

Steven T. Wax: An Oral History

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FOREWORD BY JUDGE OWEN PANNER

**US District Court of Oregon Historical Society
Oral History Project
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FOREWORD

The Oral History Project of the District Court of Oregon Historical Society began in 1983. Through the efforts of Judge James Burns and his wife Helen, a gathering of lawyers, judges, and historians took place at the Society's inception. The Honorable Robert F. Peckham, District Judge for the Northern District of California, discussed the Northern District Historical Society and the inspiration was born for Oregon's District Court Historical Society, the second such organization in the country. The original Board of Directors of the Society was composed of twenty-one members with bylaws including the Presiding Judge of the Court, the Chief Justice of the Oregon Supreme Court, and the President and a representative of the Oregon State Bar. The original officers and directors included outstanding judges and lawyers – Judge John Kilkenny, Honorary Chair, Judge James Burns, Chairman, Randall Kester, President, Manley Strayer, Vice President, Elizabeth Buehler, Treasurer, Susan Graber, Corporate Secretary, and Robert M. Christ, Executive Secretary, along with many other top names in Oregon's legal history.

The Society decided to collect, study, preserve, analyze, and disseminate information concerning the history, development, character, operations, and accomplishments of the United States District Court for the District of Oregon. It was therefore logical that the Oral History Project should be established to preserve the histories of the judges, law firms, and lawyers who actively practice in the Court. With the assistance of Rick Harmon and James Strassmaier, the Oregon Historical Society held seminars to educate volunteers in taking oral histories with a biographical and Court-oriented focus. The Oregon Historical Society has been most

cooperative in agreeing to maintain these histories in their permanent collection for study by scholars and other interested parties.

These oral history interviews have been taken by recording devices, and are either transcribed or transcription is underway. A transcript reproduces, as faithfully as possible, the original sound recording that reflects the special value of oral history, namely its free and personal expressiveness. Most of the transcripts in the District Court Collection have been lightly edited and reviewed for clarity and accuracy by the narrators. That process continues. It is through these wonderful oral histories that the story of the Court is told. We now have recorded nearly 120 individuals since the project began. The goal is to record the individual histories of all the judges of the Court, as well as those of participating lawyers. The Court has a rich tradition reflected in the activities of the judges and lawyers of the Court. The recording has been done not only by professional historians, but also by dedicated volunteers. As one such volunteer said, "The opportunity to interview someone that you always admired is truly an exciting experience."

The history of the Court is being created by the men and women who have participated in its collection and activities. The Society's goals are to collect as much of that history as possible, because it is the history of the law and those who make it that constitutes the moral development of humanity. All of us who are students of the law venerate it. We are also interested in the people who make it.

Judge Owen Panner
February 28, 2006

Family history

MO: The date today is April 29, 2013. Beginning an oral history today with Steve Wax at his office at the Federal Defender's Office. Steve, I'd like to start by asking you about your family background. Both your parents had ancestors in Eastern Europe, and let's start with your father. What did he do for a living?

SW: My dad was an editor of magazines. He was born in 1912, graduated from college, I guess, he was twenty, so that would make it 1932, right at the heart of the Depression. He knocked around a bit; he went down South to Birmingham, Alabama for a while looking for work. He worked as an operator; he worked as an English teacher; ended up working in trade magazines. I think by the end of the '30s he had hooked on with a magazine, and he dealt with the candy industry for a while. He dealt with corsets and brassieres for a while. Then he ended up as the editor of a trade magazine for the hobby industry. Model trains, model planes. It was great as a kid to have a dad with a foot in that world. He'd come back from the trade show in Chicago every year with some of the leftovers from the distributors' booths. I still have some of the model trains today.

MO: Great. [MO and SW laughing] Are they functional?

SW: They are! When my son was about seven, I dusted 'em off, and we set up a

layout in the basement. Over the course of the next five, six, seven years we spent a lot of time in the basement. Then he got into high school; his interest waned, and I must say mine did too.

MO: [laughing] And your father's name?

SW: Jack.

MO: And your mother? Tell me about her. First, what's her name?

SW: Ann Strauss. She was born 1919 and also graduated from college early. She, too, was a wordsmith. I've got the college yearbook from Brooklyn College of which she was one of the main editors. I was five or six—she went back to work and she was an editor of educational materials. Filmstrips that used to exist, tapes, and things of that nature for grammar schools, middle schools, high schools, et cetera. When my dad started his own magazine in the mid-'60s, a hobby and craft magazine, she went to work helping him on that.

MO: You have an older sister?

SW: Barbara, three years older. She started teaching middle school history and social studies the year after she graduated from college. Taught for thirty-three years and hung it up about twelve years ago, and has been enjoying retirement ever since.

MO: You went to Pleasantville Grammar School?

SW: Bedford Road School, yes.

MO: You lived in, well, maybe “intentional community” isn’t quite the right word, but in the community of Usonia. I think you described it in your book as being—*[hesitates, searching for right word]* there was a political orientation of people in that community as well as an architectural one?

SW: Yes. *[somewhat disparagingly]* Mid-’40s, Frank Lloyd Wright and a couple of his students who were living in Brooklyn, New York, got the idea of putting together a semi-utopian cooperative in what were then the wilds of Westchester County, north of New York City. My parents were neighbors of the Brandons, who were one of the original families, and my parents decided that this would be a place that they’d like to live and raise their kids.

Founded by Frank Lloyd Wright, people pooled their money, and they bought up an abandoned, 100-acre farm. Wright designed the home sites; he designed three of the first seven houses that were built. Two of his students designed the others. One of his students, Aaron Resnick, designed my parents’ home. I think we were the twelfth family to move in sometime in 1950, when I was the grand age of two. I have my roots in Brooklyn where I was born, and I still feel that strongly, but the reality is I grew up in Westchester County, in this community.

It was pretty unusual in the sense that it was a cooperative. At the beginning all of the property was collectively owned. I remember my parents telling the stories

that there was only one bank in all of the New York metropolitan area that would loan money to “these people.” After all, this is the era of [Senator] Joe McCarthy and people looking for “commies” under every bed. So any notion of collectivism was going to be tainted in some way. But there was a bank that loaned the money, and people were able to get the houses going. We had a community swimming hole that was dug out, and a baseball field, eventually. As people got a little more prosperous and settled, tennis courts were built. There was a community playgroup. Probably two-thirds of the people were Jewish, and probably somewhat more than three-quarters were quite progressive. Some maintained activity in things political, in the Democratic Party, usually on the progressive side of the Democratic Party. Some had roots in more radical things than that back in the ‘30s and ‘40s.

MO: And the nearby community of Pleasantville was, I take it, not of this composition?

SW: No. Pleasantville is a nice commuting village a little less than an hour’s ride on the New York Central into midtown Manhattan. Not much industry there. It was, when I was a kid, a lily-white community. Very few Jewish people, much more conservative socially and politically than the people who lived up on the hill in Usonia about two, two-and-a-half miles outside of the village itself. But that’s where the schools were, and that’s where we went to school.

MO: You mentioned in your book that sometimes you felt as a kid, “the other,” different from your classmates at Pleasantville.

SW: I’m not a terribly religious person, but my parents, nominally Jewish. We were raised with Hanukkah and Passover, although we didn’t go to temple much. But my first exposure to anti-Semitism, directed personally at me, was probably in second grade, on the playground with kids calling me names: “dirty Jew,” “Kike,” things of that nature. That was [pauses] the way it was.

That continued on throughout grammar school, middle school, and on into high school. There was definite awareness, on my part, of discrimination, being “the other,” not being part of the inside group of the community. It was something that I had to learn to deal with.

MO: When you had some of these early experiences, did you bring it home and talk to your parents about it at all?

SW: Sure. My father, who had heart issues, did not fight in World War II even though he was of the age. His generation was profoundly affected, I think, by what happened in Europe in the ‘30’s and ‘40s. Part of the message that he conveyed to me as a kid, when I would bring these issues home, was “You need to speak up. You need to stand up. You need to not let the bullies of the playground—I’ve translated that into the bullies of the world—have their way pushing people around.” I don’t

remember if it was second grade or third grade, getting into a fight. I remember another couple of incidents in junior high. My father was not preaching pacifism to me about it. People are going to try to take advantage; you tell them to “shut up.” As kids sometimes do when someone tells someone else to “shut up,” it can become physical. And it did a couple of times.

MO: So a couple of fights, then with kids?

SW: Yes.

MO: Of course, you had some family background, some of your ancestors, that also was pretty terrible. You talk in your book about Grandfather Julius, is it?

SW: Yeah, his father, and him. He left Russia, in large part, because of the anti-Semitism. He was conscripted into the Tsar’s army, and had problems with anti-Semitism there. He got into a fight one day with a lieutenant, where he just would not take any more what that lieutenant was dishing out in terms of the anti-Semitism. Exactly what happened, the extent of the damage that he inflicted, I’m not sure that I really understand the history. There were multiple stories about what he did. But the bottom line is that his father managed to get him out of that part of Russia, and get him out of Russia. I’m assuming he got legal papers and came to this country legally, because I’ve never heard that there was any issue about that. But that’s how he got out of Russia and why. A few years

later, in one of the *pogroms*, his father was killed.

I didn't learn or hear the full story of that until I was an adult. But a very, very unsettling story of the Cossacks coming into the home and actually placing a gun in my great-grandmother's hand, having her pull the trigger on her husband. One of my great-uncles had a very strange mannerism that I saw as a kid, but I never understood. He would do something weird with his mouth. Later, when I heard the story of what had happened, he was a little boy in the home at the time. The men who had come in ripped up the *Torah* scroll that was there—my great-grandfather was a rabbi of sorts, I don't know exactly what—and stuffed it in his mouth. My pop-psych explanation of what I saw was that he spent the rest of his life trying to spit out what had happened to him, those pages, and the vision of the murder.

MO: Unfortunately, I don't have a good note here, so I'm going to butcher this. This was Uncle Noi-something?

SW: Nat. Nat was the uncle—Nat and Shaiky—Isaiah, called Shaiky were the two of the younger boys who were there when that happened. My grandfather was the oldest of twelve kids, and I think Shaiky was seventeen, eighteen years younger. There was more than a twenty-year spread among the twelve kids of that generation.

MO: Let's talk a little bit about some of your own political awakenings in that

time. You mentioned Joe McCarthy, were you aware, at that age, of McCarthy?

SW: [*laughs*] I certainly wasn't aware of him when I was three or four or five. My parents were not active in politics. They were aware people, and we would discuss current events in the house, but they weren't political in any way. They voted, but I don't recall either of them ever volunteering to do any campaigning for anyone. I don't remember any petitions or anything of that nature. But we talked. I'm sure at some point as a kid I became aware of McCarthyism. My mother's brother, my Uncle Paul and his wife Marion—one of their good friends was blacklisted. I can hear in my head some discussion about "the blacklists." I'm not sure I really knew what the blacklists were, but I knew they were bad and I knew that some friend of this aunt and uncle had been affected. Somebody had done something wrong to him. I'm not sure at what point I really learned and understood what McCarthyism was all about. That may not have come until college.

Coming of age in the 1960s

MO: You came of age at a period of time when there was a lot of political dissent in this country.

SW: Oh, sure. In high school, I was very much aware of the Civil Rights Movement. One of the families in town was involved with the rural sharecroppers organizing

down South, a legal-aid type of lawyer working in the Civil Rights Movement in, probably, the summer of '63. A number of the people in the community who were three, four, or five years older than I was—I was fifteen in '63—went on some of the Freedom Rides down South. I knew about that sort of stuff and had some neighbors who did that.

I became involved in politics for the first time actually canvassing for a local Democratic congressional candidate when I was sixteen—1964. Then in the anti-war movement, as things were going on in Viet Nam and people started protesting at home—'67, '68, I became very much involved in that. 1967, my freshman year in college, we had what was called a “Jan Plan.” You’d take two semesters and the month of January would be one intense course, so you’d do an independent study. My first independent study was to study the racial divide in housing in Ossining, New York, a village on the Hudson River four or five miles from Pleasantville. I must have had some awareness of the racial divide, the Civil Rights Movement, in a way and on a level that caused me to want to go to Ossining and publish this—for the school. Not publish in any broader way—an audio-visual presentation on racism in Ossining, New York and how it created this housing line. I think the title of my paper, which was an audio-visual paper, was [*announcer-like*] “Ossining: A City Divided.” [*both chuckling*]

MO: I was about to ask you about school. In either grammar school, or perhaps

more likely in high school, did you have any teachers that you remember for any reason or that had an influence on you?

SW: [*chuckles*] Sure. Mrs. Henken. High school English teacher who got us kids thinking outside the box. Pleasantville School System was a wonderful school system, well-funded, I think, good teachers, but most of the time it was a relatively traditional schooling. There was not a lot of extra-curricular activity that involved things beyond the Future Nurses Club, or the student government with a traditional emphasis on Roberts Rules of Order, and things of that nature. But Mrs. Henken took us to New York City to see some plays. I don’t remember anything specific that we would read or discuss in class, I have sort of this emotional resonant memory of it being different and more stimulating and more interesting. That’s a stand-out.

Another standout was listening to our math teacher I had for three years—and ended up not really liking math, in part probably because of him—tell us the story of how he once tackled Jimmy Brown when he was playing football on the twenty-yard line and got dragged in for a touchdown. Now that type of thing is sort of an amusing anecdote, but is more indicative of what the schooling was generally like. Good classes—we could have Advanced Placement Calculus; we would take French to the point of French 5. We were actually reading French literature in French. Good school.

MO: By the time you got to the end of high school did you have any idea of what you wanted to do with your life?

SW: I knew that I was interested in things political. I knew that I had some interest in law, but not really. I was going to go off and be a Poli-Sci major, but I also thought that I might study French. I loved French. I loved reading and speaking French. Went to a liberal arts college and was exposed to liberal arts.

MO: And that was Colgate?

SW: Colgate University.

MO: What would you say overall about your education at Colgate?

SW: Loved it. Great place. Great college. Everyone should consider going there. It was terrific. It was small enough so you wouldn't get lost; probably not quite 2,000 students. Called a University, but it only had one graduate program in education, so it was primarily a small liberal arts college where you'd get to know your teachers and they were some just absolutely wonderful people. I took a class in Earth Science, Geology, whatever, freshman year with Anthony Aveni and Jim McClellan team-teaching it. I thought, "I'm going to switch, and I'm going to become a guy like Aveni," who was inventing the field of Astroarchaeology, you know, the Mayan ruins and astronomy and stuff like that. That was cool. I took another course in that my sophomore

year, all we did was look at the rocks that had snail shells in them from fifty million years ago, and realized, "Nah, I'm really not that interested in this."

They really exposed us to a lot. We had philosophy. We had to take religion courses. We had to take music, theater, drama in addition to history and Poli-Sci. The guys who wanted to be doctors had terrific chemistry and biochem teachers and all that stuff. Great place, and really a place where your mind could be opened, and you were given the opportunity to think, explore, and I took some advantage of that.

Democratic National Convention, 1968

MO: It must have been when you were still attending classes at Colgate that you went to Chicago at the time of the Democratic National Convention. I guess you were motivated to go there, in part, because of your larger political view at that time.

SW: I was curious. I had no real idea—anyone other than a few organizers—what was going to happen there. My next door neighbor was an alternate delegate to the convention. Talking with her about this, I was, "Yeah, cool, fine. We can go and maybe Norma could get us on to the floor of the convention and we could see some stuff in action."

That summer, the summer of '68, we had opened our home and taken in a

fellow from Prague, who had met some other Colgate students that were there in Europe in the spring of '68. He wanted out, was accepted at Colgate, and he needed a place to stay for the summer. We'd never had an exchange student when I was in high school, so I said to my parents, "Hey, why don't we offer our home?" Michael came to live with us. He and I have ended up as life-long friends. We see each other probably every year now. He comes to the U.S. often, and whenever I've been able to be in Europe we get together.

The Democratic Convention in Chicago was the same week that the Russians invaded Prague. It was a very different experience to go to Chicago—experience not the opportunity to go to the convention and observe the process on the convention floor—but to experience the convention as a street demonstrator, and to experience it through the eyes of this guy, my age, whose friends were in Prague at that very moment fighting the Russian tanks, to the extent that they could do that. It gave me a very different insight into both the freedoms that we have in this country, as contrasted with what was going on in Prague; the danger that we face in this country, from a police state with the way in which the police and the National Guard were treating people—many of whom, like Michael and me and the other friends that I went with, we just wanted to observe. We wanted to have our voices heard. We weren't there to engage in revolution. We weren't there to kill anyone. We weren't there to do anything other than to say, "Listen, ye olde Demi-

crats, let's nominate someone who's going to take some action to stop this war."

What was it, the Walker Commission, appointed by Lyndon Johnson—called it, a police riot. That was the official word from the official commission appointed by the President of the U.S. about what happened there: a police riot.

MO: What is a police riot, exactly?

SW: I guess a police riot, as the Walker Commission described it, was an overreaction by the authorities trying to break up peaceful protest with violence. One of the scenes that is burned into my mind, after a couple of days of protesting and a couple days of the police coming in and violently breaking up protests—Dick Gregory lived in Chicago on the South Side, a politically active comedian—comes and he addresses the protestors as were gathered in Grant Park, I think it was, Millennium Park, maybe it's called today. [Editor's note: Millennium is a section of Grant Park] He invited everyone to his house for dinner. To get to his house for dinner on the South Side of Chicago, we would need to walk, and maybe fifteen or twenty thousand of us were going to walk, more or less together. It just so happened that to get to his house, apparently you need to walk past the amphitheater on the South Side where the convention was being held!

As we are walking, Michael and I were somewhere near the front of the spread-out crowd of whatever it was, fifteen or twenty thousand people. We

suddenly see in front of us a sort of shimmering. The crowd is stopped and there is some sort of movement. The National Guard had jeeps, crossing the road, all the way across. In the front of the jeeps was chain link fencing that had barbed wire on it. They were driving those jeeps into the crowd of marchers, and *kept* driving. People back where we were, maybe a hundred yards back, not hit by the jeeps, but watching this, and then people starting to scatter and to try to get out of there and to get away, and other National Guardsmen and police coming around the sides and staring to whale on people who were trying to get away from what was happening up front.

MO: You escaped injury, then?

SW: We were not hurt. But it's the type of thing you don't forget.

MO: Of course, a little bit earlier in that decade, we had the assassinations of both JFK and Bobby Kennedy—

SW: And Martin Luther King.

MO: And Martin Luther King in that year.

SW: April of '68, King, June, Bobby Kennedy, and then August in Chicago.

MO: During your education at Colgate, you must have started thinking more seriously about a law career.

SW: I did. [*laughs*]

Harvard Law School

MO: Tell me about what you thought you might do, then. Obviously, go on to law school, but what was the motivation?

SW: I think that I was more interested in what was then called "Poverty Law." In my sophomore year—my Jan Plan—I went to New York City and I taught in an Urban League Street Academy on the Lower East Side. Kids who were not able to make it in the New York City Public School System, troubled kids. They put me up in an apartment down on the Lower East Side with some guys who were heroin addicts. That was my first real exposure to some of the grinding effects of poverty, the relationship between poverty and drug use, and dysfunction and drug use. In my second semester of junior year, we had a Washington study program; I spent the semester in Washington. We had to pick an internship in a government agency, and I interned in the Office of Economic Opportunity, one of Lyndon Johnson's wonderful doings in his War on Poverty. If I can only set aside the Viet Nam War, the things that Johnson did as President with civil rights and his efforts to fight poverty, just remarkable; an incredible progressive and a guy who also knew how to get stuff through the Congress.

I worked in the Legal Services Office, which was brand new. It wasn't yet the Legal Services Corporation; it was a government agency. They were working on poverty issues. I was going to

be a poverty lawyer, I thought. Deal with housing issues, deal with poverty issues, deal with civil rights issues, and to go and work be a legal aid lawyer for a while, something like that. Not criminal law. That wasn't something I was thinking about at that time.

MO: You went on to Harvard Law. What was that experience like?

SW: Good. I won't rave about it the way I rave about Colgate. [*chuckles*] I got a fine legal education, I'm sure. The orientation of many of the students was somewhat different than mine. I think that most of the people who went there ended up making a lot more money than I've chosen to make. It was more a motivating factor. Lot of fine people there who've gone into public service, done government work, but there was a different feeling that would come on the school in the interview season. Whether it's for a summer job, or it was for jobs after you graduate, this incredibly intense pressure to get a job with this or that law firm. That's not where my head was at.

As much as I believe I got a good education, perhaps learned to think like a lawyer. Enjoyed the fact that it wasn't a technical school—and by that I mean we were not studying law so that we could pass a bar exam; we were not studying law learning facts—we were learning how to think. We were learning how to examine the policies underlying the law. That was great. I enjoyed that. I think that's the way in which a law school should be, because

the reality is whatever the law is in your second year in law school, by the time you're practicing, whether it's five, ten, or twenty years down the road, the law's going to be different. And you're going to have to get into whatever little area of the law that particular case involves.

Teach me how to think. Teach me how to understand the policy. Teach me how to figure out what should be, and how to get there. Harvard did that for me. For that I'm grateful. Enjoyed it.

I dropped out after my first year. Dropped out in the sense that I got a job in Washington working on the Youth Project Task Force on Drug Abuse and Corporate Responsibility. A Nader spin-off, for those who remember Ralph Nader, the great crusader of consumer things in the '60s—[*imitating announcer*] "Unsafe at Any Speed"—he'll take on General Motors. Well, he also had this youth project, and we were taking on "big pharmacy." I got totally into studying about the over-production and over-prescription of the mood-altering drugs that Smith, Klein, and French, and Eli Lilly, and all these other big drug manufacturers put out, and so much of the product ends up being abused on the street. I got really into that, and told the school, "Don't want to come back." They were gracious enough to give me a leave of absence. I stayed there for a year and realized the education and the degree would make a difference so I went back.

MO: Any people, either students or professors, at Harvard that you remember or were influenced by?

SW: I had this fellow, Lloyd Weinreb, three times, for criminal law courses. He was a very thoughtful guy. The way in which he introduced both substantive criminal law and some of the procedural issues spoke to me. I think that the way in which he presented the material had some impact on the fact that I kind of liked it.

A guy who had an impact more by being a role model than as a teacher, because I had him for Labor Law, was Archibald Cox—the special prosecutor of the Watergate, who refused to bend. Nixon ordered the Attorney General, Elliot Richardson, to fire him, and Richardson resigned instead. The next in command was [William] Ruckleshaus, if I'm remembering correctly, and he refused. And the third in command of the Department of Justice at the time, Solicitor General Robert Bork, later nominated for the Supreme Court, and Bork is the one who fired Archibald Cox. Well, Cox teaching Labor Law and wanted to be a good Labor Law teacher and not political, told us at the outset that's what the class was going to be. But one day he did talk about his experiences: his uprightness, his ethics, his going forward to do what was right as he saw it in terms of the Watergate prosecutions, notwithstanding the political pressures—more power to him. That made an impression on me in terms of the importance of standing up for what you believe in, even if it's unpopular.

