

My wife was an architect. The interest rates froze construction, and she lost her job. Eventually we did sell the Virginia house and moved to D.C., but that house needed a complete renovation. I did most of the work on that, and then Cathy moved to Ohio to teach and eventually we got divorced. I was living in Woodley Park when I met Sari and we lived there until 1998.

Mr. Pollak: How do you evaluate your fourteen years at Public Citizen?

Mr. Schultz: I got a great grounding in a range of aspects of the law. That was invaluable when I worked on the Hill. When there was an issue about access to the courts, attorney's fees, the standards of review, administrative law or any issue involving litigation, I think people listened because of my experience. Obviously, all the experience with the press, with the Hill, other kinds of experience were invaluable. But in terms of the management roles I later had at FDA, as Deputy Commissioner and then as General Counsel of HHS, I think I learned an enormous amount by watching Alan Morrison and how he managed this very successful, small group of lawyers. He gave people tremendous responsibility. Alan had a rule that he would complete everybody's else work before he did his. It was a rare event when he took more than a day to edit a brief. He always worked harder than anybody else. He never told us to work hard but he was the role model for it.

I always thought there were two ways to manage. One is by instilling fear in subordinates, and I've seen that work. But the other is by doing the work and being persuasive and gaining respect. That worked best for me.

The experience with oral arguments was very valuable, both the preparation that goes into it and the discipline.

Mr. Pollak: Well maybe we should put it off there.

Mr. Schultz: Yes.

Mr. Pollak: Until next time. Thank you.