ORAL HISTORY OF WILLIAM B. SCHULTZ, ESQ.

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

Mr. Pollak: So, Bill Schultz, we are here in the Pollak kitchen; a bright sunny afternoon on Friday, February 25, 2022.

You've done a good outline and the last interview concluded with you discussing leaving your post at the Food and Drug Administration. Would you identify the timing of all this? And tell as you wish what led you to leave the agency?

Mr. Schultz: David Kessler left at the beginning of President Clinton's second term and there was a two-year period where there was an Acting Commissioner, Mike Friedman. I was also a Deputy and had a tremendous amount of authority within the agency. Mike mostly deferred to me on my priorities because I had a strong relationship with HHS Secretary Donna Shalala.

Mr. Pollak: And this was what year?

Mr. Schultz: This would be the first two years of Clinton's second term, so 1997-98.

We accomplished a lot. During that time, the Administration chose Jane Henney as Commissioner, but she had to go through confirmation hearings before becoming the Commissioner.

Mr. Pollak: And who was she?

Mr. Schultz: She had been a researcher at the National Cancer Institute and then she was Deputy Commissioner under David Kessler during the Bush Administration, but

she left before I started at FDA. I never worked with her there. She had a very different philosophy. She really viewed herself as a career civil servant. The FDA Commissioner and my position were political positions, but she wanted to run the day-to-day operations of the agency and wasn't particularly interested in major initiatives, which was what made the Kessler years and the two years that followed so exciting. It became clear to me that it was probably a good time to leave.

Over the years, I have observed in government, it's often very hard for a deputy to stay when the principal is replaced. I helped with her confirmation and I helped prepare her for all the meetings and the hearings, but I was interested in staying in the Clinton Administration and I looked around.

Mr. Pollak: And why were you interested in staying?

Mr. Schultz: Because the jobs were fulfilling. It was fulfilling in the same way that Public Citizen was fulfilling or working for Henry Waxman was, but you had a staff and you had the ability in the executive branch to accomplish an enormous amount – even without legislation—through regulation and policy decisions. So, I wasn't interested in leaving unless I couldn't find a good fit.

I learned there were two potential jobs at the Department of Justice. One was the Deputy Associate Attorney General. The Associate Attorney General is the number-three position at the Department of Justice. There is the Attorney General and the Deputy Attorney General and then the Associate Attorney General. The Associate Attorney General oversees a lot of the

Department's civil work, including the Civil Division, the Civil Rights Division, and the Environmental Division. Whereas the Deputy Attorney General is more focused on the criminal aspects of the Department of Justice and oversees the U.S. Attorneys' Offices and the Criminal Division.

The Associate AG was Ray Fischer and I interviewed with him but didn't get the job. It went to Joe Onek, who is a very prominent Washington lawyer, whom I knew. He started out at the Center for Law and Social Policy, but he had clerked at the Supreme Court with Ray Fischer, the Associate AG. So I couldn't really feel too disappointed about that.

The other job that I became aware was available was Deputy Assistant AG in the Civil Division in charge of appellate litigation. This was the Deputy in charge of all civil appellate litigation across the country.

There are about 50-60 lawyers in the division, and it seemed like a very exciting job to me. I hadn't been in court since 1976, for more than ten years, but I was still very comfortable with the idea of doing appellate litigation. I had known Frank Hunger somewhat because of the tobacco litigation, but David Kessler had gotten to know him quite well.

Frank Hunger was head of the Civil Division. He was the brother-in-law of Vice President Al Gore. This was his decision and I applied for the job. And to show you what a loyal friend and colleague David Kessler is, he flew down to Washington from New Haven where he was the Dean of Yale Medical

School to try to sell me to Frank Hunger as the person he should hire. There was a lot of competition for the job and I eventually got it.

Before I started, when I was still at the FDA, Frank asked me to participate in a number of meetings about a potential tobacco lawsuit that the White House was pushing him to file. He was skeptical about it, as were his other deputies. I was asked to participate because I had been so involved in tobacco at FDA.

This lawsuit was a follow up to national litigation that had been brought by state attorneys general against the tobacco industry to recover for health care costs that the states had paid due to fraud and other misbehavior. I believe by this time those lawsuits had settled. But the idea was for the federal government to bring a lawsuit to recover both the money it had spent in the Medicaid program and the Medicare program, and for violations of the RICO statute which gives the federal government a cause of action where there has been a conspiracy to defraud the public.