For him, in that instance, even knowing that there would be a personal cost; he'd be fired. Now, whether in that context that really was a personal cost to

him, or an "Oh, gee, poor guy; he *had* to go back to Harvard." That's not such a bad gig, and he goes back with this reputation of having been Mr. I'm-not-going-to-bend guy. I don't know. But of course, it's a personal cost, to get fired.

MO: And to be fired by the most powerful person in the United States.

SW: Sure! [*both chuckling*]

MO: You stuck around Harvard Law, and got your degree.

SW: I did.

MO: Did you take the bar in New York?

Alaska Supreme Court law clerk

SW: No. I actually didn't take the bar the year I graduated. I applied for judicial clerkships, which is something that seemed like a thing to do if you weren't really sure you just wanted to jump right into the practice of law. The easternmost city that I applied in was Denver. I applied west and northwest on up to Anchorage. Anchorage was about as far away from the East Coast as one could get. I was fortunate to get a job as a clerk for James M. Fitzgerald, who was on the Alaska Supreme Court. He was appointed to the federal bench while I was working with him, so I had the pleasure of working with him both as an appellate judge and as a trial judge; state system and federal

system. That was just a great experience, just great.

MO: You enjoyed working for him specifically? What was he like?

SW: A wonderful human being. Unfortunately he's not with us anymore. Not an intellectual, but a guy with common sense and a sense of what's right and what's fair. Open, wonderful guy. We'd talk, and the other law clerk, Barry, and me, we'd be assigned stuff, and we'd talk about it. Among the law clerks in the court there, most of us, probably all of us [were] from outside Alaska, transplanted to Anchorage from wherever we were. The nights are very long in the middle of the winter there, and it's cold outside, so a lot of time to sit and talk and talk about some of the big ideas.

It was a great time to be in Alaska. It was the fifteenth, sixteenth year of statehood, so most of the issues that would come before the Supreme Court were issues of First Impression. And the justices would say, [*fast, higher-pitched voice*] "You know, what are they doing in the lower forty-eight? You know? Does it work well in New Mexico, or does it work well in Ohio?" [*normal voice*] We could look around and there were fewer constraints of precedent, so it was a really exciting time, and he was such a wonderful human being that he made it even more so.

MO: You were there a year?

SW: Just a year. Just a year.

MO: And then was the next step the DA's office.

SW: Yeah, next step, the DA's office. How did I get into criminal law and why the DA's office? As I seemed to have somewhat [*pauses, laughs*] different thoughts? Stuff in society? [*MO laughs*]

All right. So go back to Harvard and this crazy interviewing business.

MO: Actually, just a detail—

SW: Sure.

MO: Did you go back to Harvard before the DA's office?

Early legal career

SW: No. No, no. While in school, you have the interviewing season. It's the fall. Everyone's sprucing up, and buying new suits, and polishing their shoes, and going to interview for jobs for the summer, or for after school. I had fine jobs while in law school. I had that first one in Washington, and then I got one with [the] Consumer Protection branch of the Office of Economic Opportunity, Legal Aid business. My way of dealing with the pressure for the interviews, I saw that the Brooklyn DA's office was coming to the interview. Having been born in Brooklyn, my grandparents lived there, and, as I said even though I grew up in Westchester, Brooklyn, that's where it's at for me, right? So I went and interviewed

with them more or less as a lark, to get some interviewing experience.

Well, it was kind of fun, it turned out. I guess they liked me well enough. When we were leaving Alaska—when I say, “we,” this was my first wife, who really didn’t want to stay there and sometimes we do things—well, whatever. It’s a decision that was made. We went back. I applied to the Brooklyn DA’s office because I’d interviewed with them. I applied to New York Legal Aid, but by that point I was pretty sure I wanted to be either a legal aid civil lawyer or a public defender. I’d been in the public defense clinic while in law school; that’s what they’d assigned me to. I was initially disappointed, because I wanted to go do the civil legal aid stuff, but I loved what I was doing on the criminal side. I liked the criminal courses. So I applied Legal Aid Civil, Legal Aid Criminal, and DA’s office in New York City and in Westchester County.

New York City was broke. Mid-’70s, it was the financial crisis and it was literally bankrupt; they’d created this Municipal Assistance Corporation to deal with their money issues, and Legal Aid wasn’t hiring. But DA’s generally have more money than defenders. That’s how life has been and continues to still be. So the DA was hiring, and they hired me, and that’s how I ended up in the DA’s office. Because I had interviewed with them, and they had sort of offered me a job if I wanted to come. Instead, I took the clerkship, so when I re-contacted them, “Hey, come on.”

Six weeks after I start in the DA’s office, Legal Aid calls, “Steve, we can hire you.” I’d made a three-year commitment to the DA’s office, and I said, “Sorry, no thanks.” And it was an incredible experience, working as a prosecutor, an absolutely fantastic experience. Very meaningful work, and it gave me a better appreciation than I could have had through any other experience of what the criminal justice system is about, the realities of it, both for defendants, victims, police officers. I don’t regret a minute of it.

MO: But at a certain point you decided to switch to defense?

SW: Yes, but again—

MO: Also in Brooklyn?

SW: But it’s sort of yes and no.

MO: Oh, no, I see it.

SW: The DA’s office, I was fortunate. I started in the Appeals Bureau, and then I was assigned to work on a huge murder case.

MO: Was that the Son of Sam?

SW: Actually, before that, the case of Devernon LeGrand. He was a matchbook minister, and the government or the state had been trying to get him for two decades. They believed that he had murdered scores of people, and ran a sort of cult-like church. Also dope-dealing,

prostitution. We finally got an indictment on him for murdering two teen-aged Puerto Rican girls. The case was assigned to this fellow, Harold Rosenbaum, mid-50s, I mean, damn, he seemed old to me then, but what, he's ten years younger than I am now, at least. Incredible trial attorney. He probably should have been the DA of Brooklyn; he was politically connected, he was an up-and-coming star, but Harold could be a little bit gruff or curmudgeonly. But he stayed in the office, he wasn't assigned to any bureau, but whenever there was a case that needed to be won, it'd be assigned to Harold. But, Harold needed a "law man" to work the cases with him, and so I was assigned to be Harold's "law man;" to put the legal side of the case together.

What an experience. Working with him for a year on that case, putting it together, three month trial after months and months on and off in court on motions—he was a master. It was an incredible mentorship that he provided for me.

After that year, I was asked to do the same thing on the Son of Sam case, when [David] Berkowitz was arrested summer of '77, and the Brooklyn DA's office got the case. Even though all the other murders had been in the Bronx and Queens, Gene Gold, the Brooklyn DA, out-maneuvered, out-yelled John Santucci and Mario Merola, the DAs from Queens and the Bronx. We got the case, and Gene was going to do it himself, but he hadn't been in a court room in at least ten or more years. He had his first

assistant, Shelly Greenberg, working with him, and they needed some kid to do the law, [laughs] get the stuff organized. So, I was lucky.

After that, my fourth year there, I wanted to try cases myself. I asked to go into a trial bureau, was assigned to a trial bureau. Got some great trial experience, but I also saw the way in which the numbers made it exceedingly difficult to do justice. What really did me in was a day when I was trying a very tough incest case. It could have gone either way. My bureau chief told me that I should move to dismiss it because there had been too many acquittals in that bureau that month, and he didn't want another dismissal. That's not how I wanted to practice law and have that as the basis for my decision-making.

I actually looked for two jobs, and my first choice at that moment was to go work for the Federal Organized Crime Strike Force in Brooklyn. Continue as a prosecutor in the federal system, better funded, fewer cases, and deal with real crime and real corruption of mobsters and politicians. I also applied to be the head of the County Public Defender office in Binghamton, New York, and the reverse of what happened when I applied to Legal Aid and the DA's office four years before, the County Public Defender offered me a job. I took it. I moved upstate, and six weeks or three months later or whatever it was, the Strike Force called and said, "We'd like to hire you now. We can take you on." I'd already made the change and wasn't going back.

MO: Was that because of the commitment, or because you'd decided that's where you should be?

SW: It had to do probably as much with life choices. When I moved upstate I split with my wife. I wasn't really prepared to go back to the city. When I got to the County Defender office, I liked it. Maybe I should say I fell in love with it. Representing defendants, people accused of crime, it was a good fit.

MO: Any particular case or cases that might illustrate the kind of work you were doing in that office?

SW: Well, it was everything from literally peeing on the sidewalk in the municipal courts to murder. It was a small office. There were six, seven assistants. We covered the county court, which is where the felony crimes were prosecuted, the City of Binghamton Court, which was very busy with all the types of misdemeanors that come out of bar fights and shoplifting and petty drug dealing. I don't remember how many village and town municipal courts all over the county. Kirkwood, Johnson City, Endicott, Town of Union, Town of Lyle—and some of them, the judges were justices of the peace, they weren't lawyers. You'd have some real rough justice out in some of the hinterlands.

And then you'd have the real crime. I supervised the office, did most of the heavier murder cases, but also would go out and take on some of the small stuff, because I thought it was important for

me to understand what was going on in those jurisdictions in order to effectively supervise the other lawyers in the office.

The first case I tried there as a defense attorney, my client was C. C. Woolfolk. A murder case that my predecessor had worked up before he was hired to run the new attorney general's regional office in the southern tier of New York. Not the best thing to do, your first trial as a defense attorney, five years out of law school, a tough murder case with self defense. I learned, baptism by fire, if you will. Won an acquittal on the murder, but the client was convicted of manslaughter. I don't know if I tried the case five years later whether I would have been able to get a different result. I did not have in mind, I think, the maxim that I had heard from Judge Fitzgerald, from Alaska, "Under-prove, don't over-prove." I was still fresh from the prosecutor's office and probably did too much in that case, taking on too much of a burden.

But one of the next really big cases that I had there, client's name was Azad Vega. He was a student at the state university in Binghamton. He had been tried and convicted of attempted murder of a state trooper. Case tried by my predecessor. They put on a huge, two-week defense. Case was reversed on appeal after I got to the office, and I retried it. I was able to follow the maxim of "Under-prove, don't over-prove." State put on this case, lasted three days. The defense rested. I'm sure that they were surprised at the fact that there was no defense. There'd been this huge defense the first time. Mr. Vega was from New York City; he was of Puerto Rican ancestry. The

state trooper, local white guy, and there had been all sorts of racial overtones to the trial, going into the self defense. We rested, and we got a “not guilty” out of them.

Toughest case that I tried there: Chet Chandler. Chet was a Viet Nam vet; he had been in the medical corps in Viet Nam. I don’t remember what his job was, his title, but one of his jobs was to go out into the field and gather up the U.S. servicemen who had been killed, body bags. Chet came back damaged. This was the very beginning of the understanding of Post-Traumatic Stress Disorder as we’ve come to learn it. He snapped one day. He murdered his own children and attempted to murder his wife. Incredibly difficult and emotional trial.

When his wife came in to court to testify, everything in that courtroom stopped. I don’t think anyone was breathing as she walked down the center aisle through the audience up to the witness stand. I had to question her about what I could about Chet and his Viet Nam service, and to try to bring out something. But the emotional impact of this grieving mother who had survived his attack on her, everyone was crying. When the verdict came in—a long deliberation—“guilty.” I got calls from a number of the jurors afterwards, talking to me about how torn up they were about the case, about him, and about what he had done.

MO: That must have been tough, cross-examining the wife.

[End of Recording One]

Oregon Federal Public Defender’s Office

MO: Okay, we’re back on tape. The next thing after Binghamton was the job here?

SW: That’s right.

MO: Tell me how that happened.

SW: [*laughs*] Well, it was a dark and stormy night—[*laughter*]

SW: Kathleen, my wife now of thirty years, had gone to law school. She’s four years younger than I am. When she was in law school in the late ‘70s, she had spent a summer here in Portland working with the Willamette Valley Immigration Project. She loved it. On my way up to Alaska, I’d driven through Oregon, and found an incredible blackberry patch somewhere down around Medford or Crater Lake, I don’t remember exactly where. Back where I grew up, our blackberries were maybe a half inch high. Well, these were Oregon blackberries. All right, so I’m a fruitarian. I love the blackberries. We’re sitting around one January day. There’s a blizzard outside the house that we’re living [in] on the hill outside of Binghamton. We were talking about, “Let’s move. Should we move? Should we get out of here? Yeah, the town’s a little small.” She was working in the attorney general’s office and enjoyed it. I was working the public defender’s office, but maybe we should look elsewhere. We picked about six cities in the country that we thought we might

want to live in. One of them was Portland, because she had really liked it out here.

Monday, the postman brings the National Legal Aid and Defender Association newsletter. It's got an ad, for the new position of the brand new Federal Public Defender for the District of Oregon. I applied. We came out here, we interviewed, and flying back on the plane we drew lists: Binghamton, Portland, Binghamton, Portland. Where do we want to live? What are the values? How important is it to be close to family? Because all her family is in and around Binghamton; all my family was either in or around New York City, and my sister lives in the Hudson Valley.

Judge [John] Burns was the Chief District Judge at the time. While the hiring is done by the Ninth Circuit Court of Appeals, back in those days they got a lot of input from the district judges. It was Judge Burns who called and offered me the job, and I turned him down. We had sort of decided we don't really want to move out there.

A couple of days later, we both had buyer's remorse, and I called the good judge back. I had to track him down; he was at a conference somewhere, North Carolina, South Carolina, I don't remember exactly where. "Judge? You know, is that job still open by any chance?" [*effects deeper voice*]
"Yes."

And he said in his best Judge Burns gravelly and judicial voice, "Well, Steve, the way we do things out here in the West may be a little different. You know, you make a commitment and you stick with it."

"Yes, sir!" [*laughter*] "We're coming!" And we came.

MO: Now, you were offered the job without an interview?

SW: No, we had come out and been interviewed. The way the process worked—I don't know how many people applied—but the court had set up a screening committee that included Susan Mandiberg, who had been in the office here as an assistant.

I need to take a step back. This office was originally set up as a private, non-profit community defender, 1974, as part of the Metro Public Defender Office; spun off as a separate private nonprofit in 1977. Then in '82, '83, the court decided that they wanted to convert it from a community defender to a public defender office. There were all sorts of reasons given for that. Part of it had to do with the court's unhappiness with the man who had been running the office for nine years. He was the first director and had stayed as the head of it until the conversion took place and I took over in the new form of the office, August 1 of '83. The office was really nine years old at that point, although I started as the first federal public defender, federal employee hired by the Circuit.

The committee included Susan Mandiberg, who had been an assistant defender in the office, now and then teaching at the law school here in Portland, at Northwestern. Mike Schrunck, the DA was on the committee, I remember. Jose Mata, I think, was the State Bar

representative. Some lawyers who were on the Criminal Justice Act panel, lawyers in private [practice] who would take assignments when the office had conflicts. They did the interviews; they were the screening committee. They made recommendations to the Circuit. They vetted us, talked with all our references, and that's how it worked.

Kathleen and I had come out for the interview and spent some time here, checking out Portland before going back. Burns called and made the offer, denied. Called him back, accepted. So that's how it happened.

MO: Was Kathleen also job searching at that time?

SW: She did not have a job when we came out. She started working pretty soon after with Don Willner, who was Willner, Bennett, Hartman—they were suing the state university system on behalf of the female professors. It was called the "Penk Case," a huge case in Oregon at the time. [*Penk v. Oregon State System of Higher Education*, 816 F.2d 458 (9th Cir.), cert denied, 484 U.S. 853 (1987)] She spent about a year helping out on that case. Then in spring of '84, after we had been here somewhat less than a year, I think it was. Maybe it's spring of '85. I'm sorry. She got a job as the director of the state Psychiatric Review Board, state agency that monitors the people who use the insanity defense in Oregon. She did that for about ten years, and now for the last 19 years she's been the director of the Oregon Medical Board,

licensing, disciplining doctors, and other allied health professionals. Her career here in Oregon in a nutshell.

MO: Just as a footnote, then, when did you meet Kathleen?

SW: I met her the first day I walked into the county Public Defender Office in Binghamton. She was an employee of the office. She had graduated from law school in '78, and was hired as what was called a CETA employee, Comprehensive Education and Training Act. CETA employees would be put into public service types of jobs. She was working as a CETA employee lawyer in the public defender office. I was her boss. Fortunately for only three months. I'm sure as she tells the story I'm the worst boss she ever had. As I can tell the story, she was the worst employee I ever had. Obviously there was some spark between us that wasn't well-handled in an employer-employee relationship. But she left the office toward the end of that first summer I was there to go work with my predecessor in the Attorney General's [office] as an assistant Attorney General. Once she left the office, we started dating shortly thereafter and got married four years later—or three years later, whatever it is.

MO: You didn't fire her, did you?

SW: [*amused*] Well, no, but I could say I committed the ultimate act of sexual harassment; I fired her so I could date her and marry her. [*MO laughs*] [*SW wryly*]

No, that didn't happen. [*laughter*]

MO: All right. You mentioned a little bit about people that interviewed you for this job. Is there anything about that interview that didn't go quite smoothly as far as you were concerned?

Origins of the office

SW: I think the interview itself went smoothly. After the interview or maybe the next day, a number of the lawyers in town who do the panel work, we went out—my recall is it was the place that's the bar next to Higgins, but I don't know where the heck it was. They were sort of talking to me about it, and one of them used the phrase, "You know, this is a dog-shit job."

Whoa. "Why?"

Well, there was some resentment in the criminal defense community about what the court was doing. The office had been perceived by the lawyers in town to be a pretty aggressive place. The lawyers both within the office and on the Criminal Justice Act panel were worried that what the court was trying to do was to take control of the office. I was pretty young at the time. I was the youngest federal defender in the system when I was hired. I had virtually no federal court experience, and no federal criminal defense experience, so I think there was some good reason for people to be skeptical about me. To be concerned about what the court was doing, and to be concerned that the role

the court had in mind for me was to get the office under control and make it less aggressive.

To walk into that sort of setting, resentment by the people I was going to have to work with within the office, resentment and concern about me by the lawyers on the CJA Panel, I think, is part of what motivated the comment about the negative aspects of the job. I think that history has shown that those concerns were unfounded, and that the court did not get the control of the office. I think that some of the lawyers' concerns that the court wanted to take control were also unfounded, because I did not feel pressured—with one exception.

I can tell one story. There was some tension. At least three of the people who were assistants in the office, and there were only five lawyers in the office, four assistants and myself when I got here had applied for the job. Here I am walking in like some punk kid who's never been in federal court in his life, supposed to run an office and supervise these guys who had been in it, who had the federal experience—had the local federal experience, and had applied for the job themselves and didn't get it. Not the easiest thing to do.

MO: Kind of a tough situation.

SW: Yeah.

MO: Well, then, you packed up and moved.

SW: We did. [*laughter*]

MO: Anything about that trip out? I can imagine you had a lot of belongings and so forth.

SW: Well, the belongings came on a moving van. We packed up the car; we actually put some plants in the car. We took a somewhat southern route; Kathleen didn't come out when I came August 1—Actually, I came before we even got married. We'd been living together, and I started the job, went back, we got married September 10 of '83, and I then came back shortly after the wedding, and then flew back again. It wasn't until October that we came out together to here.

I remember, we were at the Grand Canyon. We had some of our plants in the car we were carrying out with us rather than putting the plants on the moving truck. We brought them into the cabin because it was going to go way below freezing that night at the Grand Canyon. I remember carrying the plants [*chuckles*] from the car into the cabin. Whatever. We took a couple weeks and saw a little bit of the country on the way out.

MO: Did you have housing already set up here?

Settling in Portland

SW: We did. Among the lawyers who were doing criminal defense work at the time was Larry Matasar. Larry and Sandy had a beautiful old Portland house in Southeast, and they had bought another

beautiful old Portland house in Northeast. So Larry sends me photographs of this great house, and "Gee, wonderful place, would we like to rent it?" Great photographs and beautiful woodwork on the interior. Beautiful photograph of the outside of the house, of this incredible Oregon holly tree in the front yard, and wrap-around type porch. Yeah, sure, fine. We rented it.

We get here, "Gee, Lar, thanks!" It's the first on SE Main out of the inner industrial district between 12th and 13th, right next to the Buck Ambulance Company. [*chuckles*] It was a wonderful place to live. Larry and Sandy, and Kathleen and I became fast friends, and we've remained very close friends ever since. [*amused*] I still think there was a little bit of deceptive advertising in his photography.

MO: [*laughs*] Are you still in the house.

SW: No. We lived there for two years. We wanted to live out in the country, which is where we'd been living, outside of Binghamton. We lived in a house on four acres with fruit trees and berries and a huge vegetable garden. But we decided after sort of circumnavigating Portland, Happy Valley, Banks, and everything in between, that we didn't want the commute. Eventually we hit on the Mount Tabor neighborhood, and we told a realtor, "If you have a house that becomes available anywhere between 55th and the Park, between Division and Belmont, call us." And we got a call one day that a house

that backs right on to the Mount Tabor Reservoir was going on the market. One owner, Florence Roberts; she was 94 or so. She had died, and this fellow was getting the listing. He showed us the house before it went on the market. We walked in, and looked out the living room window to this huge, oversized backyard that backs on the reservoirs, and said, "We'll take it." Then we looked at the rest of the house. A perfect compromise. We're in the city, can walk down Hawthorne, it's ten minutes to the office across the Hawthorne Bridge when we're not in rush hour, fifteen if there's bad traffic.

MO: Mount Tabor in your backyard.

SW: Yeah. And plums and apples and blueberries and my vegetable garden. Now, the next-door neighbors have chickens, so occasionally they come visit me in my yard. We've been there now twenty-eight years.

MO: Tell me a little bit about your very first days in the federal defenders office.

SW: Oh, my.

MO: You mentioned that you were entering a tough situation; tell me how that played out.

Community Defender personnel

SW: It played out well. Get to the end of the story, and then let's back up. I realized

I needed to be open with everyone in the office about what I knew and what I didn't know. To let people know that I was going to have to learn from them, and if we worked together on this, the office could continue to be a success. My vision of it is I was wearing out a path in the carpet from my office to the office of the other lawyers because I'm walking asking them questions about everything. I guess it worked. The lawyers in the office at the time—Chief Deputy was Fred Black, who stayed a year or so, and then he moved back to Guam where he had been and became Assistant U.S. Attorney and became the U.S. Attorney in Guam. Steve Sady, who is still here, is the Chief Deputy, has been for twenty-five or so years, he and I have become good friends. After Fred left, Hollis McMilan became Chief Deputy. He was down in Eugene; he came back to Portland and left after a few years and went into civil law. Kenny Lerner stayed in the office, left, came back, stayed, left, came back, and he and I are good friends still today.

MO: And he's still in the office today?

SW: No. Kenny finally left, probably around 1990, maybe it was a little earlier than that was his last time in the office. He is doing criminal defense work as a private lawyer. He takes cases on assignment as a CJA [Criminal Justice Act] lawyer.

I threw myself into it, started picking up cases, learning how to be a federal criminal defense attorney. I loved it. Throughout the '80s, before the

sentencing guidelines and mandatory minimums came into effect, when we were trying cases, any number of years I tried more cases than anyone else in the office. I loved to be in the courtroom. You do six-a-year, eight-a-year. It was great. I learned how to be a defense attorney in the federal court by doing. At the same time, the office was expanding. The caseload kept going up; the U.S. Attorneys were expanding; the types of cases were changing, becoming more complex at times. We went from a total of five lawyers to twenty-five lawyers. Nine employees to eighty-three employees. We responded to the growth that the U.S. Attorneys were bringing to the system.

MO: A couple other people from this same time. Dave Teske, was the one that headed the office prior to you.

SW: Yes.

MO: Did he stay on at all?

SW: No. He moved to Seattle. He switched careers, if you will. He went and got a degree in Admiralty Law and set up an Admiralty Law practice. I lost touch with him years ago.

MO: He wasn't here when you first arrived?

SW: No. His last day as the Community Public Defender was July 31, '83; my first day as Federal Public Defender was August 1, '83. That was it.

MO: I assume he was one of the ones that applied for the job?

SW: No. The court's issues were centered around David. Part of the feeling was he was being unjustly and unfairly maligned by the court in the court's effort to get rid of him. That that was part of the reason for the conversion of the office from community to federal public defender. He and I did not have a relationship, and to my knowledge he did not apply for the job. He knew the court wanted him out.

MO: Do you know why the court wanted him out?

SW: I don't know anything first hand; I wasn't here. I have heard any number of things. What the truth was, I don't know. It's not something I want to speculate about.

MO: That's fine. Stephen Crew?

SW: Steve had been gone, probably two years when I got here. Steve was one of the assistants in the office under Teske, and was in private practice. He was doing some defense work when I got here, on assignment. His practice pretty quickly became purely civil; he stopped doing any criminal.

MO: Stuart Teicher?

SW: Teicher, also gone, and he left to do civil practice. He and I, we know each other to say "Hi" and pass a few words

at a social event, but that's about it. Tom Schneiger was another one of the early assistant defenders under Teske. Same with Tom; he was gone by the time I got here and not doing any criminal work, either. Jim McCandlish was another one. He, too, was gone when I got here. *[pauses]* I'm drawing a blank. There's another name that is escaping me. Not McCandlish; I take that back.

This is terrible. It's the guy when I said there was one thing that the court was pressuring me about. Early on, Judge Burns, I think he had presided over a bank robbery trial where one of the assistants in the office didn't think that he had gotten the discovery, the material from the government that the government was supposed to provide. He had subpoenaed allegedly every employee in the bank. The court was apparently not amused, and however that played out in that particular case, several months—and then, again, perhaps more than a year after I had gotten here, it was suggested to me that that person's activities were not the way we should be practicing law here, and perhaps he shouldn't continue in the office. *[incredulous]* Well he'd already left the office before I got here! *[laughs]* I can't remember his name! It's terrible! Sorry.

MO: That's alright.

SW: *[laughs]* Fire me! *[affects officious voice]* Oh, Steve, oh no *[unintelligible]* I really don't that's how the Federal Defender's Office should be about. *[normal voice]* The first time the court said that to

me, I had to come to the office and say to the other guys, "Who are they talking about?" *[MO and SW chuckle]*

"Oh! He used to work here. He left two years ago." *[laughter continues]*

MO: Obviously made an impression on the court!

SW: Apparently! And not a good one.

MO: You mentioned already Sady, Lerner, and Mc—

SW: Milan.

MO: And Mandiberg. Actually, did she stay in the office?

SW: No. Susan had left a year or two before I got here. She was already teaching at the law school. She was involved in the hiring process as the law school member of the Merit Screening Committee. She and I became friends. We've stayed in touch ever since. I taught at the law school for a while, and she was helpful in making that happen. Well, more recently she hasn't been teaching much on the criminal side, but for years she was one of the go-to Criminal and Constitutional Criminal Procedure professors. She would get us students who would work here as interns, and let us know that, "this kid's really sharp; that one you can pass on."

MO: Did any of the ones that stayed in the office, were any of those people actually applicants for the job, then?

SW: Yes. I believe three of them. I don't think Steve Sady applied, but I'm pretty sure that Lerner, McMilan, and Black had all applied. The court wanted a clean break. They did not want to perpetuate whatever it was that they were concerned about.

MO: And you don't know what that is?

SW: [*amused, patiently*] I answered that before; I'm not going to speculate. I wasn't here, I don't know firsthand.

MO: All right. [*chuckling*]

SW: But a good try. [*laughter*]

Legal philosophy & leading by example

MO: You've already explained all of the possible difficulties you could have encountered. You had talked to me a little bit when we first met about some of the principles that you adhered to over the years. I was wondering what your early vision was in terms of what you should do as the leader of this office.

SW: [*thoughtfully*] Well, part of my view of running an office is—leadership, I think is a good word. My sense is that one way to lead, a good way to lead, is to lead by example. If I'm going to supervise people, if I'm going to be in a position to help people with their cases and with the types of problems that come up in a

judicial system, in court, with individual personalities of judges, of prosecutors, probation officers, I need to know what's going on. I got myself into court early; I continued to get myself into court. Even as the office has grown, I've tried to structure it so that I can continue to have a case load. I can continue to lead by example that I can lead by setting a tone of the way in which, at least in my judgment, law should be practiced, criminal defense should be carried out. To be able to help people by having that personal firsthand knowledge, understanding and experience with all the types of issues that come up in the system.

My sense of the values, the principles that should guide a defender office, and probably applicable many places, you treat everyone with respect. You treat everyone the way in which you want to be treated. I'm sure I don't succeed in that all the time. I'm human; we're all human. We all fall short of our goals. But that's something that I aspire to, that I try to pass on to everyone else who works in the office. I try to make this a place that is a happy and healthy place for people to work; where everyone who works here feels valued; where everyone feels part of the process of representing our clients.

Part of doing the defense work is, I think, to understand that we are responsible for the lives of our clients in the sense that no one else in the system has a job that's focused on them. If someone's going to help them, it's going to be us. No matter what a probation officer, a pre-trial officer might say or think about wanting to help people, that's not what their jobs

are focused on. If it is focused on that, it's only in part, because they have a public safety component to what they do. We don't. We need to be conscious of the fact every minute that's what we are about. I try to pass that on. I try to pass on the understanding that every second of every one of our clients' lives has value, and we're responsible for that. Now there's no such thing as, "I'll get to it tomorrow" if "getting to it tomorrow" means that the client spends one extra day, one extra hour in jail. And I try to pass that on.

We need to push the law. We need to push the system. The law is generally against us. It's generally harsh. Congress has made it more and more repressive; the Supreme Court as it changed from what I grew up with the Warren Court in the '60s to the Court as it exists today, makes it more and more difficult for us to help our clients. And it's our job to find that little nook or cranny somewhere in the law where we can find something that we can use to help our clients. If we don't ask, no one will. I mean, that's part of what you have to inculcate in everyone who works here. When people say, "Gee, what sentence should I ask for?" Probation, is it realistic or not realistic? Yes, we need to be credible, but at the same time we need to understand if we don't ask no one else is going to ask. [*emphatically*] If we don't say, "This client doesn't need to go to jail," we can't rely on anyone to be saying or thinking that. I try to put that out to people.

In terms of working with people in the system, and I started [with] you

treat everyone with respect. My view is that we must be zealous and professional fighters for our clients at every stage in and out of the courtroom. Yet, it shouldn't be personal. At the end of the day, we should be able to have a beer or a glass of wine with anyone else in the system, and to be able to appreciate their humanity, to respect them as individuals who have a different job and a different perspective.

I try, in terms of encouraging people in the office, to encourage the understanding we've got to fight. We've got to push. We need to do it professionally and we need to do it in a way that enables us to kid around with our adversaries, to be kidded by our adversaries. And, if you're at a bar function or if you're not at a bar function, you want to invite someone over to your house, you want to play a softball game with someone, do it. There's nothing about us as federal defenders that should distinguish us from U.S. Attorneys and probation officers. We're all human beings. And let's recognize that humanity. That's part of what I try to do in terms of leadership.

MO: I might be misquoting you [*laughs*] from what you said maybe five minutes earlier, but you said that, "The office didn't have any responsibility for public safety?"

SW: Yeah.

MO: I guess the concept is that you've got to do everything you can for your client?

SW: We can't make judgments about the guilt or innocence of our clients. No criminal defense attorney can. There have been a number of people who have written about defense work; some judges who have, after sitting up on the bench twenty, thirty, forty years, talked about the burden we defense attorneys take on, when we take on this role. It is sometimes unpleasant, because we know that most of our clients are guilty, in the moral sense, "they done it." We know that most of the police officers and prosecutors who are arresting people and bringing in cases are fine people of integrity who are bringing to the system people who have committed offenses. Our job is to sort out the few where they have made a mistake. Our job is to help to explain conduct to mitigate in terms of how much is enough? A person may be guilty, and maybe he's going to be sentenced, but is ten years needed, or is five enough? Three enough, or can a person get probation?

There are a number of tasks that we have, but I don't see one of those tasks as being conscious of "I need to not defend this person because I know this person is guilty, and if I defend this person then there may be some harm to public safety." To the contrary, our system is set up in a way where I would be harming public safety if I make that kind of judgment. My job is to keep the system honest. My job is to say to the prosecutors, the police, the judges, "You're wrong. You've made a mistake. You're being overly harsh here." To question their actions and judgments. And the system will then work out

what the truth is, what the justice is. If I pull punches, and if I starting making judgments "I'm not going to defend this person," I think all of us are at risk.

You may think, "Well, Wax, he's the guy with integrity and morals, so I'll trust him to say, "Ah, this guy shouldn't be defended," but you shouldn't trust me. I don't trust anybody. Now, I'll go back to Nazi Germany and I'll go back to my great-grandparents in Russia. Modern advanced societies have had governments that have done horrific things. My job is to do what I can to keep those people in check. I can only do it if I stand by the individual defendant in every single case; guilty or not. Our system says maybe he's guilty in the moral "he done it" sense, but if the government can't bring in admissible evidence and prove that person's guilt, he's not legally guilty and the system has worked.

That's my philosophy. That's why I can do this work. I think that's the philosophy of every person who works in this office and probably the overwhelming majority who do criminal defense work around the country.

MO: I guess the idea that some of your skeptics had before you took the job was perhaps less aggression from this office? That was incorrect. *[laughing]*

SW: Well, yes, I don't think that that panned out. *[chuckles]* But perhaps I do it with a slightly different tone at times, perhaps? Although I'm sure that some of the people across the street, whether

prosecutors or judges, think that the tone could be toned down at times, but that's life.

Impressions of Oregon federal bench

MO: You said you tried quite a few cases from the very beginning. What was some of your impressions of the federal court here in Oregon at that time?

SW: *[laughs]* I think that we were very fortunate to have a high quality bench, and to have people who cared about the outcomes, people who had not succumbed, as some federal judges do, to judge-itis, or black-robe-itis. To be sure, there were some variations in personality and some people were a little bit more *[pauses]* I'm looking for a polite word, here—imperious on the bench than some of their colleagues, but nothing that was untoward, or something that I couldn't deal with. My feeling was, for the most part, we were heard. My feeling was for the most part the judges were attempting to get to a just result. I certainly didn't always agree with their view of justice, and they certainly didn't always agree with my view of justice. But we had different roles. As long as I felt that I'm heard, they call the shots. If I don't like it, I go to the Ninth Circuit. I lose there, I try the Supreme Court. I lose there, that's the system. It's worked. Come back next time.

We would do that sometimes. There were some cases where we had clients where we really felt the judges

were wrong. So you take it through the appellate process; you lose. You find a way to come back with some sort of post-conviction proceeding. You take it through the appellate process; you lose again. You find a third avenue, and the ninth time you get in front of a judge, you win. Okay. That happened occasionally. That's cool.

MO: Any cases from these early days that you remember that might demonstrate some of what you just said?

SW: Sure. *[laughs]* I love Judge Burns as a person. He treated me well, *[pauses]* when my first son died, he had had a daughter who died. He reached out to me in a very meaningful and human way, and I really like him for that. As a trial judge, I think there were times when the good Judge Burns might forget that he was no longer a county prosecutor—which he had been earlier in his career. We had a case where I had a motion to suppress, where the police had stopped my client's car improperly. Part of our role—I talk about keeping the police, the government, the prosecutors, honest—is to make sure that the rules are followed on the street as in the courtroom. Because all our liberty is at stake if the police can just stop us at will. Well, Judge Burns doesn't rule. He adjourns the hearing, then he reschedules it a month or two later, and the prosecutor does something else, and I do whatever I'm doing. I'm still right, and he doesn't rule. He adjourns the case again. And then we come back and he asks some questions. All right. Come on. Eventually, I lose. I

am absolutely right. We're in front of the Ninth Circuit on this issue, and the case has dragged out so long in the meantime, the bloody Supreme Court gets into the act, changes the law that the Ninth Circuit had, and Judge Burns is vindicated. And my client goes down. Okay? That's our system. *[laughs]*

MO: *[chuckles]* This is a specific case that you're talking about?

SW: Yeah. It was a bank robbery case with a search and seizure issue that went on. There was one moment in the proceedings, Bill Youngman, retired a long time ago, was one of the senior Assistant U.S. Attorneys, Bill is sort of sitting there, and Judge Burns is taking over! "Come on!" You know? "No!" All right. Whatever.

I had another case with him. Tough case, with a kid who had been abused and robbed a bank. Bad life, and it was a difficult case. I'm not going to mention names, but he was a relative of a very prominent player within the federal court system. I don't think that there was any—well, sure, no politics, but I don't think there was anything personal about this, but Judge Burns really thought through to the sentence in that case and took a risk on the kid. He sent him to prison, but for far less time than might otherwise have happened. Really unfortunate, the kid got out on parole and robbed another bank. And I tried a second case for him. Lost again, I can't complain about the result in terms of the jury deciding who actually

had been in the bank, robbing it. He got a longer sentence that time, the right thing to do under the law, the right thing to do. But the good Judge Burns handled it very well.

MO: I guess someone that has a real reputation among some federal judges here in town, then, his name is in fact on the old courthouse. Did you have any cases in front of Judge Solomon?

SW: You know, I came here too late. By the time I got here, Judge Solomon had taken senior status. He'd been on the bench a long time. I had one or two minor appearances in front of him on old cases of his where the people were back with some sort of post-conviction issue. But I never saw him in his "We're going move this case" sort of mode as it was described to me.

MO: Any other judges from that early period that you'd want to comment on?

SW: *[snickers]* Well, the judges who I dealt with most were Burns, Panner, Redden, and Frye. Burns had been around first, and then Panner, Redden, Frye were the three who were appointed more or less at the same time by [President Jimmy] Carter in 1980. So I get here, and they're all sort of getting into the full flower of their careers as judges. Judge Panner, who is still down going strong down in Medford, had sort of taken on the reputation of Judge Solomon—was his mentor—and Judge Panner was going to rule with an iron fist.

I loved being in front of him. You know where you stood; you knew how the case was going to go. No nonsense. You'd get a decision. I learned pretty quickly from him, and I learned a lot from him about preparation, about getting to the point, hearing what the judge has had to say, and moving on when it's necessary to move on. I tried a whole bunch of cases in front of him. He was a particular pleasure to be in front of over the years because he was so no-nonsense, with both the defense and the government.

We had a series of cases fifteen years ago, indefinite detainees—people in the immigration system who were not in jail because they had committed a crime, but they were in jail because they could not be deported. They're here in the country illegally, but couldn't be deported back to their home countries. What our government in all its infinite wisdom had done was decide, "We'll just keep them locked up in county jails." Some of these were kids who'd never been in trouble in their lives. People who had escaped from torture in China, from arranged marriages where they were being brutalized in other countries, etcetera. Judge Panter was assigned all of these cases. Craig Casey, Assistant U.S. Attorney, absolute gentlemen on the civil side, was handling them for the immigration service, then it was the INS. This is before it became ICE, [U.S. Immigration and Customs Enforcement] under the Department of Homeland Security.

We're in court one day, and Craig is making some representations about

one of the cases. They were all sort of clustered together. Judge Panter said to him something to the effect of "Mr. Casey, are you making that representation to me, or is that coming from your clients?"

Craig said, "No, that's coming from the clients." This is a Thursday, I think.

Judge Panter said, "You have your client in my courtroom Monday morning."

Craig said, "They're in Washington, D.C."

Judge Panter said, "I understand. *You* have them in my courtroom Monday morning."

I love that. A judge who understands the authority that his position gives him, the authority vested in him under the Constitution. That authority means, whether it's a local defense attorney, whether it's the United States government Department of Justice Immigration and Naturalization Service, whatever, you don't play games. As a judge, you issue the appropriate order, regardless of who it is. He has done things like that a number of times in his career. I respect that aspect of him tremendously. It was a pleasure to be in front of a judge who "gets it" in that way, and you can count on, "call it like he sees it."

Now, I disagree with his rulings more often than I agree with them. That's the nature of my job, and my perspective on life as contrasted with his. But I know that when the chips are down, and when there is a tough issue which some judges might shy away from a confrontation, or be a little bit more charitable to the government, get him in my courtroom.

MO: What about Redden and Frye?

SW: Well, Judge Redden, very different personality. Judge Redden—

MO: [*interrupting*] No southern charm?

SW: No, he's got his Massachusetts liberal-Democratic-Irish-Boston charm. Redden was in some senses easier to deal with than Judge Panner, because of the difference in personalities. I would probably more often agree with some of Judge Redden's decisions than I would agree with Judge Panner's decisions. He, too, understood, and for years—he saved the salmon. He had the salmon cases for decades. He understood the federal government, just because it's the federal government, doesn't have any monopoly on wisdom. He had no shyness about calling them on that. What he did with the salmon cases is an absolutely great example of that.

One of my favorite cases that I tried was in front of Redden. Something that happened in that case—who knows how it would have come out in front of Panner or one of the others? But with Redden, it goes like this: client is charged with possession of a gun. Client confesses nine different times to five different cops, "Yeah, I had the gun."

I meet the client in the jail—we'll just call him Billy—and I say, "Billy. What's going on here?"

And he explains to me the set-up, about how this guy had wanted to buy a rifle from him, the "yes, no, yes, no, no, no,

no, no—yes, all right, fine whatever." Billy shows up, and yes, when he's arrested he's got this rifle that he's selling to this informant for the Salem police.

I said, "Billy, you ever hear the word entrapment?"

"I don't know. What's that?"

I explained it to him. I said, "You know, we may have a defense here of entrapment. When you were telling these cops all about your possession of the gun, you know anything about entrapment?"

"Nope."

Okay. He was a charming guy. He's the type of client I got a kick out of him. I have to say, I like most of my clients. I find the humanity in nearly all of my clients. Billy was sort of one of these real charmers. Yeah, okay, he used drugs. Yeah, okay, he dealt drugs. Yeah, okay, occasionally he would burglarize this or burglarize that. Yes. From the perspective of society, Billy was a criminal. But he was a charming criminal. [*chuckling*]

So we tried the case, and Billy's going to testify. In the jury selection—good luck, bad luck—there are a whole bunch of guys in the panel who are NRA members. Generally, as a defense attorney, we don't want the NRA members because, if one is doing stereotypes, they are going to be more government-oriented and all that, and not liked by criminals. I kept three of them on the jury. I don't know why.

MO: You don't know why?

SW: No! You do stuff in the courtroom—intuition—you sort of move with stuff

at times. You have to. We get to the case, and, part of the defense, Billy testifies charmingly. He'd had a bullet in his pocket when arrested. The government has matched up—it's actually a shell casing—with some of the shell casings that fit the shells, the box of ammunition that had gone along with this rifle that he's selling to the informant. Their theory was that, of course he's in possession of these bullets, which means that he wasn't entrapped. He was predisposed to possess the guns. Okay, law, enough of that.

Our theory is, "No, no. This is a keepsake. Billy's had this shell casing forever."

I'm holding this shell casing in front of the jury, making my closing argument, explaining to them, "You'll have this in the jury room."

One of the NRA guys reaches out, because I'm pretty close to the jury box, and he tries to take it out of my hand.

I said, "No, you'll have an opportunity."

It's sort of awkward, and I look up at Judge Redden over my shoulder. He's sitting there, and he sort of gives me one of these shrugs—"so what"—in his wonderfully judicial-but-relaxed-judicial human way. I shrugged, and I let go of the shell casing.

The guy sitting next to this NRA guy is another one of the NRA guys. They inspect the shell casing, and they say, "Keepsake," and give it back to me! [laughter] Acquittal! [laughter] They don't come that often, but, that happened. That was Judge Redden—a more relaxed way

of doing things. He never lost control. Not relaxed in the sense that judges could rough-shod over him, but a more relaxed bearing on the bench. [chuckles]

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Impressions of Oregon federal bench, cont.

MO: May 2, 2013. Continuing the oral history with Steve Wax in his office.

Steve, when we broke off last time, we were talking about some of the people you had met that were here in the office, some of them still to this day, and then also a little bit about your first interactions with the federal judges here in Portland. You were about to tell me a story about Helen Frye, but we ran out of time. That would be a good place to start.

SW: Sure. Judge Frye. My first images of her were actually in Judge Solomon's chambers up on the sixth floor in the old Solomon Court House. I came toward the end of Judge Solomon's career and toward the end of his life, so I didn't have any new cases with him. Saw him there, and a month or two after I got to town and started in the job, I was invited to come to the judges' weekly lunch, which was in the room that was in the back of the courtroom on the sixth floor where I think Solomon and Panner had their chambers, if I'm recalling.

Judges are eating their lunches, and in comes Judge Frye. She takes out a

gigantic bowl of shredded cabbage, as I recall it. That was her lunch, and that was my introduction to her. I think that it's a fitting memory in some respects because Judge Frye walked to the beat of a slightly different drummer than her colleagues here in Portland, and, I think, a slightly different drummer than many federal judges.

She was more independent thinking in some respects. In terms of life, she was in many ways a very compassionate person. One of the ways in which that came out, as I learned, was she had a daughter who had some issues, and Judge Frye ended up raising her granddaughter.