Mr. Pollak: And put this in time -- like when Kessler came from New Haven to talk to Hunger.

Mr. Schultz: This was probably late 1998.

Mr. Pollak: I see.

Mr. Schultz: I believe I started at the Justice Department at the beginning of 1999. Interesting, a couple of days before I started the job, President Clinton at the State of the Union announced that the federal government was going to bring this lawsuit

that Frank Hunger and the other deputies in the Civil Division had been so skeptical about.

When I started Frank asked me if I would be in charge of it, which was obviously outside the jurisdiction of my main job in appellate litigation. But he knew that I had a lot of background in tobacco and in litigation. And frankly, I think his other deputies didn't want to pursue the case. So I gladly accepted.

I think a number of people thought that I was hired at the Justice Department to do this case. But that wasn't true and that wasn't the sequence of events.

Shortly after I started, Frank Hunger left. He told me that he was going to leave when he offered me the job. He left to work on his brother-in-law's presidential campaign, and David Ogden, who had been working for Attorney General Janet Reno's office, became the Acting Assistant Attorney General. He then became my supervisor, and he was very supportive of the case. Interestingly his father had worked for HHS and had been the principal author of the famous 1964 Surgeon General's report, which was the classic document on the devastating diseases caused by tobacco.

Mr. Pollak: So, you stayed at the helm of the appellate section of the Civil Division at DOJ for two years, is that right?

Mr. Schultz: Yes

Mr. Pollak: And Ogden was your immediate supervisor during that time?

Mr. Schultz: Yes

Mr. Pollak: I see. So you worked closely with him?

Mr. Schultz: Very closely.

Mr. Pollak: I see. Well, but did you then handle the tobacco litigation?

Mr. Schultz: I was in charge of it. The initial effort was to put the case together and then file the litigation. But yes, I was in charge of the tobacco case that the Department of Justice brought.

Mr. Pollak: And I think that history would be interested in who put the case together. Who led the litigation? Where it was? What judge and how it all played out?

Mr. Schultz: We put together a component of the Civil Division that we created and named the "Tobacco Litigation Team." Initially I got help from some of the best people in the Civil Division. From the Appellate Division I enlisted Mark Stern, a senior lawyer there, and Alisa Klein, who had been a neighbor and was one of the few people I actually knew in Civil Appellate.

I was given authority to do a substantial amount of hiring because there was a lot of interest within the Justice Department to do this work. But I also was determined to hire people from outside the Justice Department as well as inside.

Mr. Pollak: Why?

Mr. Schultz: The Civil Division is a defensive organization with the exception of civil fraud. All its work is in defending the government. It takes a much different mentality to be a plaintiff in a case and to initiate a case. I wanted to take advantage of the

tremendous abilities of the Civil Division lawyers, but I also wanted to interject some plaintiffs' energy into the case.

So, we did hire a few people from the Fraud Section which initiates cases, but we brought on others from the outside as well, including Colette Matzzie, who had been at Public Citizen Litigation Group, and Andrew Goldfarb, who had done some work with my friend from the Bork hearings, Ralph Neas. We also brought in several others and put together a very talented team. Patrick Glenn became the director, responsible for the day-to-day management of a team of about 20 lawyers.

Mr. Pollak: Meaning what?

Mr. Schultz: The first thing we had to do was develop the theory of the case. We put together a team to do that and I brought in a lawyer who had been very key in the state cases. The best-litigated state tobacco case was litigated by Mike Ciresi and his law firm in Minnesota. It was clear they really knew what they were doing. They actually assigned partners to read all the documents. His right-hand person was Roberta Walburn, and I persuaded her to move to Washington for three months to help us develop this case. We drew on her expertise and on expertise around the Justice Department. For example, I brought in David Barron from the Office of Legal Counsel, who was an expert on the Secondary Payer Act, the Medicare statute that allows Medicare to recover product liability claims. And Susan Davies, who worked with Joel Klein in the Antitrust Division, because we were looking at potentially an antitrust case too. David Barron is now Chief

Judge of the First Circuit and Susan Davies went on to become counselor to Senator Patrick Leahy. She worked at the White House under President Obama and held several important positions in government. At one point, I arranged for David Kessler to come down to D.C. and talk to this group because I wanted to inspire them about what was at stake and David was able to talk about the devastating public health consequences of tobacco.