Another one of the conversations I had with her was somewhat amusing. Her son, Max, was a—and I assume still is—a Hollywood screenwriter. There's a movie that came out twenty-some years ago called "Something Wild," which is a somewhat wild movie with some racy scenes written by her son. I mentioned it to her one day, and sort of one of those moments where, here's this federal judge who's discussing a racy movie. It was a fun conversation. [*chuckling*]

MO: Early in your tenure here you had a notable case with Judge Frye, and that was the Jim Bryan case [*United States v. James G. Bryan*, 110 S.Ct. 167, 107 L.Ed.2d 124 (1989)].

SW: Yeah. Memorable case. Jim Bryan was charged with tax fraud. Huge case. Fascinating case. Some of the government statements about it said, "The total loss

to the government from Jimmy Bryan's activities was \$1.6 billion." Bryan was a fascinating man. He was a high school teacher in Dallas, Oregon, if I'm recalling correctly. Very small school. He was an incredibly motivating speaker. This is back in the '60s. He was the wrestling coach. I don't know how many total students there were in the school at the time. I think he told me 120. Small school—and he had half of the school out for his wrestling team. They became the state champions. He was powerful in that way.

Jim was a devout Catholic. When I got to meet him after he was charged, twenty years later, we talked about how Vatican II completely turned his life upside down. He could not understand how it could be a sin one day to eat meat on Friday, and the next day, it's not.

Jimmy and his wife had a number of children, and his teacher's salary wasn't quite enough. So he started a business helping primarily doctors, chiropractors, dentists with their practices. How to make more money in their practices—probably how to make their practices much more unpleasant for the patients the way they are today, where you get put in a room, see somebody, you wait, you wait, you wait, you wait and eventually the doctor goes room-to-room. Jimmy helped them make money. After helping them make money, he tried to help them invest the money and save the money on taxes.

We're now in the late '70s, and he set up a system of doing commodity straddles. Which the big boys were doing then—Merrill Lynch, the other

big brokerage houses—they're doing straddles. Well, Mr. Bryan had a twist on his straddles, because, going back to Vatican II and his religious and moral beliefs, when his faith was shaken, he ended up establishing the Congregational Church of Human Morality. A real church with a well thought out philosophy about how to live life morally. Okay. He would have people set up little church franchises, if you will.

Now, he never pocketed a dime. This man did not become rich, at all. He helped other people become rich. And when he combined the notion of his churches and the commodity straddles, the church would always take the profit on the straddle, and the individual doctor would take the loss. Hence, no tax.

Then he franchised this across the country and set up branches in forty states. He also would hold seminars in the Cayman Islands for people to come and learn how to invest. The church was really a small part of this. Among his speakers were people at the level of Alan Greenspan. Senator—I'm drawing a blank on his name—from Idaho—a Republican senator in the '80s from Idaho. [Eugene] Gene McCarthy, former Senator [D-Minnesota], Presidential candidate.

Eventually the government decided that the combination of the churches and the straddles was cheating the government out of taxes and they indicted him.

MO: Do you want to give a brief definition of what a "straddle" is?

SW: I knew very well twenty-five years ago. How much do I remember? You take—in purchasing, if I'm remembering correctly—a future position in a stock. You buy a stock future. You buy that it's going to go up, and you buy that it's going to go down. So you can't lose. People, if I'm remembering correctly, were doing straddles over a tax year, so if they wanted to reduce their tax bill one year, you take the loss that year and then you'll get the gain the following year. What Jimmy did was add the thing the church takes the gain, because churches don't pay taxes. And some of the doctors, chiropractors, whatever, would sell their practices to the church. They would then become employees of the church; that would be another way to reduce the taxes.

Government's not amused; they indict him. We end up in a knock-down, drag-out trial with Judge Frye presiding over it. I don't remember how many weeks the trial lasted, after how many months of some pretty intense pre-trial litigation. One of the highlights of the trial was the day "Clean Gene McCarthy" walked into the courtroom as a character witness for Jim Bryan. Judge Frye, sitting up on the bench presiding, quite interested, invested, happy, I don't know. Here comes "Clean Gene," and the national media, to say that this alleged tax fraud really is a fine, upstanding guy who actually believed in everything that he was saying and was never trying to cheat anybody.

Alan Greenspan, the senator, and the other high level people, we had

contacted them, suddenly had terminal memory loss about ever having known Jim Bryan, or ever having been in the Caymans, or ever having lectured— notwithstanding the fact that we would then send them some of the tapes that Jim had provided us of their lectures. “You know, I still don’t remember.” McCarthy was a stand up guy, and he came.

Unfortunately, Bryan was convicted. Judge Frye, I think, recognized that, notwithstanding the huge loss figures that the government was putting out, he really wasn’t the bad guy. He had not profited personally from this. She gave him an eight year sentence, as I’m recalling, without any requirement that he serve any portion of it. This is in the days when there were no sentencing guidelines—judges had full discretion—so that he was eligible for release after two years.

The government then indicted him in Dallas, Texas. He was assigned a lawyer who had never been in a courtroom in his life. The guy was a patent lawyer and did not do trial work, but in Texas, at the time every, person admitted to the federal bar was obligated to take assignments. They had no federal defender. I worked with this poor fellow to try to help him. He then had to take money out of his own pocket, because he had enough ethics to know he needed to do this, to hire a person who actually knew how to try a case. Jim was convicted there, sentenced to the maximum twenty-five years, requirement that he serve a third of the sentence. Judge Frye’s, I think, very appropriate and

human response and understanding of the total situation was then trumped by what happened in Texas.

Jim ended up writing a self-published book that he called *American Gestapo* about his experiences. How the government had treated him, the Oregon system came out somewhat more favorably than the Texas system in his retelling of his story.

MO: So there were additional charges filed?

SW: Yes, because he had franchised and had business operating, as I said, in roughly forty states there was jurisdiction to try him for the individual transactions and for a conspiracy based in each of those jurisdictions. Texas was the only place that also stepped up, and they whacked him.

MO: Do you know what his prior contact was with these luminaries that he brought to—

SW: Sure. He would run seminars. Sometime in the mid-to-late ‘70s he stopped teaching, and he devoted all his energy—maybe he stopped teaching in the early ‘70s—but at some point he stopped teaching and devoted all his energy to his business. The business of being a management practice consultant to the health care professionals, as one part of that he provided this tax advice. Now, I loved the irony of the fact that his last two years in prison, he served at Sheridan once they opened the new prison—the

then new prison at Sheridan, here. Jim was assigned, as his prison job, to be the instructor for the inmates on finances as part of their transition back to society. [MO laughs] And he was good at it! I'm sure in the prison curriculum there was no straddles and there were no churches. [laughter]

Public Defender's Office expansion

MO: I want to bring you back maybe to more or less the same period. We talked about the fact that Frye, Redden, and Panner were all appointed at the same time. That was as a result of an expansion of the judiciary, because cases were piling up and there was a need for more judges in the Oregon District. Did that also apply to the Defender's Office when you came? Did you also have additional positions authorized?

SW: Yes. We had a slow and steady growth throughout the '80s, four assistants and the defender, so five lawyers when I got here. We were probably about nine by the end of the '80s, and then had another major expansion '91-93, and probably got up to about 14 lawyers. The reality of our experience throughout the '80s, and at least the first half of the '90s, was we were always lagging a couple of years behind the growth in the caseload in the District and would have to play catch up. That was the result of the fact that we're a responsive agency and have to build our budget and build the staff based on what

the U.S. Attorney's Office primarily is providing to us. There's another portion of our caseload that is *habeas corpus* representation for people convicted in the state system who are then coming to the federal court saying that their conviction were unjustly obtained. In that we're also responsive because that's dependent upon the number of petitions that people are filing from the state prisons. So, as caseload goes up from the U.S. Attorney, caseload goes up from the state prisons, once it has built and we have two years of growth, let's say, then I could go to the administrative office in Washington and say, "Here's the statistics; here's the growth. We need more staff."

It was a period of [hesitates] stress as the caseload would get above a comfortable level. We would then catch up. We would be fine for a year or two. Stress, as the caseload went up, and then we'd catch up, be fine for a year or two. That's pretty much how we grew for the first fifteen to twenty years that I have been here.

MO: Always just a little bit behind.

SW: Yes. And that's how the budget process works and probably appropriately so, because resources are adequate for us, but the pie is limited. We can't go in and say, "Well, we project we're going to have x number of cases three years from now; give us the lawyers." The answer is always, "Well, let's wait and see."

MO: I guess to some extent I've heard

complaints from the judges themselves that they were a little bit behind all the time.

SW: Yes. Yes.

MO: When you first came to the office, how many people were you supervising, again?

SW: It was a total staff of nine, so four Assistant Defenders and support staff: two secretaries, administrator, and an investigator.

MO: By the end of the '80s you had roughly—?

SW: Let's say, give or take, what'd I say, nine or ten lawyers, and we were probably up to six or seven investigators, administrator and probably five secretaries, legal assistants, so what's that? Twenty-five, thirty people maybe?

MO: You did a lot of hiring in those first years?

SW: Yes. I've done a lot of hiring throughout. Because from nine to fourteen to twenty and twenty-five. Now with the stinking sequester we're in a period of retrenchment.

MO: Which we can talk about—

SW: Next time.

MO: As far as I know about your career

you hadn't had too much of administrative duties before you came to Portland.

SW: No, in Binghamton, in the County Public Defender Office, I was the head of the office. I had spent four years as the Public Defender of the county. We had seven lawyers in the office there. I think there may have been six when I started, and when I left there were seven. We probably had a total staff—investigators, interns, administrators—seventeen, eighteen, give or take. I actually have a picture on the wall up there of the staff, seventeen or eighteen people there. Maybe it's fourteen. *[laughs]*

Criteria for hiring lawyers

MO: I'll get that picture later. But you were in the business of hiring lawyers almost right away when you got here.

SW: Yes.

MO: How did you determine what your criteria were for hiring someone for this office? Were there any guidelines that would be different from hiring in any law firm?

SW: One, perhaps. First and foremost, you want the best and the brightest. However you define that, however you figure it out, through interview process, writing samples, etcetera, etcetera. I think the one thing that is different in hiring for a Public Defender Office, as I see it

and I think many of my colleagues do, you have to really believe in what you're doing. Whether you're going to work here as an attorney, investigator, secretary, or financial person. Reality of our lives is we don't win that much. When we go to trial, nationwide the statistics are that in felony cases, the government, the prosecution's going to win at least three-quarters of the time; in some jurisdictions, more than that. I think I said the other day, reality is we know most of the clients who are brought in to the system in the sense that "they done it." Reality is that many of our clients are not terribly well thought of by the general public, and some of them have done some pretty nasty and unpleasant things to other people. There is an intellectual appreciation of the need for a public defender, I think, in many quarters. But to translate that intellectual belief into an emotional belief and feeling is not so easy.

I think that the experience that most public defenders have, generally, is a fair number of the clients are suspicious. They don't want to be our clients. They don't want to be arrested. They don't want to be facing prison. At least people who've come through a state public defender system—less true here, in Portland, in particular, and Lane County, and Jackson County—I guess I should say Oregon generally—the state/county/local public defenders are generally well-respected. People who have experience in other areas, the incredible overload in the county public defender offices generally means people don't have a lot of respect for public defenders. So

you have to overcome that distrust from your client.

The mental health issues that many of our clients have, the drug addiction, alcohol abuse issues that many of our clients have, make them somewhat more difficult people to work with. Their families are often dysfunctional and don't understand what's happening. Because the federal system here in Oregon, and most places, is so much harsher than the state system, people are used to committing crimes and they'll get probation, they'll get six months, or it will be matrixed out. Come into the federal system for the same or lesser conduct, [they are] facing much harsher sentences. When the defense attorney gives that message, there's a tendency to kill the messenger. I don't mean literally, but—

The public isn't always that supportive of some of the arguments that we make on behalf of people that the general public would just as soon not have to deal with. And then you don't win. Lawyers, in particular, we're over-achievers. We're used to performing well on tasks throughout school. We're used to winning in our lives. But you come to a defender office, you're not going to win in the same way.

People have to believe in what we do. It has to be something that is in and of itself the motivating factor. The "it" that is the motivating factor is the belief in the Sixth Amendment. The belief in individual liberty. The belief in our system, which says that the government must be kept honest. This is some of the stuff that I

think I talked about earlier on. I look for that in the interview process. I look for it in interviewing the lawyers; I look for it interviewing for a clerical position.

Part of the interview process that people go through here is for me to—or other people in the hiring group—to put on the table a—particularly for people who have no experience in the criminal justice system, some of the “horribles.” What’s their reaction? When the client says, “I did it; I enjoyed it. Get me out. I want to do it again.” You have to be able to give that person 100 per cent. You can’t pull punches for anybody.

Everyone in the office has to feel that. If you don’t, you’re not going to last here. There is some self-selection in people applying, but in the cycles of the economy, there are times when we’ll get three hundred applications for an attorney position. Many of those people are looking for a job. Many have wonderful credentials. Some have been hired and have made great defenders, or great legal secretaries. But some have come here and gone, “Oh my god. They weren’t kidding. I have to talk to a child pornographer. I have to look at images of child pornography.”

That’s not pleasant. That’s part of our job. And if you can’t do it, you can’t work here.

MO: You have to give 100 percent to the pornographer, too.

SW: Everybody. We don’t have the option to say, “No, I’m not going to take

your case. No, I’m not going to give you my all.” That’s part of the screening process.

MO: You’re heavily involved in every hiring?

SW: Yes. In the beginning, before the office became too big, every person in the office was invited to participate in the interviews. Every person. Everyone would speak up. There were times when there’d be an office vote, if you will, on whether or not we’d hire someone. When we had candidates who were competing, and some wanted A and some wanted B. At one point one of the people in the office called the “Wax-weighted Voting System.” [chuckling] But there was a voting system. There were times when I ended up hiring people who wouldn’t have been my first choice, but it was the consensus of the office that we should hire this person, and I had this open process.

We got to a point where we couldn’t have everyone participating. Then we would have hiring committees. On the committees for all positions you’d have lawyers, investigators, secretaries, administrators. Everyone would have an equal voice in the process.

In the last probably ten years, all of the preliminary screening on the legal secretary, clerical, and administrative positions other than the office administrator has been done by other supervisors and other people in the office. They have then presented me with the top three candidates for me to have a final

interview with. I still do that with virtually every position.

Not the law clerks. Our chief research and writing attorney does the hiring of the law clerks. She does all the interviewing by herself and she makes the decisions.

MO: Who is that?

SW: Michelle Sweet has the position. She's been in that position now for seven years.

MO: One of your hires, no doubt?

SW: Of course. *[laughter]*

Criminal Justice Act, 1964

MO: The answer to this question may be obvious, but when you first came, there was this conversion from community defender to public defender. What triggers that conversion, and what did that mean in Oregon. Was there any real difference apart from personnel and who you report to, or how did that work?

SW: 1964, Congress passes the Criminal Justice Act. [18 U.S. Code § 3006A - Adequate representation of defendants] 1963, Supreme Court decides the case *Gideon vs. Wainwright* [*Gideon vs. Wainwright* 372 U.S. 335 (1963)] and says 175 years after the Sixth Amendment was put into the Constitution, it means what it says. The Sixth Amendment says everyone

is entitled to the assistance of counsel in a criminal case. The Supreme Court finally says, 1963, "Yeah. We mean that. You can't put someone in prison if you don't give them a lawyer." Federal government, and all state governments.

As a result, all of the judicial systems in the country, state and federal—and the states handled ten, one hundred times more cases than the feds—had to create mechanisms for providing counsel. The state legislatures and Congress had to appropriate money.

The Criminal Justice Act was the Congressional response, part of Lyndon Johnson's Great Society—wonderful statute—that reflected a thinking-through of how you create a public defense system that can provide quality representation. Where are you going to put in the government? In some states, the public defender is part of the Department of Justice, the prosecuting entity; always an inherent conflict. In some states, an independent entity; in some states it's an elected official. Gee, how do you run for public defender? "I got twenty-three murderers off last year; Vote for me?" It's not going to work.

They placed us in the judicial branch—issues about that now, sequester, rising to the fore—we can get back to that. Money talks. In most states, public paid defenders are paid far less than prosecutors; provided far fewer dollars. Federal system, Criminal Justice Act requires that we be paid comparably to the people in the U.S. Attorney's office, and that we be staffed comparably. We

can then hire better quality people. There are some people, who are great, who are willing to work for a pittance. Most people want to at least be able to make a decent living. Federal public defenders? We make a decent living. We're paid the same as the prosecutors, and prosecutors generally are paid enough to live reasonably. Top people in both offices could probably earn three, four, five times as much if they were in private practice. We're making choices in terms of our income, but we live comfortably. And we're adequately supported with staff. My offices aren't shabby; you see that. We have generally enough money to hire the investigators we need, the paralegals we need, to buy the computers we need, the computer programs we need, to hire the experts we need, etcetera. Built in to the Criminal Justice Act.

Then you have to figure, where's the Public Defender going to come from? Who's going to appoint me? Here's where you get to the difference between how this office was set up, and the conversion. Congress, in the Criminal Justice Act, gave each district three choices. One, create a federal agency, which is what we are, federal public defender. If you go that route, the appointing authority is in the Court of Appeals for the Circuit in which the district exists. My appointment comes from the Ninth Circuit Court of Appeals based in San Francisco. To ensure independence, you do that rather than the district court, because in the district court there's a lot more contentiousness. Our job, as I said the other day, is to say

to the judges, the prosecutors, probation officers, "You made a mistake, guys, and your judgment's bad."

Well, on occasion, if that's not said politely, or even if it is said politely, you're going to ruffle people's feathers. And people will sometimes see us as impeding the process of justice, rather than recognizing we're insuring that the system functions justly.

When you're in the Circuit, it's more "ivory tower." It's not every day. You don't have the victims there. You don't have the same emotion that you have at the trial level. So have the Circuits, which is a step removed, be the appointing authority. Then, to insure that the aggressive defender isn't fired for being aggressive, we're given a four-year term. Unless I lie, cheat, or steal, they can't fire me in that four year period. That's one model.

Next choice to serve the districts we're given, was to set up a private, nonprofit entity, called the "Community Public Defender" with a board of directors that would be selected by the district, by the Circuit, the combo, whatever, and then it sort of becomes self-perpetuating. That private nonprofit would contract with the administrative office of the courts to do the exact same thing in the exact same way under all the other exact same restrictions or benefits as a federal public defender. But they get a quarterly check from the federal government and have a checkbook, and the employees aren't federal employees, but the salaries are the same. The benefits are supposed to be

created so they're the same. The number of support staff are supposed to be the same, etcetera.

Third option was use lawyers in private practice as a Criminal Justice Act panel. When I mentioned the Jim Bryan case, their vision of the panel was, if you're admitted to federal practice, you take cases. Most districts that have used this panel route, you had to apply and be screened and actually have some expertise. Only three districts, I think, are left in the country that use a panel only: one is in Georgia, one is in Alabama—although I think, actually, Alabama may have converted recently so maybe there are only two left. One was too small to have a defender. Couple of the other really small districts have been merged so that a federal defender in Massachusetts has Massachusetts, Rhode Island, and New Hampshire, because Rhode Island and New Hampshire were too small to set up independently.

This district started with the community defender. The court was unhappy, perhaps there were fiscal irregularities, perhaps thought there was too much aggressiveness, perhaps thought the board wasn't doing its job. I have no first-hand knowledge as I said the other day. They made the decision to convert.

In the conversion, every employee of the Community Public Defender was hired by me, if you will, on August 1, 1983, as an employee of the Federal Public Defender. But nobody had to apply; nobody had to resign. There were no job interviews. It was just switched over. The

federal government, General Services Administration, took over the lease of the building in which the community defender had been operating, and the community defender sold/gave the computers, the desks, etcetera to the federal government. The employees started getting a federal green paycheck, rather than a community defender bank check from whatever the bank—First Interstate Bank, or whoever the bank was at the time with whom the community defender did business.

MO: So not a big change.

SW: Not a big change. Today there are twenty-some community defenders and seventy federal public defenders.

Public Defenders & U.S. Attorney's Office

MO: I asked you about how you interacted with the federal court here in Portland. How about the U.S. Attorney's office when you first came? What was your experience working with them?

SW: Generally good. As a general proposition, this office has had good relations with the U.S. Attorney's office, and I've had good relations with the U.S. Attorney. As a general proposition, Oregon has been fortunate that the United States Attorney's position was not a political plum as much as it was a place for professional prosecutors to work. Most of the Assistant U.S. Attorneys were there

as career prosecutors, not for three or four years, get some notches in the belt, and then go somewhere else and make more money. That makes a big difference.

Having a professional corps of prosecutors dealing with a professional corps of defenders, we were able to deal more with the reality of the cases. Emotion plays less of a role. Ego plays less of a role; which isn't to say there isn't emotion and ego, of course, there is. It's not to say that there aren't differences in the way in which individual assistants in both offices approached the work. of course, there is. By and large, it's a group of professionals that's been working with a group of professionals.

The head of the U.S. Attorney's office when I got here was Charlie Turner. Charlie had come here from Chicago where he'd been an assistant U.S. Attorney. Charlie was a hard-driving prosecutor. He was appointed by President Reagan to replace [Sid] Lezak, who had held the position for twenty-some years from Kennedy to Johnson to Nixon to Ford to Carter. Democrats, Republicans, whatever professional group twenty years. Reagan came in and after a year or two, out goes Sid; in comes Charlie with a different orientation than Sid had, and a different perspective and a more hard line prosecutorial bent.

There were some tensions in the office, between the offices in the early years. There were some cases where they thought that we had crossed the line, perhaps, and cases where we thought they had crossed the line. In a couple of

instances, those tensions were real and palpable and unpleasant. In one instance, when Judge Burns was still chief judge, he intervened, and he ordered Charlie Turner and me to have lunch together so that we could talk for the good of the order. One of Burns's favorite expressions was, [*lowers voice*] "for the good the order."

Well, back in the mid-'80s, there were two Chin's restaurants in Portland. One was on Washington Street; one, I think, was on Fourth. Charlie and I agree, "all right, Burns has ordered us to have lunch and to talk to each other because we're really apparently not able to talk and try to work out these issues." He went to Chin's on Washington; I went to Chin's on Fourth. I was sitting there in my Chin's, fuming, "The guy's standing me up!" [*laughter*] I'm sure he was sitting in his Chin's, fuming! "The guy's standing me up!" [*growl, both laugh*] Perhaps it was indicative of the degree of tension that existed, or the lack of communication. [*more laughter*]

MO: The relationship, huh?

SW: Yes. But eventually we figured out we were both in the wrong Chin's and we got together, and we talked.

MO: On that same day?

SW: I know we talked on the same day, and Michael I can't remember whether we actually had lunch together that day or talked and laughed a bit about the fuming. But that helped. I think Burns'

encouragement to us to sit down and talk was a message that we both needed to hear.

The person who worked with Turner as the Criminal Chief and the first assistant for a number of years was Bob Weaver, and then Barry Sheldahl was a person who was the next guy after Charlie. We had an excellent relationship. Barry was a career prosecutor and a very level-headed guy. We got to the point in terms of the relationship where when there were issues between the offices, Barry and I could work them out. Or Steve Sady, who by the late '80s was the Chief Deputy, would work with Barry. We'd be able to work them out. The relationship between the offices definitely improved.

The irony of my personal relationship with Charlie is—hearkening back to the negotiations between Henry Kissinger and Le Duc Tho at the end of the Viet Nam War, they'd be sitting in Paris for however many years. The press releases would come out, and they would describe the interaction as "Correct." I remember that word. I don't know what "correct" meant, but I think between Charlie and me, the relationship was "correct." Until the mid-'90s.

Rajneesh cases

Most Oregonians remember the Rajneesh. When I got to town in '83, there were lots of purple uniforms around and about town, and the Rajneesh were in their full flower. The U.S. government

was going after them for voter fraud, immigration fraud. There were all sorts of issues. Very early on, I guess it was '85, they raided the ranch. We represented twenty, forty of the lower-level people. All of the higher people in the Rajneesh in the mid '80s, early '80s were retaining counsel. But we helped a whole mess of the lower level people, most of who were not indicted. But we helped them as witnesses; we helped a few of them with indictments.

The government filed an indictment, late '80s, early '90s, near '90 or so, against seven of the top Rajneesh leaders, conspiracy to murder the U.S. Attorney; conspiracy to murder Charlie Turner. In '94, the last two people—many of the people who were indicted. I think all but two, ended up cutting deals, pleading guilty and agreeing to cooperate with the government. Su Hagan and Sally Croft did not. They fought extradition, and it wasn't until '94 that they were eventually brought back here for prosecution. And the office was assigned to represent Su Hagan; Les Weatherhead out of Spokane was initially retained and then assigned to represent Sally. Colleen Scissors, an assistant defender in the office at the time, was one of Hagan's lawyers. I guess she was the lead lawyer—she and I were co-counsel on the case. And Charlie's the victim.

We developed a very different relationship as I perceive it as a result of the way in which the prosecutors from the Anti-terrorism division of the Department of Justice, who were the ones who

prosecuted the case. Local U.S. Attorney couldn't do it because Charlie had been head of the office. These guys coming in from Washington did not treat Charlie as a victim with proper respect. He resented that. He also saw how they were handling the case and became aware that they were not providing us, in the discovery process, exculpatory material, material in the government's files that he understood existed and that we, as defense under the law, had a right to see. And he didn't like that. I guess he did appreciate the respect that we, as defense attorneys, showed him in our representation of our clients.

During the course of that year or so that the case was active in the District Court, he and I developed a very different and much better relationship. I got to know him a little bit better as a person. That was really good. I'm very glad—not glad that he was the victim of a conspiracy plot—but I'm very glad that we had the opportunity to develop a relationship in a different way and of a different kind.

MO: In what way would you say that the federal prosecutors that were brought in didn't give him due respect as a victim?

SW: I think he really needs to answer that question. What I saw, what I heard from him was they would discount his—they were going to do what they were going to do, and were not listening, perhaps, to some of his perspective on the case, on the Rajneesh, and on him as a victim. He was ignored—in part, as I understand it from my conversations with him. That wasn't

right. They rode roughshod, coming in from the big city to the hinterlands. He didn't like their attitude and wanted to be treated differently, better, more respectfully. From what I saw in my interactions with him, I understand why he felt that way.

I'm jumping ahead, but there are a number of other things about that case that are just—it was another one of the big cases that I dealt with and spent a lot of time on, and that says a lot about this District.

Should I keep going, or should we get back to it? Am I jumping the chronology on you, Michael? [*chuckling*]

MO: We are probably within four or five minutes of your call, so maybe I could ask you one small little question earlier in the interview and then—

SW: Go ahead!

Federal court sentences

MO: —go ahead with Charlie and/or Rajneesh [*unintelligible*] You said that defendants face much harsher penalties in the federal system. Is there any history to that, a reason why the penalties are more harsh? Did the federal government leap on mandatory sentences more quickly than the states have done?

SW: In some areas in the country, yes. Oregon brought in Measure 11, and Measure 11 probably came in with its

mandatory sentences, maybe the same time that the feds were upping the ante. As a general proposition, I tell my clients who come into the federal system with experience as “consumers of criminal justice services in the state system” that they really don’t want to be here. The federal system takes itself generally more seriously. Part of the reality is some percentage of the judges in the federal court were state court judges; some percentage of the prosecutors were state prosecutors. Probation officers, defenders, etcetera. I don’t know that the skill level overall is higher. I’m sure there are plenty of people in the state system whose skill level is as good as or better than the skill level of people in the federal system.

But there’s something about the old phrase, “Don’t make a federal case out of it,” that’s grounded in reality. Both in terms of the way in which people perceive themselves, the smaller number of cases, the larger time that we have to work on cases throughout, the greater resources that are available in the federal system as compared with virtually any of the state systems and any of the counties in Oregon. When the sentencing guidelines were imposed by Congress on the federal courts in the—statute was passed in ’84, they became effective in ’87, and in the Ninth Circuit really, finally in ’89—it was a reaction to what was perceived to be some federal judges being “soft on crime.” The original sentencing commission, as it set the guideline levels, the sentences that people were looking at, ratcheted up the sentences, from the pre-guideline to the guideline world.

Congress jumps in and says, “Oh, yeah? Guidelines? That’s not enough,” and they start with the mandatory minimums. Armed Career Criminal Act, 1984 [18 U.S.C.S. § 924(e)(2)(B)]. Fifteen year mandatory minimum for simple possession of a gun. Not doing anything with it. If you have three prior felony convictions, even if they were twenty-five years old—and we saw people prosecuted who fit those facts. Then the drug mandatory minimums. Then, more recently, the child pornography mandatory minimums. It’s real easy for a Congressperson, “We’ve got to be tough on crime.” Some of the worst—that is ratcheting up types of things, occurred under Bill Clinton. It’s not a Republican versus Democratic issue, only. There’s an equal opportunity of users in both parties. You run on a “tough on crime” platform; you ratchet up the sentences. You federalize crimes. There are law reviews written about how the federal government passes a new statute to make something a violation of federal law, when it’s been historically handled by the state courts.

MO: We should call it a day now. We must be within two or three minutes of your conference.

SW: Okeydoke.

MO: Thank you very much. It was great, and we’ll see you tomorrow.

[End of Recording Three]

Subpoenaed first day on the job

MO: Michael O'Rourke continuing the oral history with Steve Wax, today on May 3, 2013. We were talking before I got on tape about something I forgot to ask you about in your first day. Was it your first day, that you were served by the subpoena?

SW: [*laughs*] Indeed it was. Part of the transition from the community defender format to the federal defender format regrettably included the pendency of a lawsuit that the administrator of the community defender had brought against the community defender office, Dave Teske, and she included the federal public defender as well. Seeking reinstatement to her job from me.

I walk into the office, and my recall is it was the very first day in the office. It's possible it wasn't the very first day, but that's how I remember it. The marshals come in and serve me with a summons and complaint from this woman who is seeking reinstatement, wants me to rehire her. Of course a person I've never heard of and never met. [*both laugh*] The court brought in a judge from Los Angeles to handle the case, and it actually went to trial. It was a very unpleasant time and an unpleasant trial. There was some bad blood between the plaintiff and the primary defendant. Eventually, from my perspective, justice prevailed and the plaintiff did not prevail. The defense triumphed, I, as one of the defendants in that case. Through that experience I got to know Bob Carney quite

well. Tongue Carney, I don't remember the full name of the law firm at the time, but Bob was a senior partner in that firm. He had also been the president of the board of the community defender. So he was the representative of that now defunct organization in the courtroom during the trial. We got to know each other, and to share our common misery as defendants in that civil lawsuit.

MO: [*chuckling*] I guess you were getting to know the attorneys in town at that point?

SW: Yes. Welcome to Oregon! [*laughter*] You're sued by someone you never met!

Rajneesh trial

MO: Let's bring you back to the point in the chronology that we were at yesterday. We were talking about the Rajneesh trial, and I guess you had an anecdote from that trial that had to do with Judge [Malcolm] Marsh?

SW: Judge Marsh and Charlie Turner and the two defendants in that case. Tough case. Serious allegations. Sad case, because our clients, Su and Sally, as we knew them in the mid-'90s, were very accomplished, highly educated, middle-class people who at that point were back into their professional careers. Su's career at that time was as an aroma therapist. She was a very good aroma therapist and making a decent living at it overseas.

That's something that she pursued and followed and probably still follows today. Tough case, with I think I said there were seven people charged in the conspiracy, five of them pled guilty, cooperated with the government. It was not an easy task to convince the jury that each of those five was making stuff up about our clients, Su and Sally, and they were convicted.

The government asked for a, if I'm remembering correctly, twenty-five year sentence. And these are the terrorism prosecutors who've come in from Washington to handle the case. Judge Marsh imposed a sentence of five years, a very moderate response in light of what the government had been asking for and the seriousness of the charges. We appealed, we fought, we ranted, we raved. The Court of Appeals affirmed the conviction, and we then went back to Judge Marsh, as we were able to on the pre-guideline cases, and say, "Judge, enough is enough," and ask him to reduce the sentence. We contacted Charlie Turner about that, and asked for his input. Charlie stepped up and said to the judge he was fine with a reduction in the sentence. Judge Marsh reduced the sentence down to what was in essence time served. The women were freed from prison after serving two years and change.

MO: Were the charges, attempted murder?

SW: Attempting to murder Charlie Turner. I think a reasonable resolution to what was a very interesting, and

at times tumultuous and crazy and criminal, chapter in Oregon's history with the Rajneesh and—ten years after the commune was shut down in 1985 is when we had the trial, and then another couple years later is when the sentence was reduced.

In that time, I guess, in the resentencing, Su and Sally are here in town. At that time, the old Rajneeshpuram site was being run as a Christian youth facility. Judge Marsh had been spending some time out there, working in the woodshop at that facility, as a Christian facility, as part of his faith and the work that he was doing with young people when he wasn't on the bench wearing a robe. Les and co-counsel, Sally's counsel, and Su and Sally and I, we went back into chambers, he invited them back into chambers. It was a wonderful time to see Judge Marsh and his pride with the photographs that he had of the former Rajneeshpuram, then Christian youth camp, the woodshop, and Su and Sally looking at the pictures, "Oh! That used to be this! That used to be that!" Talking with Judge Marsh and on the one hand, in that setting, one could see the diversity in the room. On the other hand, one could also see the common humanity, how what the former Rajneesh had been attempting to do in setting up a utopian place that could help people, wasn't that different from what Judge Marsh was doing in trying to help people in the very same facility.

[*amused*] Now, I don't think that Judge Marsh's group ever went crazy, the way the Rajneesh did, but when the

Rajneesh were in there in their heyday, trying to set up this utopia—it was quite something. It was quite a time, that resentencing, and that visit in chambers that took place.

MO: And these were the only two Rajneesh defendants that you defended? Or were you involved in any other aspects of the case?

SW: I was involved in one other aspect, peripherally. One of the other people who had been charged, Jane Stork, had actually been indicted in the state court, tried and convicted in the state court for the poisonings of the salad bar in The Dalles, if I'm remembering correctly. Maybe it was that, maybe it was some other event. There was an outstanding indictment against her for wire-tapping, I think. She and I had been in contact when I was representing Su, because we saw Jane as a potential defense witness. I'd actually gone to Germany, where she was living, the Germans had refused to extradite her on the outstanding federal charges here in Oregon. She had served time on the state conviction, and she was there. We met, we talked; we wanted her to come here. She wasn't willing to come here. We moved for Judge Marsh to order depositions, this huge deal. But Jane and I talked with her lawyer, and we had stayed in contact.

She had some family issues that came up with illness and eventual death of one of her children, and wanted to come back and clean up the outstanding charge because she wanted to be able to travel

outside of Germany, which she could not do as long as that charge was pending here. Interpol had the warrants, and if she tried to set foot outside of Germany which refused to extradite her, she could have been picked up by any other country and brought back for the charges.

But she needed to go to Australia to deal with the family issues. She contacted me; we went back and forth. Because of the relationship with Su Hagan and the other charges, we had a conflict and couldn't represent her. Phil Lewis, attorney in private practice in town, was assigned by the court, and eventually worked out her coming here and entering a plea to I think it was a wiretap charge for all the crazy wire-tapping that had been going on there for a while at Rajneeshpuram. She was sentenced to probation, was able to go to Australia where she needed to go. I think that's where her son was.

I stayed in some contact with Jane, a little email, maybe sent a letter. This is now 2009, after I've written a book and then a German publisher bought it, translated it into German, they brought me over there on a book tour. I'm in Germany on the book tour, Jane, who is back there, living with her husband, she came to one of the readings. We had a breakfast together, and she gave me a copy of a book that she had written about her experiences in Rajneeshpuram. Very interesting, very sad to see how that experience had affected her life, had taken her into a very dark period, and because some of the things that were going on, really contributed to the death of her son through illness,

probably contracted as a result of some of the stuff that was happening. So my last official contact with anything Rajneesh was this breakfast with Jane and her husband in Germany, I guess three, four years ago now.

MO: The son's illness, was it mental illness?

SW: No, physical illness. Something he contracted as a result of what was going on there. Jane describes that in the book.

MO: I know that in the beginning, maybe before they completely swung out of control, that there were some positive things going on at Rajneeshpuram.

SW: My client, Su, who ends up as an aroma therapist, and had probably never done anything with heavy equipment in her life, the Bhagwan, in 1981, pointed at her and said, "You. You're in charge of the roads." Su ends up being the person in charge of all the heavy equipment that built the roads out there. She was proud of that. They did a great job! There's a lot of positive stuff.

But, [*makes whooshing sound*] veered off the track

MO: Well, you also mentioned the Rajneesh case in connection with the improvement of your relationship with Charlie Turner, a somewhat legendary figure. I wondered if you would have any anecdotes about pre-Rajneesh relationship with Charlie and post-Rajneesh.

SW: [*laughs*] Post-Rajneesh is easier. When he left the U.S. Attorney's Office, for a while he was a *pro tem* judge. I was aware of that; this was in the state system. The defense attorneys enjoyed having Charlie as a judge; I think the prosecutors didn't. His belief in doing things right came out as a judge in nonsense from the prosecutors. Don't lie, don't cheat, don't steal, don't cut corners. Don't hide the evidence. Do it right! You don't need to do anything but do it right to get your convictions. He was harder on the prosecutors was the perception in the state system. I heard about that; at some point we chatted about that.

I, over the years, sought to be a judge on a couple of occasions; it never worked out, but Charlie, on a couple of occasions, wrote some positive letters on my behalf, in support of my efforts. The relationship became one of, I think, much freer mutual respect that it had been.

When he was in the office, I think I've said one of the ways in which he and I interacted was perhaps by not interacting. I talked to Barry Sheldahl because it was easier. We would be able to work stuff out more easily with Barry than with Charlie, perhaps because Barry was a little bit less hard driving as a prosecutor. Why don't I just put it that way? [*both chuckling*]

MO: This sounds like it might be a little out of chronology here, but you just said that you had some interest in being a *pro tem* judge?

SW: Not a *pro tem* judge, I sought to be

a federal judge on a couple of occasions; a magistrate, Article II, what have you. I thought it would be good to be on the bench. It didn't work out.

MO: So you threw your hat in a couple of times?

SW: I threw my hat in the ring. And they kept throwing it back! [*chuckles*]

MO: [*laughing*] Anything else about Charlie or the Rajneesh case?

SW: Nah, enough of that.

Eldridge Broussard case

MO: Another case that you mentioned was the one having to do with Eldridge Broussard.

SW: Rajneesh, we first got into it, as I said, in '85 when Rajneeshpuram was raided. Everything was coming apart, and there were many people who needed some legal assistance and couldn't retain counsel.

Broussard was the leader of a group that was called...Ecclesia Group [Ecclesia Athletic Association], is what he called it. Eldridge was a fascinating, fascinating guy. He had been a student at Pacific University, if I'm recalling correctly. He was from Los Angeles, and he had gone from Oregon back to L.A., set up a church, and had a following. Some people used the word "cult" to describe

his group as people use people use the word "cult" to describe the Rajneesh.

Eldridge came back here, I'm not sure exactly when. Probably sometime in the late '80s and bought land out off of 26 on the way to Mt. Hood. One day, one night, at a gathering of the group, things got quite out of hand, and his daughter was beaten to death; a discipline beating, very strict discipline. The state prosecuted a number of people for a number of reasons related to that, perhaps related to some other things. Then the federal government brought a civil rights lawsuit against Broussard, Carolyn Van Brunt, who was one of the leaders in the group with him. Very, very bright, very capable woman. She had been very active in the Olympics in Los Angeles in '84. She had a pretty high level position there, working for the Olympic Committee. That was the type of person that she was.

I was representing Eldridge. The case lasted for about a year. It was gearing up to be a huge trial involving First Amendment issues, no intent to kill his own daughter. His view of discipline, the appropriateness of discipline, parental rights, religious rights, religious beliefs. From the perspective of some of the other people who were charged, were they part of a cult? Were they less culpable or lacking in responsibility because of their relationship with Broussard as the cult leader, and they had been brainwashed? We were in contact with people who had worked with cults in deprogramming people and reprogramming people—the whole thing. Utterly fascinating case,

intersection of the law, religion, family, privacy, etcetera.

About a year into the case, Broussard died. He went on a fast. Part of his religious practice had been to periodically fast. Well, he fasted, and if I'm recalling correctly, he had diabetes; he had some physical issue that, on this fast, he went too long, and the intersection of the fast and whatever his physical condition was, he had a dramatic heart event, aortic event—I don't remember specifically right now. He died. Once he died and was no longer there, and I think from the perspective of the other defendants continuing to be in control by the force of his personality, by their loyalty to him, by their belief in him, the case pretty quickly settled with all of the remaining defendants, if I'm remembering correctly, ended up pleading guilty and received a variety of sentences, probably running from probation to a few years in prison. Some had been sentenced to some pretty substantial prison time by the state.

Administration of the Criminal Justice Act

Okay, I do remember. One of the functions of our office is not only to provide representation to our own clients, but to under this Criminal Justice Act plan—I was talking about the statute the other day, the District's plan—says that the Federal Defender is to be responsible for administration of all of the Criminal Justice Act matters in the district. Here

in Oregon, the court has delegated to the Defender more responsibility than is true in most districts in the country. It's my responsibility, the Office's responsibility, to constitute the panel of lawyers who will take cases, to screen them, to review their work periodically to see if they should stay on the panel or not. When they need resources, they need investigators, they need experts, they can file their motions literally with the office. We review them, we help them, and then recommend to the court what it should do. When it's time for payment they send their vouchers to the office, we review them, work with them. That's reasonable, not reasonable, suggest this, suggest that, and then we pass it on to the court. If judges have problems they will more often than not call me, or the head of our panel department, who for the last thirteen years has been Ken Wright, and we'll work with the lawyers and then get back to the court.

In large, multi-defendant cases, with, and I say LOTS of documents—in the Broussard case, we had a room full of boxes. This is the dawn of the computer era, and in terms of our office we did not have any computer equipment to do databasing or stuff like that in 1990. So, this is all boxes and boxes and boxes, and reviewing and photocopying, and making folders, physical, etcetera. We were able to organize and coordinate all those resources, not only for my representation of Broussard, but for all the other lawyers' representation of their individual clients. When Broussard died, my representation, our Office's involvement in the case ended,

and that would not have been good for the panel attorneys.

I was asked if we could stay in, can I stay in. I think it was Emily Simon, was the lawyer who was representing Van Brunt, and I ended up being assigned as co-counsel for Van Brunt so that the Office could stay in and we could continue our organizational and administrative assistance to the other lawyers in the case, the other defendants in the case with an active presence. So, Eldridge died, I stayed on and worked with Emily, with Carolyn, and participated in the resolution of the case.

MO: Was that contested at all, your continued involvement?

SW: No. One of the interesting things about this district has been that, while there are conflict issues that we all have to be conscious of, there are bar rules regarding conflicts of interest, the court, U.S. Attorney, and all of the lawyers in private practice with whom we are working have accepted the role that we play. I think from the lawyers' perspective, they love the fact that there is a person, an entity with a true belief in the Sixth Amendment that's there working on all their issues. They don't have to deal with the judges as much as is true in other districts, where if the judge says, "No," it's usually the end of it. If the judge has a question here, I'll intercede on their behalf. I'll work with the judge. It is probably easier because of the relationships that I develop with the judges because I'm there all the time, for

me to have some frank conversations with the judges and to push back a little bit, easier than it is for some of the lawyers in private practice who are not in court as often, are not as well known, don't have the track record, etcetera.

I think the lawyers like it. The judges, I assume, continue to like it. It's been going on since before I got here. That was the set up when it was a community defender. They can make the call, and I think that they feel comfortable relying on the input that we provide because they know, "been there, done that." And we're balancing the obligation to the individual client, the obligation to the Sixth Amendment, with an obligation to fiscal responsibility, which I've got, and to the system. It works.

Arguing before the Supreme Court

MO: Something I don't think we talked about in our first meeting, way back in November was any appeals that might have brought you into the Supreme Court. Did you have any cases that went to the Supreme Court?

SW: I have had the privilege of arguing there twice. Once in 1992, and the second time was 2010, I think. Both were *habeas corpus* cases, state prisoner cases. The first one was a very disappointing loss on a procedural issue where the underlying issue had to do with ineffective assistance of counsel, failure of the system to provide

an interpreter, to provide the basic tool that a non-English speaker needed in the courtroom. The case was botched in the state system at the trial level; it was botched in the state system on the post-conviction and appellate level because nobody went out and proved the incompetence of the interpretation that had taken place. So the case came to us.

We went out and we investigated, and we established that what had taken place in terms of the interpretation was grossly inadequate. On the merits, this guy was screwed. It was wrong, fundamentally wrong. You can't try someone in an American court in English if he speaks Spanish. And you can't give him an idiot as an interpreter instead of someone who can really do the interpretation.

But, *habeas corpus* law ain't that simple. There is an antipathy to *habeas* in the Supreme Court, and after this case, in the Congress. So there are all sorts of procedural hurdles before you can get to the merits of the case such as I just described. You have to make sure you have crossed every "t", dotted every "i", and there are these doctrines of default, and exhaustion, and statute of limitations, and you can't present new evidence in this situation, but you can present new evidence in this very, very little situation over here.