We spent about six months putting together the case and we looked at various theories - antitrust, battery, other theories – but in the end, we made two arguments. One was under the Medicare Secondary Payer Act, which would essentially allow Medicare to recover for health care costs; and the second was under the RICO statute –a civil statute that allowed the government to sue where there had been mail and wire fraud and to obtain injunctive relief looking forward against those who violated the statute.

Mr. Pollak: And where did you bring the suit?

Mr. Schultz: We brought it in Washington, D.C. It turned out there were two other tobacco cases pending before two different judges and so we had the option to file it as a related case before either judge. I told the team that this was the most important decision we were going to make. We chose Judge Gladys Kessler and filed it before her, which in hindsight I think was an excellent choice.

Mr. Pollak: Who was the other judge? Do you remember.

Mr. Schultz: I do.

Mr. Pollak: Do you want to leave that out?

Mr. Schultz: Yes, the judge is a friend.

Mr. Pollak: Right. Ok. So what would you like to say about the tobacco litigation? What made it a ripe time to go against tobacco in 1999 or 2000?

Mr. Schultz: The Clinton Administration became interested in this litigation after state attorneys general had brought cases against the tobacco industry. Those cases were an attempt to recover state medical costs based on fraud. I think most of the costs were under Medicaid and the state attorneys general ended up with a very large and meaningful settlement that not only paid the states billions of dollars but set up Truth Initiative, a public advocacy group to advocate for tobacco control, that received $500 million dollars. Under the settlement, the companies agreed to major changes in tobacco advertising and in their conduct. And because of that settlement, there was tremendous interest in whether there was a case the federal government could bring. Our theory was that the Medicare Secondary Payer Act case was a basis for recovering health care costs that the federal government had paid under Medicare because of the misbehavior of the tobacco companies. By this time, because of the state work, because of the Waxman Committee's work, and because of Kessler's work at FDA, there was a very solid foundation for proving the tobacco companies knew the risks of tobacco going back to the 1950s -- long before the Surgeon General's report. They used their trade association to confuse the scientific discussion and to create doubts about whether tobacco caused lung cancer, heart disease, and other

ailments. The tobacco companies had been very successful in keeping people who smoked from quitting.

The tobacco companies marketed their products to children because they understood that new smokers were almost all children. Ninety percent of smokers started before the age of 18. They had a very sophisticated marketing campaign that included cartoon characters like Joe Camel to addict children to tobacco. So, the whole issue of tobacco health and tobacco health care costs was very much a priority for the Clinton Administration, and it had, as I mentioned before, tried to pass major legislation, an effort which had barely failed. The challenge to the FDA regulation was being litigated through the courts, but this seemed like another opportunity.

The case was litigated for ten or more years after the Clinton Administration, long after I left the Justice Department. But in the end, Judge Kessler had a long trial, and she wrote an opinion that was more than 1000 pages long that has finding after finding about the fraud of the tobacco industry and the devastation that it created. She ended up imposing various kinds of injunctive relief. The case went up to the DC Circuit several times. But it is regarded as a great success.

I should add a couple of other things. Because this was such a priority, David Ogden, the head of the Civil Division, was very involved and the Attorney General was very involved. In the summer of 1999, we were ready to file the case and Attorney General Janet Reno was ready to sign off on it, in the

middle of the Elián González matter. A child had been found in the waters between Cuba and United States. His mother attempted to escape with him but had drowned, and there was a very public custody fight between his uncle who lived in the U.S. and his father in Cuba.

Janet Reno, who was from Florida and had deep connections there, was very pre-occupied with the Elián González matter, but in the middle of all this, she had to make a final decision about whether we were going to bring our case. She ultimately authorized it and the case announced at a big press conference on the day we filed.

At some point during my tenure, Patrick Glynn stepped aside as the director of the Tobacco Litigation Team and was replaced by Sharon Eubanks. In 2001, after Al Gore had lost the presidency to George Bush, there was a question as to whether this case would survive. There wasn't a lot of support in the senior leadership in the Justice Department. Those discussions were leaked, which embarrassed the Department, and the case actually survived.

The Tobacco Litigation Team never got the support it would have gotten in a Democratic administration, but they stuck with it and they litigated the case year after year, and did, from what I know, a terrific job.

Mr. Pollak: Why don't you describe your role as the case went along. Your own personal role.

Mr. Schultz: I was ultimately involved in developing the theory of the case and putting together the team; and then in reviewing and editing every pleading that was

filed. I was very involved in the case during my time at the Justice Department. I devoted a lot of time to it.