We won in the Ninth Circuit Court of Appeals. They got to the merits of it, and they said, "Whatever these procedural rules are, you've shown enough," and we get to the merits. State appealed, Supreme Court grants cert, and they reversed. Case was called *Tamayo-Reyes* [*Keeney v. Tamayo-*

Reyes 504 U.S. 1 (1992)]. They established, as I saw it, bad, unfair law, further limiting the right to present evidence in federal *habeas*. That was in '92. Four years later, in what was called the Anti-terrorism and Effective Death Penalty Act of 1996, the AEDPA, Congress, and good Democrat Bill Clinton get together and further restrict the right to present new evidence in *habeas*. More recently, in a couple of cases in the last year or two, the Supreme Court has even narrowed it further. I mentioned that a substantial portion of our caseload involves *habeas* cases. Nowadays seventy to eighty cases a year from the state prisons; a few years ago it was as high as 150 a year.

We waste so much time fighting about procedure. I understand that there is an interest in finality, which is the catchphrase used by Congress and the Supreme Court. "State court decisions should be final." Yes. But they should also be fair. And what's happened is we waste inordinate amount of time fighting about procedure; just get to the bloody merits. Reality is, most of the cases, on merits the petitioner's going to lose. So take two months, get to the merits, and say "No." Be done with it. Don't spend five years litigating about procedure. "Can I make this argument? Can I make that argument?" That's where it's at. Basically, the reality as we've seen it over the now three decades of my doing state *habeas* work, we've seen the overwhelming majority of the clients who come to us, their convictions are upheld. The overwhelming majority probably should be upheld. But there wasn't anything substantially wrong.

But we have, every year, a couple of cases, every other year, a major case where either the system just failed in terms of a grossly incompetent attorney, lack of an interpreter, the judge being completely out of control in his rulings, the prosecution hiding evidence. Or, newly discovered evidence that a person is innocent, which is increasingly difficult to present. We've had—it's a small number—half a dozen clients over the years actually innocent. We've established their innocence in federal *habeas*. Yet the system is set up so that it is increasingly difficult to do that. And I don't think that's right. Yes, we want finality, but, fairness. Why keep a person who's innocent in prison? As I said, talking about how I defend the person, and why I defend the person who's guilty, to keep the system honest. If the system has not given the person a fair shot, it's not an honest conviction. It doesn't serve us as a society. We keep making those arguments, and the Supreme Court keeps saying, "No, no, no, no."

The second case that I had a couple of years ago—another *habeas* case, probably not as righteous in terms of the underlying facts—but we went up on another one of these procedural issues. Can they even hear the claim or not? Nope, you can't. I am less disappointed in that result, because of what the underlying facts were. We had a good claim, but it wasn't one that was turning my stomach the way the first one was.

But I'll give you another little anecdote about my first argument, okay? The life and aging of a lawyer. Okay?

I stand up in 1992, and I look up at the bench. And the first thing I realize is, all of my heroes from when I was in law school—there's no Douglas, there's no Black, there's no Warren. [*lamenting*] There was no Marshall. You know? Where are the guys? Where are my heroes? It's a different court. Okay, fine. You get over that. [*Editor's note: William O. Douglas, Hugo Black, Earl Warren, and Thurgood Marshall*]

It was a hot argument. I had my notes, and you say something for thirty seconds; they start asking you questions. Boom, boom, boom, boom. Boy! It really is the pinnacle of the lawyering profession. It's great. What an honor to be able to be there. About twenty-seven, twenty-eight minutes into the argument, they stop questioning. I look down at my notes. I can't read them. I need bifocals, and I didn't have them. And that's when I realized. My eyes wouldn't focus on my notes! [*laughs*] What was I in '92? I'm 44 at the time. I came back and went to the eye doctor and got bifocals for the first time. You have to laugh at the way stuff comes up in life, and to look down—here I am in the Supreme Court, at the podium. They've stopped asking questions, I've got to say something! Where am I? It's a blur! [*laughter*]

MO: And your first experience there, too! Any interactions with any of the justices at that time, either in the proceedings or afterwards?

SW: Well, this is a picture of the good Justice [John Paul] Stevens—

MO: Why don't you hold it and I'll get you in a little closer here.

SW: —with Kathleen and our first son, he was at a judicial conference, and he was shining a light of liberalism, if you will, on the court at the time. I chatted him up, and then said, "Oh, Mr. Justice, one of my heroes. Would you mind if I took a picture so that someday, when the kid's grown up, I can say, 'Yeah, that was me and Justice Stevens.'"

Oh, and I played tennis with Sandra Day O'Connor! How's that? *[laughter]*

MO: Pretty good! That's pretty good.

SW: At the Ninth Circuit Judicial Conference, there's always one of the Supreme Court, and sometimes two of the Supreme Court Justices, go. Great opportunity to hear them talking, and, on occasion, to chat with them. Justice O'Connor liked to play tennis, and there was a tennis tournament at the conference every year. She played, I think a couple of years that she was there. It's a round robin, so it's pot luck. There are marshals, of course, more than usual when the justices are on the courts. But she and I were paired up. We won our set; it was a love set. Our opponents won no games. I'm sure it had nothing to do with either her skill level or my skill level or lack of skill level. I don't think the opponents were playing quite as hard as they might otherwise have done because the good Justice was out on the court. After the match we both drew a bye in the next round; there was an uneven

number of players, so she and I got to sit on the bench and chat a little bit about life and stuff. I tried to push her a little on *habeas* law, and fairness and procedure. We went back to playing tennis. *[laughter]*

MO: That didn't prove to be a fruitful conversation?

SW: Nah. *[laughter continues]* But I figured, you know, we're sitting there in shorts—

Streamlining the court system

MO: Back to that, briefly. What's the motivation to make it tougher and tougher to get past the procedures? It would seem like streamlining the court system might be a better idea, given the delays in federal court and so forth and so on.

SW: *[sighs]* The theory is that the trial in the state court should be the main event. The theory is that once there's been a conviction, the state and the victims of the crime in the state system have an interest in bringing it to a conclusion. Finality. The people who are more active believers in states' rights, as opposed to federal rights, and federalism, their view is that the less intervention by the federal courts, the better. There are, I think, sound political, philosophic, jurisprudential reasons for the positions that are taken. I think, from my perspective, they're out of balance. One can streamline the system—I'm all for streamlining it, just give me a fair shot

at making the arguments about why the case should be looked at.

By the time you're in federal *habeas*, you've usually been through six court proceedings in the state system. So there's been a good opportunity, in many cases, for review. But people miss stuff. If we find something, if we go out and investigate and find the evidence of the lawyer's incompetence, or the prosecutor's hiding the evidence that was missed before, I don't understand the interest in the state in saying, "No." They should be as equally interested in justice as we are, and that's what they articulate. A prosecutor's duty, the Supreme Court said, is to do justice, not seek conviction. Yes, once a conviction has been obtained, perhaps the scales tip a little. But if somebody finds that it was wrong, or an unfair process, do it again! Do it right. My philosophy has always been, from the day I was a law clerk through my days as a prosecutor and now my decades as a defense attorney, do it right. If a guy done it, and you can prove it, put him in prison. He goes to prison. The system has worked. Good. Don't make the sentence ridiculously long and counter-productive, but put him in prison. We need to just do it right.

I'll get off my soapbox. Ask me a question.

Ninth Circuit judge relationships

MO: No problem. I asked you already about some of the district court judges, especially the first three that we talked

about. Now that we're talking about the Supreme Court and the Appeals Court, what's your relationship with our two appellate judges here in Pioneer [Courthouse].

SW: Three. [Edward] Leavy, senior status, [Diarmuid] O'Scannlain and [Susan] Graber who are active. It's good. Wonderful people. I certainly don't always agree with them. I think that we are currently blessed here in Oregon with one of the people who would be described as more conservative on the court, Judge O'Scannlain. Don't agree with his decisions, but wonderful guy. At these judicial conferences and other places, we chat. Relationships are fine. He was one of the judges on their Defender Committee, which is the committee which hires us—or makes the recommendation to the Circuit as a whole, which has to vote on the hiring process. They review our performance every four years, so he sat at this very table, probably twenty years ago, when he was on the committee, reviewing the quality of our work.

Judge Graber and I knew each other from the day our kids showed up together at the same school, and through eight, nine years that they were in school together. So we're friends outside of the court system and had a lot more opportunity to interact socially because the kids were in the same school and we have some mutual friends.

Judge Leavy, I knew first as a Magistrate Judge. When I got here, he was on the bench as a magistrate, quickly as an Article III judge, and quickly on the

Ninth Circuit. I tried a great case in front of him, my second year here. Arson case from Eastern Oregon, Jimmy Jones was the client. I don't remember any of the details from the case. I remember that they had an informant, god, I can't remember who was the investigator on the case with me, who put together this wonderful dossier on that "rat's" background. When he was testifying, I had a litany of one hundred lies that he had told. Boy, was that fun going after him. Jack Ransom was representing the co-defendant. Good trial with Jack in front of Judge Leavy. At the end, the government rests, and I move for Judgment of Acquittal based on whatever, and Judge Leavy sat up on the bench. *[affects ponderous, deep voice]* "The motion is allowed." I had to sit there for a minute. "What's that mean? Oh! He granted the motion for judgment of acquittal, kicked the case over—we've won!" *[laughter]*

That was my introduction to Judge Leavy. He was very, very practical guy and with a belief in fairness. We'd get into arguments with the government about discovery; they need to give us this; they need to give us that. He would sit up on the bench, and he would say, *[affects ponderous, deep voice]* "The government proceeds at its peril." *[normal voice]* If they don't turn it over, and they should have turned it over, he was going to do something. *[laughs]*

He was then, later on, appointed to the Foreign Intelligence Surveillance Court of Appeals. I may be jumping a little bit ahead of you here, but the last ten years

we have been up to our eyeballs in national security cases, locally here in Portland, and in Guantanamo, and gotten into all this foreign intelligence surveillance stuff. But Judge Leavy was on the Foreign Intelligence Court of Appeals, and the one case that it's ever ruled on, he loves to talk about it, has great stories, of course, the "true secrets" that went on behind the lead-lined room within the Department of Justice where they had their hearing.

He was also involved in the Wen Ho Lee, Los Alamos—the guy takes his computer home—and he settled that. He worked as a settlement judge in that case. We've talked about his experiences with those things. It's good.

MO: You weren't part of the Wen Ho—

SW: No, no. Just listening to him and thinking about potential roles that he could have, though it hasn't panned out, in trying to help in settlement discussions in some of our cases here locally. But it hasn't happened.

Oregon Public Defender's branch offices

MO: Let me ask you a couple more questions about the growth of your office. I assume when you first came that there weren't offices outside of Portland who were part of this? Or am I mistaken?

SW: You're right. We had a branch

office in Eugene that had one lawyer in it and a legal secretary, as we called her at the time. The Eugene office went to two people, probably late '80s, and then three lawyers in mid-'90s. It's stayed at three lawyers since then. We added staff, so that in Eugene, we went to three lawyers, three investigators, three legal assistants, administrative, reception people. Although, with the sequester and the downsizing, now we're down one there.

We opened a branch office in Medford, probably ten years ago, give or take. Maybe twelve, maybe nine; I'm sorry, I don't remember exactly. When the U.S. Attorney's Office set up an office in Medford, they started with one, and we were using our CJA panel lawyers in Medford; the lawyers in private practice were handling the cases. We'd have some people go down from Eugene. The number of cases they were bringing increased to the point where we needed to have a presence; opened up the branch, and started it as a one lawyer office. One lawyer offices aren't optimal. We added a second lawyer. The indictment caseload isn't sufficient for two lawyers for us there, and in this sequester downsizing we're now back to one lawyer in the Medford office with investigative and secretarial support.

MO: I want to talk to you about the sequester, but maybe we're ahead of other things, here.

SW: Okay.

Public Defender office relationships

MO: I did want to ask you a little bit more about some of the people in the office. I know you probably can't talk about everybody, but maybe you can talk about some of the longer relationships you've had with folks and a little bit about who they are.

SW: Sure. Steve Sady is Chief Deputy. Steve is the longest serving person in the district. He was one of the attorneys in the Community Defender Office. He'd been there a couple of years. He'd actually been a law student working in this office when he was at law school at Northwestern [School of Law], here. He and I have become friends. I appointed him as Chief Deputy in '85 or '86. He's got a national reputation as a legal genius. He knows the law better than most. He remembers cases; he loves dealing with legal issues. He has spearheaded for us, and for the nation, a number of series of challenges to Federal Bureau of Prisons policy. How they calculate sentences, when they let people out, when they don't let people out, and won a fair number of cases in the district court and on appeal. He took a case to the Supreme Court, two years ago, I guess it was, on a Bureau of Prisons sentence calculation issue. We were so right, and we lost 6 to 3. Justice Stevens, saying, "This is really wrong. Congress, you should fix this."

Well, wasting—and especially in this time of sequester—hundreds of

millions if not billions of dollars a year because the Bureau of Prisons is not fairly calculating sentences, and it's holding people in prison unnecessarily. The way they calculate good time credits, the way they don't use the Second Chance Act opportunities to let people out. Compassionate release, if the person's dying, or someone in their family's dying. Sady has really pushed that and has loved to deal with that.

For many years, Lynn Deffebach worked with him on those cases, Lynn worked in the office; she started actually in the Rajneesh cases as a part time paralegal. I don't remember if she was in law school or had already gotten out of law school. But she was good; she stayed on, we hired her full time as a paralegal and then promoted her to be what we call a research and writing attorney. She and Sady drove that train, Lynn unfortunately she died a year ago of cancer, an untimely death, mid-50s. So he's the longest serving guy.

Ellen Pitcher has been in the office twenty plus years. Ellen and her husband Ken ran a—well, first she was a Metro defender, and then she and her husband went out to Hood River, ran County Public Defender Office, there. She is a wonderful, solid lawyer. She is what we call our senior litigator, so she's part of the management team and helps in the supervision of the lawyers in the office.

Here in Portland, probably the next longest serving lawyer may be Chris Schatz. Maybe it's Gerry Needham. I should get the roster in front of me in

terms of their longevity, because actually on our letterhead we list it that way.

Schatz came up from San Diego; he'd been in private practice down there, and he *loves* the big white collar cases. He does everything, as almost all lawyers in the office do, but Chris, give him a case with thousands, millions of documents, megabytes, terabytes, quadrabytes, whatever they are. He and I worked the cow case together, about fifteen years ago. Huge fraud alleged in Eastern Oregon. A guy's running a cattle ranch, and they decided they could make more money if they sold limited partnerships in cattle herds. Well, maybe they owned six thousand cows, but by the time they finished selling the limited partnership interests, they'd sold 36,000 cows.

Great story in that case came out. The IRS, I think it was, sent an agent out to inspect the herd; the Hoyt brother's ranch. The Hoyt brothers: "Well, you can't get to the herd to inspect it unless you're on a horse." This poor agent wasn't a horseman. They put him on a horse, they ride him fifteen miles or whatever to inspect the herd. He was checking out the brands on the cattle. That night he can't sleep he is so sore. That night the Hoyt brothers drive the herd up over the mountain into another pasture. The next day, the IRS man gets in his Jeep, very gingerly sitting down. "No, I'm not going to ride out and inspect the herd." So he's sitting there, in the Jeep, through the binoculars can't really make out anything. It looked like two herds to him. But eventually that sort of thing fell apart. Schatz, we loved that.

Part of the fun of doing this work is you meet so many interesting people. You also learn so much about so many different things. When we're talking about commodity straddles, I learned all about that business. This cow case with Schatz, learned how to turn a spring heifer into a fall heifer and what the difference is. You forget about it quickly, but at least I remember that there was such a thing.

So that's Schatz. Right now he's working on the largest case in the office, the Sunwest nursing homes. Judge [Michael] Hogan spent a couple of years settling that case. It involved many of the major firms in town. And then the government indicted the principal in that case, that's our client. It's a pending case. That's Chris's. He loves that stuff.

Lisa Hay was one of our first research and writing attorneys. She's now an assistant defender. Lisa's been with the office probably, oh fifteen years, give or take. Needham's been here longer; I'm skipping over him, but as you said, I can't talk about everyone. Hay—brilliant young lawyer. She went to Russia; her husband has a Ph.D. in Russian history or something. They came back, she clerks for a judge. They come here, she goes to Stoel Rives, spends a few months there and realizes, that ain't for her. So we hired her on as a research and writing attorney. She worked with me on my cases for four years, started the process that we have now of becoming the supervisor of the law students. She made me look really good and smart for a while, helping me on my cases, then became an assistant defender.

She has got one of those minds where she will spot a legal issue that isn't necessarily going to be visible to other people, and I think she files and wins more pre-trial motions involving Fourth Amendment search and seizure issues than other people in the office do. It's really fun to see a no longer young, new lawyer develop in the way in which that happened with Lisa.

The person who replaced her, Amy Baggio, same thing. We're able to bring in, on occasion, at least, as we were growing, bring in a young person and to be able to mentor them and watch them grow. *[recording stops, then resumes]*

MO: We're back on tape, on the 3rd of May, 2013. Any others—

SW: They're all great people, Michael. They're all great people. I love them all. Some of the other people who have been around the longest, Gerry Needham came here from "New Yawk." Unlike me, who came from New York, he hasn't lost his accent. He has a wonderful smile, wonderful attitude, a wonderful laugh. The clients relate to him sometimes in a slightly different way because he's from "New Yawk." He's got a little bit of, not an aggressive way—well, whatever. A little bit of "New Yawk" is still in him. He was nicknamed years ago by some of the clients, I shouldn't say it on the tape, but it's Gerry "F" Needham. It was because "He's the Man!" *[laughs]* He just purrs along. He's a wonderful lawyer, steady and knows what he's doing and gets stuff done.

In terms of seniority, longevity, the three lawyers in Eugene are probably the next three most senior lawyers. Craig Weirnerman, Bryan Lessley, Mark Weintraub, all been with the office twenty, twenty-one, twenty-two, twenty-three years. Gerry has been here twenty, twenty-one. Schatz, twenty-two, twenty-three, something like that.

The three guys in Eugene, it's great to have three veteran lawyers in the branch location. They know what they're doing. *[phone rings. Recording stops, then resumes]*

MO: Okay, back on tape.

SW: Just great to have three veteran lawyers who know what they're doing and can help each other and take care of business. We get a wonderful mix of cases in Eugene. We get the smaller frauds, guns, drugs. We get some huge cases. Bryan Lessley for five, six seven years had a run of timber thefts, which was great because Bryan came to the office from the East Coast where he'd been doing some criminal and some civil practice. Big environmentalist, he wants to save the environment, and he ends up representing a bunch of guys the government is accusing of stripping the environment and ripping off the government by chopping down trees they shouldn't!

You realize that timber theft, or fraud in the timber industry, these trees are expensive and if you move a boundary of a timber sale fifty feet, you're picking up millions of dollars of board feet of

trees. Bryan had a number of really fine successes in representing people who were accused of taking more than they should have out of the national forests. I was always amused at that.

Going beyond the lawyers, some of the senior investigators, legal assistants, fair number of people have also been with the office twenty, twenty-five years. In Eugene, our lead investigator there, Judy Nakhnikian, I think she's been twenty-six years, now. Again, it's great to have people who know what they're doing, can do it exceedingly well, and not burn out. Which is one of the difficult aspects of doing this work, how you avoid burnout when the system is harsh and you're not always winning and you're not appreciated. I think one of the reasons why people are able to stay in this type of office longer than in a state public defender office is that we're not buried in the numbers. We have substantial caseloads, but we don't drown in them. We're able to send cases to the panel lawyers, if we are overloaded. On occasion—when I was describing the catch-up in the growth of the office, we can do that.

Here in Portland, our chief investigator, William Teesdale, British citizen, originally. He's maintained his accent, so you put him and Gerry in a room and you wonder, "Am I in Portland?" William is a barrister as well as an investigator and a lawyer admitted to the bar here in Oregon. He and I have worked a number of big cases together. He was in on the Rajneesh case. He worked on the terrorism Pete Seda case that we

tried in Eugene a couple of years ago. [*Al Haramain Islamic Found, Inc. v. United States Dep't of the Treasury*, (D. Or., Nov. 5, 2009)] He and I went to Sudan together on the Guantanamo-Sudanese case—

MO: Terrible case.

SW Yes. He's here, and a couple of the other investigators have also been in the office twenty years. Jennifer Stoll, today's her twentieth anniversary, which she's celebrating on furlough, thanks to the sequester. She's great, and she keeps going along. Terrific mitigation person.

Jennifer Lillie is one of our legal assistants, who, I think, has celebrated her nineteenth anniversary recently. Shelly Chetwood, who is right now administrative assistant, and our office administrator is retiring—Shelly is preparing to transition there. She started as a receptionist as a kid, twenty—nineteen, eighteen, twenty-two—I can't even remember how many years ago. She has stayed, and she's grown, and shortly she will have the primary responsibility for the administrative side of the office.

It's great to see the growth and to have been able to, I hope, have some little role in fostering an environment where people want to stay and keep doing the work.

MO: It seems like you've got a lot of longevity here.

SW: Yes. And, hopefully, no brain death. [*laughs*]

MO: I had a question in mind a minute ago about this, and now it's evaded me. Well, that's okay, we can talk 'til it comes back to me. I was going to ask you if you have been able to expand the office—it sounds like you have—without having to do too much lobbying. Expansions have come automatically, as you said earlier; when the federal judiciary expands their caseload, you get your share, too.

SW: [*slowly*] Yes. It has been a generally good process. The administrative office, defender people, have been generally supportive. Things have changed in the last year or so, with a different and, I think, I very dangerous attitude at the highest level in the administrative office and in the Executive Committee of the Judicial Conference. I'd say for the first twenty-eight years of my tenure here, if we needed something because the caseload had expanded, the old "Ronnie Regan trickle-down economic theory" worked. Congress would throw more money at some crime problem; U.S. Attorneys would get some, and the FBI would get some, and enough would trickle down to us for us to be able to respond in kind. New initiatives with illegal reentry cases—and we have a sizeable caseload here in Oregon, even though we're not on a border—of people who are charged with having been kicked out of the country after sustaining a conviction and coming back. Beef up the border, beef up the Immigration Service, we would get money necessary to respond with that. Up until recently, that's been fine.

Sequester and its effects

MO: We're right on top of it, so why don't we talk about the sequester a little bit.

SW: It's awful. What we're dealing with, unfortunately, is not just the sequester. Before the sequester, February 14 of this year, we were told by the administrative office that there was a shortfall in the defender appropriation and all defender offices were cut five percent. You start on October 1, the beginning of the fiscal year with the expectation you have this year \$13.5 million to spend, staff for that, and suddenly you're told, "No, you don't have 13.5; you have 13.5 minus five." Then March 1, the sequester hits, and you take 5.52 percent off of your already reduced budget. That's what's really affected in an incredibly bad way the whole defender system.

MO: I suppose all the politics surrounding the sequester means there was a great deal of uncertainty, too, about when it was going to hit and how big and so forth?

SW: Yes. The sequester is the national deal. And I don't think the sequester is in any way targeted at this little flyspeck of the defender budget that was affected, but it has an impact on us. And we can't go to Congress and say, "Oh, Mr. Congressman, you didn't wait at Reagan Airport because of the FAA sequester, so

let's get those flight controllers back in the booth, because you don't want to be affected." Or, "You didn't want your meat to go bad, so we'll let the meat inspectors avoid the sequester." Well, we don't have any children of Congresspeople we're representing, so there's no incentive for them to help us.

But the real problem is, for the first time, the way in which the judiciary—of which the defender program is a part—is not recognizing what it has historically recognized, which is a fiduciary duty to us. Recognition that we're in the judiciary because there's no other better place to put us, but we're really not and can't be judicial employees in the same way that a clerk's office employee is a judicial employee, or a probation officer who works directly for the court is. That was understood until very recently. And that's gone. There is now an hostility to the program that I had never felt before. There is a lack of support in the Judicial Conference, the governing body of the judiciary, for what we're doing.

There is a sense that I think is completely misplaced and wrong; that the growth in the defender budget means that expenses are out of control. Our budgets have grown because the caseload has grown. Our budgets have grown because the U.S. Attorneys and FBI and DEA and Immigration and Customs people, they've grown. More cases, more complexity, you have to fund us. Fine. They did that for decades. And we manage very well and very carefully. Yes, there's an occasional abuse. Some people are throwing around

some abuses by some panel attorneys, billing 36 hours in a day. One person out of four thousand, six thousand nationwide? If the guy did that, indict him! But don't change the system. Don't hold the defender office responsible.

I had to lay off people to get to the point where we have only fifteen furlough or fourteen furlough days the remainder of this year. To absorb what was about an \$850,000 shortfall, when they cut and cut based on what we started with on October 1. Impossible. I had to let some people go. The worst week of my professional career, having to go around here in Portland, Eugene, Medford, here in Portland on another day, and tell people I'd worked with for a long time, "I'm sorry, I need to let you go because I need to have, on September 30, spent no more than \$12.3 million." The only way to get there is to let people go, or have the whole office take a number of furlough days that is an impossibility for people to take and continue to pay their mortgages and pay their rent, etcetera. To do that in a system in which the U.S. Attorneys, no furloughs. Clerk's Office, no furloughs. Probation Office, no furloughs. It's very difficult to justify, to explain to the staff. The efforts that I've been making personally, and that my colleagues who are in leadership positions this year in the national defenders stuff are making, no good.

MO: You're saying it hasn't been even-handed.

SW: The sweet, simple, short answer, no.

MO: Unfortunate all the way around, I guess. There was some uncertainty, as to exactly how this was going to play out.

SW: Yes. Uncertainty and direction from Washington; each defender; decentralized decision making. You figure it out. After doing that and taking responsibility for what I perceived, then the Judicial Conference steps in and by fiat says, "You must—we're going to count this and that," and ignores the decisions that individual defenders made. Not right.

I turned sixty-five this summer. We're doing an oral history now because I've been around thirty years. I'm no longer the youngest kid in the system. I'm not the longest serving defender yet; I'm only third in line nationwide, but reasonable likelihood I'm going to retire soon. This four-year term ends in 2016. I don't know that I will seek another. This is not how I wanted to end my tenure in the office, by saying "goodbye" to people because I can no longer employ you; struggling to maintain the quality of representation. I've made a commitment to the office, to do my best to see us through this transition and to try to maintain the quality and the integrity of what I think we have become. I don't want to be spending my time at this stage in my career, but I guess those are the cards I've been dealt. I will do my best to make it work.

MO: Did you personally talk to everybody you had to let go?

SW: Yes. [*regretfully*] It's my responsi-

bility, and I looked them all in the eye and said what needed to be said. It's not something that seemed to me to be reasonable to delegate to anybody else.

MO: Do you have any sense of what this office's approach to defending people—you said at the beginning that you choose people that essentially have "fire in their belly," I guess.

SW: Yes! Good phrase! [*chuckling*]

MO: And are really committed to put up with the situation that they find themselves in here, always having to say "no" to the rest of the system.

SW: Yes.

Comparing Public Defender's offices

MO: Do you think that that's in any way an unusual approach in federal defender's offices nationwide? Do you have any sense of whether or not the way things are being done here in Oregon is maybe different from some of the other states?

SW: Sure. The core is going to be the same everywhere. You get outside the core, you get to the margins, that's where you find the differences. I think that here in Oregon, and in many of the districts in the Ninth Circuit, you will find that there is a level of advocacy that may be somewhat broader in scope, perhaps

somewhat more zealous than you'll find in some other places in the country. I think that the judges here in Oregon have been supportive of the defense function of the Sixth Amendment, regardless of where they might fit on a spectrum of liberal to conservative. They've understood the importance of the Sixth Amendment. They've appreciated the quality advocacy. They've appreciated, perhaps, being pushed and having to make some tough decisions, and have tough decisions presented to them. I know from talking to my colleagues that that is not necessarily the case in all districts.

At the circuit level, the circuit has been real supportive of the defense function under a series of chief judges of the circuit. Only a couple of people have been the Circuit Exec, running the administrative side of things, but they've been real supportive of us in terms of the hiring process. When they hire and review us, I've had the sense that they are genuinely concerned about the quality of representation. They're concerned about the quality of administration. They're concerned about the quality of representation. When I have gone to them and said—because under the statute, their other responsibility, that is, in addition to the hiring and firing—is setting the number of assistant defenders that an office can have. They have to set that number. That's not Administrative Office, that's not Congress. Of course, Congress has to fund, it, but the number is set by the Circuit. Other circuits, in talking with my colleagues, have not been supportive of

defenders adding an attorney. They have not been supportive of defenders who have been really fighting and pushing hard, and pushing the envelope. There have been a number of instances in which defender offices were disbanded entirely because the court didn't like the defender disrupting the "progress of justice" [MO chuckles] Or the progress of injustice.

MO: How does that work?

SW: Yes. I think we do do some things differently. Our court here has been willing to assign us on these prisoner cases I was talking about that Sady did. Statute permits it. It's not mandatory; it's discretionary. They've understood, it's a reasonable thing to be doing. They've understood the quality of justice has improved. We're assigned in more of the state prisoner *habeas* cases than many other districts.

Again, judges understanding here that you get a lawyer in and there's a better chance of finding out if there really is an injustice. We do more state prisoner cases than any other district in the country. And that's a credit to the judges of this district, historically and today, understanding the importance of having counsel in. That doesn't exist everywhere. That's lucky. That's lucky for us here in Oregon. I think that it has been one of the reasons why my view, my feelings, my philosophy, my belief have meshed well here in Oregon. I don't know how it would have worked if I was in Dallas, or Duluth. Don't know. I don't know if I'd have lasted thirty years there. [laughs]

MO: [amused] You landed in the right place.

SW: I think so.

MO: Why don't we leave it at this today. [audio stops]

[End of Recording Four]

Selecting Defender's office lawyers

MO: Okay, we're on tape now on May 9, 2013, with Steve Wax in his office. Steve, we've already talked a little bit about the growth of the office, and you told me that you hired most of the people personally, and you told me a little bit about your standards and looking for the highest quality folks. I'm wondering if there was any special expertise that may have been lacking in the office, and did you pick candidates at all based on their having a background in some types of law?

SW: General proposition would be, no. For the most part we're looking best and the brightest. We're looking for people who can handle all types of cases, whether as an attorney or an investigator. However, we have on occasion advertised in a way that is looking for people who are more interested in doing *habeas corpus* and appellate work, researching and writing, as opposed to people who want to try cases. The hiring process, on a couple of occasions, we have been more interested in people who would enjoy the large, white

collar cases and poring through millions of documents, as opposed to people who really want to get in there, down and dirty, and try bank robbery case, ten pages and three witnesses.

Nancy Bergeson murder

MO: I want to ask you or as many questions as we can squeeze in about subjects we haven't touched on yet, maybe starting with the terrible unsolved case of the murder of Nancy Bergeson. First of all, tell me who she was and what she brought to the office.

SW: Sure. Nancy was with us for nineteen years before she was murdered. She was a very lively person. She was outgoing, and, as a lawyer, she was aggressive. As a person, as a lawyer, she could loud and boisterous. You always knew when Nancy was around and you always knew where she stood on things. A real presence in the office. It was a total shock and tragedy, and the effects of the murder continue to be felt in the office. Unsolved, and a situation that we're in where there are no suspects, everyone's a suspect. We have worked very hard with the Portland Police to do what we can to assist in the investigation. It has been quite a challenge because the investigation, again, because there are no suspects, focused on people she knew, people who were her colleagues, people she was a dragon-boater with, people who might have been in her personal life, and her clients.

In terms of providing information to the police about her clients, it presented the most complex ethical decisions that I have had to deal with in the office. We have an obligation to protect our clients' confidentiality, the information we obtain from them. We *wanted* to help the police in whatever way we could. I hired one of the top ethics lawyers in town to assist us in wrestling through those issues, because for me it was a personal conflict: an obligation to the client and a desire to help. I think that we have been successful in walking that line.

What has happened over the last few years, and this is now three and a half years ago that she was murdered, we've established a very close working relationship with the two lead detectives in the Portland Police Bureau, with Norm Frink, who was the Assistant U.S. Attorney, I guess he's now retired, who was leading the investigation. It took a while for us to overcome the problems of a defense firm, a public defender, working cooperatively with the government, while at the same time protecting our clients.

I give tremendous credit to Norm, to Detectives Michele Michaels, who is the lead detective, Brian Steed, their boss, Detective Sergeant McGlathery, for becoming comfortable with working with us and allowing us to participate in the investigation in a very, very unique way. That's ongoing.

We certainly hope at some point this is solved, but right now it's an ongoing investigation.

MO: Not being investigated by your office, or is it?

SW: No. The investigation is handled by the Portland Police. They've had, and had much more input at the outset from the FBI, from other federal agencies, U.S. Marshal's Office. Things that are going on now that I cannot talk about, but that still involve cooperation among a number of law enforcement agencies. We are in a position in which we are assisting. It's a very unique and difficult and complex relationship, but it's a very, very important one.

MO: The media have speculated, as they would, I suppose, that Nancy had lost a tax case, and that the person she was representing in that case maybe was a person of interest? Maybe that's too strong.

SW: Michael, I cannot comment on any of the specifics of the investigation. Sorry.

MO: I guess there were two people in the office identified also in the media reports, Lisa Hay and Colleen Scissors, from this office. Is that right?

SW: Colleen had worked in the office back in the '90s. Lisa Hay is still here. *[Editor's note: Lisa Hay succeeded Steve Wax as Oregon's Federal Public Defender in 2014.]*

MO: Anything about their roles, is it also something you can comment on?

SW: Colleen was a very, very close friend of Nancy's, and when the two of them were in the office together in the '90s, it was a wonderful rivalrous relationship. Some of the boisterousness of both of them would come out, and was infectious for the office as a whole. It was great! The practical jokes on each other—terrific.

Lisa has been with us now fifteen years or so.

In terms of any aspect of the investigation beyond what I've said, I'm sorry, I can't comment.

Office morale

MO: Okay. We've already talked a little bit about the sequester and I don't want to get too much into that, because we've got lots of other things to talk about.

SW: Sure.

MO: You're currently laying off some people, and putting some on furlough days, I guess. What sort of reduction is this, in your capacity here in rough terms?

SW: In terms of the overall staff, it's going to be about ten percent reduction in staff from the beginning of this fiscal year to the end of this fiscal year. Plus the furlough days—fifteen furlough days per person, which is quite a whack in the paycheck. We're told that the dollars will not be any greater next year, so I am hopeful that the way in which we've approached

the shortfall this fiscal year will put us in a position in which we do not have to go through any further layoffs next year, and in which we can hold furlough days to a minimum or avoid them.

What it's going to mean in terms of the workload is yet to be seen. U.S. Attorneys are not furloughing this year. If they continue to produce indictments and bring cases at the same rate as they have, we cannot handle as large a caseload. Which means more of the cases will need to go to the lawyers in private practice on the CJA panel. If the caseload goes down, then we're a smaller office dealing with a smaller number of cases, and we should be able to provide the same type and quality of representation with proportionally the same resources as in the past.

That's going to be worked out over the coming months. On the one hand, it is very difficult personally to be saying goodbye to some of these people, to be telling them they can't work here anymore. It is very bad for the office in terms of morale. This comes on the heels of—the office was devastated by Nancy's death. And last year, in April, one of our other long-term lawyers, Lynn Deffebach, died of cancer. Fifty-five, I think she was. Her illness—we all struggled with her for several years as she went through chemo, radiation, more rounds, more rounds. She continued to come into the office until very close to the end, because it was meaningful for her. The office was a support for her. She wasn't married; she didn't have kids. She had nieces and nephews around. The office was a safe harbor.

But her presence in the office was difficult. People would give her fresh flowers every week. That went on for more than a year. The flower fairies. It happened organically. Nobody sat down and said, "We'd do this," and organized it; it just happened. She died, and that has not been easy for the office. We are probably a closer-knit group than many offices are, because I think in part, as we've talked, there is some type of self-selection in the type of people who want to work here. We have probably more common values, and a lot the values that are shared have to do with helping people and caring for people.

And then we get these layoffs. We've now been going for several months dealing with the trauma, which it *is*, of people being laid off and the uncertainty of what's going to happen because it's been a period of uncertainty, and it continues. It's not easy. We will survive. We will carry through. We're trying to set this up in a way that, as I said, we're not going to have to deal with it again in four or five months. But, only time will tell.

My goal, my commitment is to get us through and to keep the office in a position in which we can provide the type and quality of representation that we have been, and that we believe is important. That's my goal.

Terrorism cases

MO: Let's get into the terrorism cases a little bit. Your office probably had maybe a case or two even before Brandon Mayfield?

SW: We did. Portland, for whatever reason, has seen more than its share of terrorism or national security cases since September 11th. We've been involved in a number of them, not all, but a fair number. The reality is the very first case involving those issues came into the office in October 2001, a month after the Towers went down and the plane hit the Pentagon. A case that came in not with a national security prosecution, but when it came to sentencing the client, and this is a client who had been brought up in a Palestinian refugee camp, in 2002 the government was going on about national security issues. But they didn't put up any evidence. Judge [Anna] Brown was very explicit with them. "You want me to consider something, give me facts. Without facts, without evidence, this case is going to be sentenced as the gun case that it is."

Within about a month of the sentencing, that client's name appeared in the indictment of the Portland Six, as they were known, the young guys who tried to get to Afghanistan and join the fight over there in late 2001 or 2002. He was named as an unindicted co-conspirator in that case. Oh, okay. That's what the government was talking about, obviously. But they didn't produce any evidence. Because of his being named there, we did not represent any of the people who were actually indicted in that case, but administrative role and the fact that he's named as an unindicted co-conspirator, we had some involvement in it.

That was cases probably resolved sometime in 2003 and then May 2004 was when Brandon Mayfield was arrested on the material witness warrant. Since then, with representation of Brandon, then Guantanamo, then Pete Seda in the Eugene indictment, then Mohamed here in Portland, and a number of other investigations that the government has been involved in where we've been representing people that I cannot talk about. It has been a steady diet of cases involving national security, terrorism, etcetera.

MO: You volunteered, well, the office volunteered is probably a better way of putting it, to get involved in the defense of Guantanamo detainees, also. First of all, I guess, the general climate that you found yourself in. In your book, for instance, you make some statements about the Bush Administration's perhaps overreaching, might be a word. You at least said that it was unprecedented the way they were conducting the War on Terrorism ever since maybe 200 years ago in British and American law. Would you maybe comment a little bit about the clouds you maybe saw gathering?

SW: Sure. I was aware men were being detained in Guantanamo through the media in 2002, '03, '04. I really became aware of what was going on there in 2004, when the first arguments were held in the Supreme Court on the *habeas* petitions that had been filed on behalf of a number of

the men there. In those cases, the Bush Administration, in writing, in their briefs, and in their oral arguments before the Supreme Court, took the position that the President had unlimited authority on his say-so alone, to seize and imprison people indefinitely. He asserted that position under the Commander-in-Chief clause of Article II of the Constitution, which sets up the presidency.

The arguments included arguments about why they chose Guantanamo, and that in part they chose to put the men in Guantanamo to keep them isolated, to keep lawyers away from them. Those arguments were made a month or so before Brandon was arrested. When we first met him in the county jail here, we—Chris Schatz, one of the senior assistant defenders who I worked the case with him—we had to tell Brandon, “This is what they’ve just been saying. We don’t know if you’re going to be here tomorrow. They may take you out of here.” And he sits there: “I’m a lawyer. I live here. I have cases pending in this federal court. What are you telling me?”

We explained, this is what has been said in writing and in oral argument before the Supreme Court.

They didn’t take him out. But, that was a concern because that was the position they were taking. It was understanding the extreme nature of the assertions of presidential power, of limits on judicial authority, the unavailability of judicial review through *habeas corpus* of anything the president was doing, whether the detention, the interrogation, the torture,

lack of hearings—those seemed to me to be fundamental issues. When the Supreme Court said, for the first time out of three—first time, June, 2004, “Mr. Bush, you’re wrong,” and the military told the men in Guantanamo the Supreme Court has said you can petition for *habeas*, fifty guys did, and the court in Washington D.C. couldn’t handle them. And they recognized, “We need lawyers.” They did not have *pro bono* lawyers available. There were a number of big firms that were in the fight then, that are still doing it today, out of their own pockets, and more power to them, because some of them have spent millions of dollars of attorney time in this fight.

MO: Who are some of these firms?

SW: Here in town, Perkins Coie got into it. Perkins on the East Coast was in it before. Schwabe was in it. Garvey Schubert Barer volunteering lawyers here. Cody Weston, Jan Kitchel, Bob Weaver, Sam Kauffman, Paul Fortino. Some senior partners in some of these big firms. East Coast branches of some of the Portland firms as well, and other firms, Reed Smith, Jenner and Block, I don’t know. You go through the roster, the muckity muck firms in Boston, New York, and Washington and Chicago, and you find most of them have had some senior partners taking on some of these cases, and for the most part out of their own pockets.

You also have a number of sole practitioners, or small firms around the country who joined in the fight as well. Far more difficult for them to do

it *pro bono* because they don't have the resources when they have to spend tens of thousands of dollars to go visit their clients in Guantanamo. That comes out of their pockets. And they don't have five hundred lawyers in the firm bringing in the income to do it. [recording stops, then resumes]

Guantanamo detainee cases

MO: Okay, we're back on tape after a little interruption here.

SW: All right. So all these *habeas* petitions came in. The court needed volunteers, because they couldn't get the *pro bonos*, so they decided to ask if any of the other federal defenders offices outside of Washington could help. Given the work we had done in *habeas* cases, given the fact that we had filed a whole slew of *habeas* cases about five years before for people who were being indefinitely and unlawfully detained by the Immigration Service and had gotten all those people out, and given my understanding of, and belief of, the magnitude and importance of the issues, I thought we should get into it. Had a conversation within the office, talked to everyone about it, that it was going to be an add-on. We weren't going to have any reductions in our caseloads. We would have to find the time and the money within the existing budget and case structure. And the office said, "Yes, Steve. Do it!" So we did. I let the court in Washington know. Ended up, seven

defender offices were assigned cases at that time. We ended up with more than the others. That was the fall of 2005, and we finally managed to jump through all the hurdles to get down to Guantanamo for the first time March of 2006.

MO: So this is the lead office, then, in terms of the numbers of cases?

SW: We had the largest number, and probably because Steve Sady and I had been doing a fair amount of *habeas* work before. More than any of the other defender offices elsewhere in the country, we ended up being heavily involved in it, and participating in a number of the planning discussion by the Guantanamo group. Probably by 2006 there were several hundred lawyers involved, nationwide, but there was sort of an inner cadre, if you will, of people who would talk about strategy and try to figure out how we could all stay on the same page in terms of the issues we were raising and arguments, etcetera.

MO: You mentioned also that some of the private firms had volunteered to do the work as well. I'm wondering, in both cases, the extra workload that would be in this office, for instance, plus the lack of compensation for lawyers that usually are used to getting paid in some of the private firms; what would you say would be the motivation of people on your staff or these other attorneys to get involved. Was it because they were afraid of what this might do to the rule of law in this country,

or was it because they sympathized personally with the plight of Guantanamo detainees, or—?

SW: When we got into the cases, Michael, we had no idea if we were going to be representing innocent people or terrorists. Bush, Cheney, Rumsfeld were saying publicly every single person in Guantanamo deserved to be there; they were all the worst of the worst. We had no other information to counteract that.

Once we started meeting with some of the lawyers who had been involved in the representation from 2002 to 2005, we started hearing a contrary view. But we didn't know if our clients were going to be nasty terrorists, the planners of the September 11 attacks, innocent people, mere foot soldiers. What motivated me, what I think motivated all the people in this office, and what motivated nearly all of the people who volunteered their time, was the fight for the rule of law. The belief that what our country was doing in Guantanamo was fundamentally at odds with our notions of justice, our justice system, criminal or civil, and the nature of our Constitutional limitations on power. That's what the fight was about. The fight was on those legal issues for the most part.

What became very interesting, once we got into it, was we were the first people who actually went out and did in-depth field investigation of the accounts that our clients had given us. I didn't go to Afghanistan, but more power and credit to the guys in the office who went.

We went there in 2006. The war was going on then. They went into that war zone, in Afghanistan, to try to track down the truth about what our clients had told us. It wasn't easy, and it was dangerous.

They were in Pakistan. They were in Peshawar, Pakistan. They were in the Northwest Territories in Pakistan. Came back with scores of hours of video-taped interviews attesting to the innocence of the clients for whom we were able to get to the places in Afghanistan where we had to investigate.

I personally went to Sudan, in '07. The civil war is going on between North and South, and Darfur fighting was going on. But for our Sudanese client, we needed to go get more evidence, and we also went to talk with the Sudanese government, to try to get them, who were being reviled around the world as the butchers of Darfur and President Bashir under indictment by the International Criminal Court. We went to talk to them. To say, "You've got innocent men in Guantanamo."

Guantanamo Sudanese client

MO: What was that like?

SW: Utterly fascinating. For the guys who went to Afghanistan: Chris Schatz, Ruben Iñiguez, Bruce Dailey. And William Teesdale and I, when we went to Sudan—

MO: Yeah, that's what I was specifically—

SW: Utterly fascinating. We met with his family. On the one hand, it was incredibly emotional.