Mr. Pollak: How did you divide your time between tobacco and running a division of 60 lawyers?

Mr. Schultz: I probably spent a quarter of my time on tobacco and the rest on the appellate job, which is a big job. As I mentioned, Bob Kopp was Director of Appellate Staff in the Civil Division, and there was also a very strong senior leadership team. Interestingly, my office was in main Justice and the entire Civil Appellate Division was in a different building about three blocks away. because their offices in the Justice Department were under construction. My secretary and I were in a little group of offices around David Ogden who – as I said – was the Assistant Attorney General. I got involved in what seemed like the major cases, which were appropriate for me to be involved in.

Mr. Pollak: Did you have any personal assistants or lawyers? Or did it go directly from you to Kopp?

Mr. Schultz: No, I did not. Everyone I worked with were career lawyers in the Appellate Division. By the way, one very senior appellate staff lawyer who has become prominent is Doug Letter.

Mr. Pollak: Yes!

Mr. Schultz: As you know, Doug is now counsel to House Speaker Nancy Pelosi, a position that he has held since the Democrats won the House back in 2018. He has

brought and argued major cases in the federal courts, including many in the Supreme Court.

Doug and I were next-door neighbors when I was growing up, although his family moved to California when he was probably six years old and he was five years younger than I. So we didn't play together but our parents were very good friends. When I was at Public Citizen, I argued a number of appellate cases against him. So, he is somebody that I knew well, and I remember he had a nice dessert party for me to welcome me to DOJ.

There were a few other lawyers there that I knew, but it was –was and is – a very talented group of lawyers. These are difficult jobs to get and the lawyers just do litigation in the federal circuit courts of appeals.

Mr. Pollak: What was the ultimate decision in the tobacco case?

Mr. Schultz: In 2006, Judge Kessler rendered a decision that the tobacco companies had violated the civil RICO statute and had engaged in a conspiracy over 30 or 40 years to deceive the public about the health risks of tobacco, and marketed tobacco to children. After many years of further litigation, she ordered the companies to publish statements to correct their deception about the risks of smoking and the addictiveness of nicotine. Her 1000-page opinion meticulously catalogues the companies' unlawful behavior.

Mr. Pollak: So, you have a section in the outline about the basic job of the head of appeals and you alluded to it, but is there more to say?

Mr. Schultz: Yes, there is probably a little more to say. There are several components to it. One component is authorizing appeals. When the government loses in the district court, a decision has to be made as to whether to appeal it to a circuit court. And the process is generally that the federal agency involved makes a recommendation. The recommendation is submitted to Civil Division's appellate section, my office. It is first reviewed by one of the career lawyers who writes a recommendation as to whether the government should appeal. So I was involved in making that decision. The recommendation is then submitted to the Solicitor General's office and the Solicitor General makes the decision. But we listened very conscientiously to the agency's recommendations and the Solicitor General generally deferred to what we wanted to do. So that's one part of the job.

The second part is reviewing briefs and editing briefs. There is so much going on you obviously can't read them all. I would have to identify the ones that were major issues or one I was particularly interested in. For example, those involving Food and Drug Administration. It was my job to clear those briefs and to spot any issues that could be particular problems for the administration; whether a policy matter that could have to do with issues that cut across different departments such as standing or exhaustion or other threshold issues.

I had a close working relationship with Solicitor General Seth Waxman because many of the cases the Solicitor General was arguing were cases that our

team had argued in the courts of appeals. We would review all the Supreme Court papers and comment on them, participate in the moot courts for the Supreme Court arguments, and generally work very closely with the Solicitor General's office. The Deputy Solicitor General for the Civil Division then and today was Ed Kneedler who was a law school classmate of mine, so he is somebody I had known for a long time.

Occasionally I testified before Congress, maybe once or twice, and I argued cases in the courts of appeals. Over two years I argued six cases so there was a fair amount of time preparing for that.

Mr. Pollak: It is interesting to me that there is sort of a one-on-one relationship between the Deputy Assistant in charge of appeals and Bob Kopp, the Director in charge of appeals. It seems kind of a strange organization.

Mr. Schultz: It worked well. Bob Kopp was a very talented but self-effacing person. There was never any tension. He was very reliable, and he was always very respectful of what I wanted to do.

Mr. Pollak: What did you bring to your oral arguments having litigated for Public Citizen and working in government at the FDA?

Mr. Schultz: You know it's interesting, because I initially wondered how somebody in my position should handle these oral arguments. The Department had a career lawyer who did most of the work and who may expect to argue. I didn't want to be seen as taking the argument away from the career attorney. When I asked Bob Kopp about that he said the best thing to do if you want to do an argument in a

case is to get involved early on. Then everybody knows it is something you care about and it won't be a surprise that you want to argue it. So I took that advice and I don't think I argued anything where I hadn't done significant work on the briefs. But again, just by the nature of the job, I wasn't doing the original research. There just wasn't time and the lawyers were too good for that to make sense.

The one exception I think of is *Campbell**Error! Bookmark not defined.** *v. Clinton*. This was a challenge by a member of Congress to the War Powers Act. I think the claim was that Clinton had sent troops to Kosovo without authorization from Congress as required by the War Powers Act. Bob Kopp or Mark Stern wanted me to argue it because they felt it was a political case and it made sense to have the political deputy argue it.

Our main argument in this case was that Congressman Tom Campbell didn't have standing. In other words, this was a political issue between Congress and the President, and a member of Congress did not have a right to sue the President to challenge whether he was complying with the act. I was willing to argue it but it put me in the position of arguing against standing, which was exactly the opposite position I had taken at Public Citizen in many contexts. I once estimated that I probably spent a quarter of my time at Public Citizen arguing about standing, about whether we could get into court. I do remember when I got up to argue, one of the members of the panel, Judge Larry Silberman, looked at me with great surprise. He knew me well from Public Citizen and

seemed to be surprised to see me arguing for the government. But I argued the case and won. While I was at Civil Appellate, I had four cases in the D.C. Circuit and I believe Judge Silberman was on three of the panels. And I always felt I had a good rapport with him. He was a tough judge but I always felt I connected well with him in oral arguments. Interestingly, Judge David Tatel, who has become a good friend, was on four panels.

Mr. Pollak: What other circuits did you argue in and do you have anything to say about an argument in some other circuit as compared to an argument in the D.C. Circuit?

Mr. Schultz: I was very interested in a case about publishing journal articles without FDA approval. I worked a lot on this issue at FDA, and I decided to argue it. The panel was Judge Silberman, Judge Tatel, and Judge Stephen Williams. Between the time District Judge Royce Lamberth decided the case and the time the D.C. Circuit held its argument, Congress had passed amendments to the Food, Drug, and Cosmetic Act that had gone into effect and that in limited circumstances allowed for the distribution of journal articles that hadn't been approved at the FDA. It was a compromise that I was very involved in negotiating when I was at the agency. The idea of the compromise was the article could be distributed if the company made a commitment to do the studies needed to determine effectiveness. I thought we were in a lot of trouble particularly since the panel didn't seem like it would be favorable to our position.

Judge Lamberth had decided that the new statute restricted distribution of journal articles, but in fact it did just the opposite. It created a safe harbor

allowing manufacturers to distribute articles if they agreed to do the studies required to determine whether the articles about a drug's effectiveness were valid. If the companies did not comply with the statute, then the pre-existing law would apply.

I was looking for a way to save the case and thought that we should advance an interpretation of the new statute that did not contain a prohibition on the dissemination of journal articles, an interpretation that was contrary to Judge Lamberth's ruling but that I believed to be correct. The problem was the lawyers at the Food and Drug Administration didn't want to admit that the statute was this limited, and I needed to concede in order to avoid a very bad First Amendment decision. I spent the whole weekend talking to the senior lawyer at FDA because I wasn't going to make the argument unless she went along. I think the Justice Department is entitled to do that, but I wasn't willing to make that argument without FDA agreeing. Ultimately, I convinced the lawyer, Ann Wion, the key and most conservative FDA lawyer, and made the argument. The lawyer on the other side was Bert Rein of the firm Wiley Rein & Fielding, a very prominent lawyer, quite a bit more senior than I.

I laid out my theory to the court, which hadn't been in any of the briefs, and I remember Judge Silberman said he thought they were going to make a major First Amendment decision but it looks like they couldn't do that. We ended up avoiding the issue, and the decision relied on my theory. It was sent back to Judge Lamberth, who dismissed the case. The Washington Legal

Foundation asked for attorneys' fees on the ground that they had prevailed. I was adamantly against that but the lawyer in the U.S. Attorney's Office at that point who was handling the case in the district court strongly felt that the government should agree to attorneys' fees. I just wasn't willing to have this battle with him. You can only override career people so many times and I just wasn't willing to do it here.

So the Justice Department took the position that the Washington Legal Foundation could get something like half a million dollars in attorneys' fees, but when Judge Lamberth considered the issue, he said, "Nothing doing." Judge Lamberth ruled that the D.C. Circuit had overturned his decision and he was not awarding attorneys' fees, so I felt vindicated.

Mr. Pollak You noted that you wanted to say something about Seth Waxman's oral argument in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*.[20] What's the case and why is it something you wanted to comment on?

Mr. Schultz This was a challenge to the tobacco regulation that we had written and issued when I was at FDA in which FDA concluded it had jurisdiction to regulate tobacco as a combination drug and medical device. It was a very controversial decision, but we won most of the issues in the district court in North Carolina, the forum selected by the tobacco industry. We lost a divided decision in the Fourth Circuit and the government petitioned for certiorari, which the Supreme Court granted.

[20] 529 U.S. 120 (2000).

We knew it was going to be a tough case and I was very involved in the briefs and the moot courts. And we felt that the outcome was probably going to depend on Justice Sandra Day O'Connor - that she would be the swing vote. When Seth got up to argue it, almost immediately she said: "You're saying tobacco is a drug? That doesn't make any sense." She just squinched her mouth up and made it pretty clear that we didn't have her vote. Seth struggled through the argument. We felt after the argument we were going to lose.

I remember David Kessler and a bunch of us had lunch afterwards. Everybody had seen the argument and we weren't feeling very good about it. In the end, the decision was five to four. It was probably closer than we thought, with a very effective dissent by Justice Stephen Breyer.

Mr. Pollak But you lost.

Mr. Schultz We lost. We lost and the FDA lost all its jurisdiction over tobacco. The program was closed down and it wasn't revived until 2010 under the Obama Administration when Congress finally enacted legislation establishing a tobacco program at FDA. Between 2001 when I left government and 2010, I worked closely with the Campaign for Tobacco Free-Kids to get the legislation enacted.

Mr. Pollak You wanted to comment on cases that were brought in the Southern District of New York under the United States Attorney and their relationship with main Justice.

Mr. Schultz As I said, Civil Division's appellate staff was in charge of all civil appellate litigation across the country. Any case that we thought was important enough,

we briefed and argued. Our job was to identify the most important cases, particularly those that were simultaneously being considered in several circuits. It was important to have us arguing and managing them so the arguments would be consistent. Often the same attorney argued in several circuits.

The exception to this was the Southern District of New York, often called "the sovereign district of New York," which historically had successfully taken the position that they should handle any case within their jurisdiction. And this seemed wrong to me. It seemed contrary to the interests of the Justice Department. I decided to take a run at this and try to persuade the Attorney General to restore the Civil Division's responsibility for those cases. I had been in government long enough to know that I needed help and so I got Seth Waxman, the Solicitor General, on my side to agree to this.

I also met with Deputy Attorney General Eric Holder, but he wasn't willing to go to bat for us. He was in charge of overseeing all the U.S. attorneys, so he had to work with them. He just wasn't willing to take on Mary Jo White.

Seth and I jointly made a presentation to Attorney General Reno. The U.S. Attorney for the Southern District was Mary Jo White, who felt she had to be very protective of her office's jurisdiction. She was a very effective, aggressive advocate and she flew to Washington to meet with the Attorney General on this issue. This happened in the middle of a crisis at the Justice Department involving a Cuban child, Elián González, which I previously

mentioned in connection with the Attorney General's authorization of the tobacco lawsuit.

In the middle of this crisis, Attorney General Janet Reno took an hour to hear from Mary Jo White why the U.S. Attorney's Office in the Southern District was so special.

I had the head of the Civil Division and the Solicitor General on my side, but in the end the Attorney General sided with Mary Jo White and things remained as they were. Seth later told me it was the only internal cause he ever lost while he was at the Justice Department. So, I guess it goes down as a valiant effort.

Mr. Pollak Well, do you want to devote a little more time to this?

Mr. Schultz I just want to say a couple more words about the role of the Justice Department. One interesting question that comes up is who is the client? When the Justice Department brings a case on behalf of an agency or defends a case on behalf of an agency, there is a raging issue about whom they represent. Many lawyers at the Justice Department will say they are representing the United States.

Mr. Pollak So, just to make it a little more concrete, why don't you pick a subject matter field and make a hypothetical of representing an agency. It doesn't need to be a real case.

Mr. Schultz Well, let me take a real case that came up when I was at the General Counsel's office at HHS. As background, most administrative agencies don't have

independent litigating authority. Whether you're the Food and Drug Administration or the Department of Defense, you're represented by the Justice Department. At the Justice Department, generally the mantra there is that the Justice Department represents the United States. And I think it's fairly clear the Justice Department can make the calls on what is litigated.

You'll recall when I was at Public Citizen, I had a case against the Food and Drug Administration involving banning color additives that were animal carcinogens. As a reminder the Food and Drug Administration had developed what it called a de minimis policy for these carcinogens. FDA took the position that if the risk to humans was trivial or very small, de minimis, it didn't have to be banned. It went to the D.C. Circuit, and at some point in the briefing, Richard Willard, head of the Civil Division, read the brief and it didn't make sense to him. He was right. The law said animal carcinogens must be banned and there was no de minimis exception in the law.

Ultimately, I was told the Secretary of HHS had a conversation with the Attorney General. I guess the head of the Civil Division lost the battle, but in the end, he was right because the court didn't buy FDA's argument. The FDA lost the case because, as Richard Willard said, the agency wasn't following the law. But that's a very rare situation. Usually, the Justice Department decides, and it doesn't get to the level of the Attorney General and the Department head. In theory, if they disagree, the Cabinet Secretary and the Attorney General can go to the President and the President can decide. But that's very unusual.

Going back to my experience as General Counsel of HHS, I had a case very early on in the Supreme Court. The issue in the case was whether Medicare providers, doctors for example, can challenge the state Medicaid agencies over whether their rates were adequate. Generally, the states set rates as to what hospitals and doctors and other providers are paid for Medicaid, but there is language that the rates have to be sufficient to attract doctors and other providers to participate in the program. And so doctors were challenging the states' rates as inadequate. The question in the Supreme Court was whether there was a private right of action. Could the doctors bring this kind of challenge in court, or did they have to go thought the administrative process at HHS?

The U.S. government wasn't in the case, but, as is often the case, the Solicitor General's office planned to file an amicus brief informing the Court of the government's position. And the question was, who's side should the U.S. be on? Should the United States side with the states or should it side with the providers seeking adequate rates?

In this case, Kathleen Sebelius, the Secretary of the Department of Health and Human Services, was very interested and wanted to support the idea there was a private right of action, that the doctors could sue for adequate rates. She wanted the Department of Justice and the Solicitor General's Office to take that position in the Supreme Court. There were others in the government who agreed with this, including the Associate Attorney General, the number three official in the Justice Department, and the White House Counsel, the President's

lawyer. But the career lawyers in the Solicitor General's Office disagreed. They thought this wasn't consistent with positions they had taken before, and they felt very strongly that the government ought to take the opposite position of what Secretary Sebelius wanted.

Acting Solicitor General Neal Katyal ended up backing his staff. Nobody was willing to take this to President Obama. And so, against the desires of the client, the federal government took the position that there was no private right of action.

I had several meetings with the Acting Solicitor General about this, making all the legal arguments. He told me he was certain that our argument only had one or two votes, and it just wasn't a position he thought the government should take. In the end, it was a five to four decision, with Justice Breyer in the majority, finding there was no private right of action. It was a particularly disappointing result since it might have made a difference had the federal government supported the doctors and the Secretary of HHS.

The bottom line in my experience is that lawyers in the Justice Department have had different views of this. In the Civil Division, at least in the Appellate Division, I felt the lawyers were mostly respectful of the agencies and took their position seriously. Obviously, the Acting Solicitor General at the time of the Medicaid case didn't really seem to care what his client wanted to do. He did what he thought was in the best interest of the Solicitor General's Office.

I should note that after Don Verrilli became Solicitor General he asked me to lunch, and it turned out he wanted to discuss this case. He had watched the whole thing play out from the vantage point of the White House. He had been in the White House Counsel's Office before he became Solicitor General, and he wanted to tell me that he had a different view. He did very much care what his client, the Secretary of HHS, thought. It wasn't a promise that he would always go our way, but it was a promise that it was a new day. And, in the end, we had many, many cases in the Supreme Court together and a very close working relationship.

Mr. Pollak You're at a point where there came to be another presidential election in 2000 and you left the government. Right?

Mr. Schultz Right. So, it's probably a good stopping place.