MO: This is Adel—

SW: Adel Hamad's family. His youngest daughter, who had no knowledge of or contact with her father—when we met her, she was five, and there was never a daddy in her life, because he was arrested in 2002. To meet her, her clinging to us, as if somehow she knew, on some intuitive level, that we had something to do with this father she had never met. Incredibly impactful. Incredibly emotional. His wife, his brother, and other witnesses that we were able to track down, to confirm what he had told us about his work, his life, what he was doing in Sudan. Why he ended up in Afghanistan.

Meeting with the State Minister, the Justice Minister, the Human Rights Committee of the National Assembly, and talking to them about their innocent citizen who was in Guantanamo. Now, I can't engage in diplomacy, but I could educate. We were able to motivate them, to initiate a dialogue with our State Department about Hamad. Six months later, he got home through negotiation. We gave them the evidence of his innocence, the same as we had given it to the U.S. military when the courts were closed to us. Because after the Supreme Court's first ruling, they shut the doors again.

It wasn't a situation that was a walk in the park. At one point, we were arrested.

MO: In Sudan?

SW: In Sudan, with Tom Durkin, lawyer from Chicago who was representing another Sudanese guy. We had a very tense hour or two, dealing with some Sudanese Secret Service and military people who were not appreciating what we were doing until we got to a level where some guy they called "The General"—he was in a military uniform, maybe he was a general, who knows, but when he saw William and I traveling on official U.S. Diplomatic red passports, government passports—the whole scene changes when he realizes, "Oh, you're the Americans who are here helping our clients in Guantanamo. Welcome to our country." From "Who are you guys and why are you hanging near our National Assembly building, and why are you on this bridge over the Nile?" to "Welcome and let me whistle you up a taxi to get you back to the ersatz Hilton" that we were staying in nearby.

On one of the rides, William and I were in the car with our host, the Civic Aid organization. William and I had been pretty forceful in the Foreign Ministry that day, talking to them about [*pounding*], we want you—please! You've got to act! Stop running us around!" And we were talking in a way that is far more aggressive—we weren't being aggressive, of course we were being polite and friendly and tactful, but to them, the way we were talking to this high government official! The one says to the other of our hosts, "We're afraid now we're going to get arrested."

But it worked. You do what you have to do. Our obligation to our clients took us there; took the other teams that went to Afghanistan. And it took William and me to Sudan. By the time that we went to those places, we had a strong sense from our meetings with those clients in Guantanamo that they were not only being held without process, in violation of the rule of law, but they were, in fact, innocent. I can't say that about all six of our clients. But we had the majority, mistaken identity; sold by someone in a vendetta. Pakistanis, "Well, we got to help the Americans, so let's round up some Arabs, or Sudanese and give them to the Americans. It doesn't matter if they're innocent or not." And the guy spends five years in prison as a result.

MO: Adel's family, I imagine they were under not emotional but financial distress as well.

SW: They were. It was an exceedingly difficult time. The charity for whom he had been working had provided some help, financially. The Sudanese government provided some help. Relatives provided help. One of Adel's brothers is a teacher, so the family had some income. Adel and a brother had owned some land in Khartoum, so that his wife and daughters, four daughters, had a place to live. It was brick, mud brick and a pit toilet and one spigot was their running water. But they were taken care of at a low level. One of his children died while he was in prison

because they didn't have the money to get the medical care that the baby needed.

MO: Okay. We're about here at the end—

[End of Recording Five]

Balance of sequester layoffs

MO: Michael O'Rourke. We're doing another interview as part of Steve Wax's oral history on—what's the date?

SW: May 28, I think.

MO: Yeah, I guess that's right. [chuckling] Steve, I have one follow-up on one of the things we were discussing last time, which was the sequester. You had mentioned that your office had to lay off maybe ten percent staff, and also that the rest of the staff were taking furloughs to save money. You mentioned that the U.S. Attorney's office wasn't similarly burdened. Can you tell me a little bit more about why you got short-changed?

SW: Exactly why we got shortchanged, I don't know. This is the machinations of Congress, the Department of Justice, the judiciary. The reality is that we, the Federal Defenders system as a whole nationwide, has been hit far harder this year than the United States Attorney's offices, or the parts of the Department of Justice that we are interacting with on a

daily basis. We've been hit far harder than any of the other Judicial Branch entities: probation, pre-trial, clerk's offices. We are working hard, collectively, to try to change that. We managed to convince the judiciary to go to Congress and a little bit of money was given back, so that in addition to the layoffs and the furloughs, I had had to put some people on four-day weeks. We were able to reverse that little piece of the shortfall. The big battle now is what's going to happen next year. There's talk that we may be hit again, next fiscal year, with further cuts from this short-change sequester dollar amount. Whether or not that affects the U.S. Attorneys only time will tell.

Right now, we're struggling in a way that we have never had to struggle. It's difficult. It's bad enough to be in a position in which our daily life is to be fighting against these other people, and to be suggesting that they've made mistakes. Don't get a lot of thank-yous; occasionally, we do. But when we then have to fight this money battle, and it's uneven, and we're not getting paid our full salaries, and we make enough, but most of us could make more money in private practice. Yes, we've chosen to do this work, but then when they cut your salary, it's not easy to keep people motivated. I guess that's an additional burden that the other supervisors in the office have had to take on this spring.

MO: One other question: apart from the sequester, do lawyers that work in this office get similar compensation to the U.S. Attorneys?

SW: Yes. One of the wonderful features of the Criminal Justice Act that was passed back in 1964 was a requirement of comparable pay between the Federal Defender and the U.S. Attorney. That has translated over the years into comparability for all staff. So that my pay is the same as Amanda Marshall's, the U.S. Attorney, the lawyers in this office are paid the same as people with comparable experience in the U.S. Attorney's office. What we're paid is substantially more than people working in the DA's offices and public defender's offices in the state system. It is, by and large, I think, a substantially less than many of us could make in private practice, both U.S. Attorneys and Federal Defender's Offices.

In terms of the support staff, investigators, the legal assistants, what they're paid is relatively comparable to what the private market would bear. People here and in the U.S. Attorney's Office may be getting a little bit more than people working in small law firms, a little less, perhaps, than people in big law firms. I think there's more comparability among the support staff with the private market than there is among the attorneys.

September 11th memories

MO: Let's switch to terrorism. *[laughing]*

SW: All right! *[laughing]* A different kind of terrorism, instead of financial terrorism.

MO: The impetus for all the terrorism cases that have come to this office, of course, was the attack on the United States on September 11, 2001. I was wondering what your own experience of that day was. I think probably it's one of these things like the Kennedy assassination, where we all remember what was going on that day.

SW: It was early in the morning here in Oregon. I think that we got a call from one of Kathleen's sisters whose husband works in the city. They had friends who worked in the Trade Towers. We turned the TV on, I don't remember exactly what time it was, to watch this stuff. Then we had to get our son Michael up for school.

A couple of the most vivid memories that I have are really coming through Michael, through my son, who was ten at the time. Our yard backs onto the Mt. Tabor reservoirs, and immediately afterwards, the city hired 24-hour guards to guard the city water supply. We're out there; we walk on the reservoirs all the time. I remember Michael looking at—it's a half-mile around the reservoirs that are on 60th Street—the guys they hired, at least some of them, were a little bit on the older-than-active-police side, and a little overweight. Michael says to me, with the voice that only a ten-year-old can muster, "Dad, what's that guy going to do? He's over there. If he's on the far side of the reservoir where—what's that guy going to do if something's happening here?" He's looking at this old man, overweight, and it's sort of like through the eyes of this kid, "What are we doing? Is this a rational

response? Are we buying security? Is this really even a symbolic gesture?"

Another day, a couple of weeks after, we're driving him to school. I don't remember if that day we were coming across the [Morrison] Bridge or the Burnside Bridge, but the Portland Police, for a while, had police cars stationed at either end of most of the bridges—probably all of the bridges crossing the Willamette. Again, Michael says, "Dad, look, there's a police car there. What's this about? What are we doing? Why?" A sense of insecurity, being felt by this kid, and the unintended consequences, perhaps, of some of the measures that were taken, we as a society, as a country, felt we had to react. We had to do something. We did any number of things. Some of them were perhaps more symbolic than real. Some of them were probably overreactions. Those are some of my memories of it.

MO: Did you anticipate how your office might be involved at that time?

SW: God, no. This was New York, this was Washington, D.C. It had nothing to do with Portland, Oregon. I think part of the reaction to seeing the law enforcement presence on the reservoir, these private security guards the city hired, the police sitting under the bridges was, "Why here?" Can we really protect every civic institution? Do we really need to? If we're protecting civic institutions, what about all these chemical plants? What about all of the facilities that have dangerous things in them? Most of which are privately

owned. No, the presence was brought here in that sense, but I didn't have any sense professionally, this going to affect us? [*scoffs*] No.

MO: Did you have any connections to some of the people who were in the Trade Center building?

SW: No. Not personally.

MO: But you had a connection to the city, of course.

SW: Oh yeah. Yes.

MO: Even I had a bit of connection to it. You told me a little bit about your experience in Somalia last time—

SW: Sudan.

MO: Oh, Sudan! Okay, Sudan, not Somalia. Got that wrong. Sorry about that.

SW: Mohamed is Somali. But Hamad, the Guantanamo fellow, is Sudanese.

Client research & evidence trips

MO: That story you were telling me last time, I was wondering how prepared you and other people in the office might have been to travel to these, in some cases, somewhat dangerous countries and certainly countries where the Muslim culture was present and, etcetera. Had you ever travelled in any of these countries

before, and had you had any experience there before, or did you have to go in cold?

SW: Yes, and yes. I had been in Egypt. Kathleen and I took a three-week trip to Egypt the year after [Anwar] Sadat was assassinated. That was a very interesting experience. There weren't a lot of tourists going back yet. I guess we were sort of young, in our early and mid-30s, and naïve, at the time! There were soldiers everywhere. But we were there to see the pyramids, and to see the temples, and had a wonderful experience with it. Kathleen was still running a fair amount at the time, in Luxor, she went out Saturday, Sunday, whatever day it was, covering her fair-skinned legs in black tights, but running along the banks of the Nile. An Egyptian soldier, full uniform, gun over his shoulder, "Ho, ho, this is funny! There's this woman running." He starts running along with her. The two of them get into a race, on the banks of the Nile. Okay, he was a soldier; he's carrying a gun, but it became it became a Sunday event, with the Luxorians cheering, "Who's going to win? Who's going to win, the gringo or the Egyptian?"

We studied the culture, in terms of our representation of the men in Guantanamo. We brought some experts into the office to talk to us about Islam. We brought in people to talk to us about Afghanistan, about the Middle East, about Sudan. We tried to learn something about both the religion and the countries and cultures that we were going to. In that sense we did some things to prepare

ourselves for the trips. On the other hand, you just have to go.

We did some things to prepare ourselves in terms of finding people in Afghanistan when the two groups from the office went in the summer of 2006. To provide security; places to stay that would be secure. People who would be able to help us physically get around inside the country and to look out for our safety. In Sudan, we did not go to Darfur, we didn't go down south where the wars were going on at the time. We did take a trip north, out of Khartoum, up to the Egyptian border area as a sightseeing tour with our hosts. The hosts were paving the way for us, but in Sudan, they weren't armed. In Afghanistan, the hosts, the security company we hired, they were armed.

Basically, you go. You do what you have to do.

Writing *Kafka Comes to America*

MO: I want to ask you about some of these cases, but before we get there, well they're related obviously, how did you decide to write a book about your experiences, and what was that experience of becoming a first time author like?

SW: Decide to write a book. You know, Michael, I don't know that I really decided it in a conscious way. Coming back after the second visit to Guantanamo, so this May 2006, I sat down on the little two-engine propeller plane, Sunshine Air,

I think it was at the time. These are old, old prop planes held together with baling wire and chewing gum. You feel the wind coming in. There's no oxygen; they don't go over 10,000 feet. I pulled out a yellow pad. I was so moved by, angry at, what I had seen, what I was experiencing, that I just *had* to witness; I guess that's a word that's sometimes used. I had been some place that very few Americans had been. I had been given the opportunity, through the representation, to see firsthand as perhaps a couple of hundred other non-military people had seen—that was it—what was going on in Guantanamo. I had felt the emotional power of meeting our clients and of feeling their pain, feeling their innocence, and what our country was doing to them. It started pouring out of me.

Now, my thought, as I'm writing on this yellow pad for the three-hour flight back to Fort Lauderdale, was, "I'm going to write a magazine article." So, I wrote an article, and I sent it out to *The Atlantic*, *Harper's*, to the *New York Times*. Rejected, rejected, rejected. But I'm a defense attorney; I'm used to rejection! So if I can't write an article, write a book. [*laughs*]

I kept writing. I got lucky. Things fell into place. Phil Margolin, the noted Portland crime author and former criminal defense attorney, is a friend. I called Phil. "Hey, Phil." I took him out to lunch. "How do you write a book?" He chats me up; he's helpful. He introduced me to his agent. Not his agent, because that's a top guy in that agency, but a sub-

agent. I talked with that person, met that person, and sent some stuff to her. She was not impressed. She was underwhelmed. I think that the reality is her political perspective and mine didn't match. She freed me to look elsewhere and suggested I needed a writing coach.

All right, whatever. I got in touch with a woman writer, published author, out of Toronto, who also helps as a writing coach. Fascinating woman who'd been a soap opera star or starlet in her youth, and then she started writing soap operas, and then she started writing books with ideas and political novels, but under a male pseudonym. She didn't want to upset her female romance audience. She worked with me for a couple months and said, "You don't need a writing coach, Steve." She loved what she was seeing, and she introduced me to her agent, who was the head of his agency. He said, "Yeah, sure." He liked what I sent.

I got lucky. I got an agent, and he put this out to auction, and a publisher bought it. I say auction, a very small sum of money. [laughter] But it all just fell into place, and the writing, it just emerged. I would do it at home. I'd wake up at five o'clock; Kathleen and Michael wouldn't get up until seven. I'd have two hours quiet time, and then I'd come to work and get home and he's doing his homework, and I'm sitting next to him writing. I'd get up Saturday morning before either of them and spend a couple of hours writing before they woke up. It came together. The publisher liked it, and the editor who they assigned was great. The rest is history.

MO: About how long were you at it before you sent your final manuscript in?

SW: Late May 2006. Sent out the articles over the summer of 2006. Eventually get together with Barbara Kyle, Toronto, teacher and author, probably fall 2006. Sent in a manuscript, the final thing, I sent to the publisher, late August 2007. Actual writing of the book itself, seven, eight, nine months, before work, after work. Then there was another three months or so of back and forths on the edits and the copyediting and stuff. The whole process, about a year, probably? Sandwiched around this job.

MO: It sounds like a pretty quick turnaround, all things considered.

SW: Yeah, it was. It poured out of me. It's a story that had to be told.

Brandon Mayfield case

MO We were talking last time about your trip to Sudan. You had previously been engaged with the Brandon Mayfield case. I don't necessarily want to cover territory that you already covered in your book, but maybe you could talk a little bit about the U.S. government's hard-core response, you might say, to these kinds of cases, and maybe a little bit about the Brandon Mayfield case and how you were becoming more aware of how determined the government was to crack down on terrorists.

SW: The bombs went off in Madrid March 11, 2004. U.S. government gets into it because the Spanish were able to find a bag of unexploded detonators near one of the train stations. They couldn't get a match on the fingerprint, asked for assistance. U.S. says, "By god, we found it. Hundred percent match." That was their phrase, the phrase they used in their search and arrest warrant affidavits. "Match: 100 percent certainty." I had never before in my career seen any report from any expert that used that phrase. Nor have I since. It turns out that they were 100 percent wrong.

Mid-April, after the U.S. had told the Spanish that they had a match, and the U.S. government had gone to the Foreign Intelligence Surveillance Court and started 24-hour surveillance on the Mayfields, gone into their homes under the Patriot Act, taken DNA swabs, copied their computers, and done incredibly intrusive things to the entire Mayfield family. Spanish, mid-April, send the U.S. a letter: "Negative." It's not his fingerprint.

U.S. sent a team of FBI agents over there, and their account of that meeting with the Spanish, they say, Spanish said, "Well, okay, maybe we're not so right," and "We'll look further."

Later on, when I talked with the head of the Spanish national police personally, that's not the account of that meeting that he gave. He said, "No. We told them it was not Mayfield's print."

I wasn't there; I don't know the truth. All I know is what the FBI reported and what the Spanish guy said. But

the declarations or affidavits that the government filed with the court, the only ones I'm able to see are the ones filed here with Judge [Robert E.] Jones in Portland, didn't tell the court about this Spanish saying on April 14, in a letter, bold, "Negative, it's not his print." Didn't tell the court that. I don't think that was right.

To the government's credit, and this is an important thing to understand, Brandon was in jail, in custody, for about sixteen days, which on the one hand, in terms of the criminal justice system, is a pretty short time. To him, to his family, it's an eternity. Ultimately, the government, once we're out of the case and civil lawyers came in, paid a \$2 million settlement for what they did. But to their credit, when the Spanish came back to the U.S. in late May, after he'd been arrested and was in custody, and said, "Look, guys. We now have matched this print to an Algerian named [Ouhnane] Daoud," Brandon was released. Our work is pretty much done. He hires civil counsel who pursued a civil suit and got him a decent settlement.

The FBI did a report on the mistake. How did it happen? What they said in that report has really resonated with me throughout my work since then. They were honest in saying, "This was operator error. The people doing the examination made a mistake." Why? A couple of the phrases they used were, "confirmation bias;" the FBI agents saw what they wanted to see. When one agent said, "Oh, boy, it looks this" they didn't use the scientific method and have another blind review of it. The first agent says,

“Oh, look! I got a match. Hey, Joe, come on over. Look! I think I have a match.” “Oh, yeah, you got a match!” That’s not scientific method. Confirmation bias: you see what you want to see. You see what you expect to see.

The other thing they talked about in this report was a “big case bias.” The incredible pressures that the agents, the law enforcement people, the prosecutors working on a case of that magnitude feel to get a solution; we *need* a solution. When you’re operating in that kind of an environment, this FBI report says you’re more prone to make mistakes because you can lose judgment.

Now, what I have seen in the other cases in which I have been personally involved—Guantanamo cases and local cases. What I’ve seen in reading about other cases prosecuted elsewhere in the country, those pressures are real. Law enforcement people, prosecutors are no more immune to the human failings than any of the rest of us. When you’re put in a situation where the stakes are really high, your judgment can be affected. You can operate with blinders on.

Those are some of the dangers I think we as defense attorneys, we have to guard against, of course, in *our* work—not to fall prey to that—which, I’m sure we do. But part of our job is to be pointing out where law enforcement people have been operating inside these blinders, and say, “Guys. Push it aside. Let’s look at the whole picture.” Sometimes the whole picture is different, and sometimes it’s not.

MO: With respect to that print, was it your office that hired the fellow in San Francisco?

SW: Yes. We hired our own expert. Our own expert looks at it, and our own expert succumbs to the same “confirmation bias” and “big case” pressures and says, “By god, the FBI is right!” We, fortunately at the same time had managed to get—not at the same time, because in terms of the way it worked with the government and the circumstances under which we were given access to the print to send to that expert, we had to wait a week. Then we were able to get it to the expert we had originally wanted to use, an expert in England who had taken on Scotland Yard. This is a guy who worked for Scotland Yard, had been successful in breaking open the Lockerbie bombing cases where the planes explode over Lockerbie, Scotland, so an inside man. But a little later in his career, he had taken on Scotland Yard, when, in his perception, they were framing, mistakenly, doing something to one of their own. He’s the guy we wanted, because he had demonstrated the backbone to stand up to some really intense pressures.

When we got the print to him, we got back a report from him within a day or two that said, basically, it’s inconceivable that anyone could have made this mistake. He points out where the differences in the latent print lifted from the bag and Mayfield’s print were, and said, “Come on, guys.” Fingerprint Examination, class 101, first day of class. Look, there’s a ridge here; it’s not there. You can’t just say, ‘It’s

an anomaly.” He said, “No. Impossible.” Then he went through a whole list of other things.

But the guy we used in San Francisco, he made the same mistake as the FBI.

MO: Well, I guess if it all unfolded over the course of—

SW: Couple weeks. Which, again, to Brandon and his family, is an eternity for which the government paid him. In terms of “Did the justice system work?” It’s hard to say that it didn’t work at all, because it did move rapidly. The government did come forward. He was released. Ultimately the civil system also worked, because he gets a settlement.

MO: You had had that experience before you signed on to the Guantanamo cases.

SW: Yes.

Presidential legal practices

MO: In your book, you talk about some of the machinations, or strategies, maybe, would be a better word, of the Bush Administration to continue to detain these people because of their certainty that they were all bad people. Did you think that everything that the Bush Administration attorneys did was correct, given their mission and the stakes at the time? It sounded like, in the book, that you felt they were stepping over the line a little bit.

SW: Stepping over the line in terms of ethics, the torture memos, the memos that were written by some of the Assistant Attorneys General, some of the Assistant General Counsel in the White House. Those memos have been called into question in terms of whether they were properly presented. In the sense that there was some real shoddy legal work reflected in them. The question is whether or not that shoddy legal work was bad lawyering, or whether these memos were intended to produce the result that the political leaders wanted produced.

I didn’t sit in on any of those meetings. I can’t tell you anything firsthand. All I can do is to tell you that, as I read some of the memos, it is difficult for me to believe that people with the quality of minds that some of those authors had, made such simple and basic mistakes.

In terms of the litigation strategy, they played hardball. I don’t say that they stepped over the line in terms of doing anything unethical. But they played hardball. I think it’s legitimate to ask whether or not they were being true to the motto that’s over the Department of Justice, that a prosecutor’s duty is to seek justice, not just to get convictions. Or the motto that’s over our county jail here, the Justice Center, the letter from Martin Luther King, Birmingham City Jail, April 1963: “Injustice anywhere is a threat to justice everywhere.” I don’t think they were true to those principles.

But I don’t think that the lawyers crossed an ethical line in terms of their response to our pleadings. I think they

were shortsighted. I think they doing the bidding of their either military or political clients, masters, however you want to call it. It didn't change when the Obama Administration took over. So that, if you look at the last, now, five plus years of the litigation strategy by the Obama Administration, it's virtually impossible to distinguish it from the litigation strategy of the Bush Administration.

Last week, the President gave a speech about the national security strategy and approach. He was talking about the drone strikes. He was talking about the need to declare this War on Terror at an end. He was talking again about closing Guantanamo. The rhetoric of that talk, "We need to close Guantanamo," is inconsistent with a number of the positions that his office has been taking, his Justice Department, his Department of Defense have been taking, in the litigation over the last five years, and some of the things that they have been doing in Guantanamo itself.

I think that it's important in thinking and talking about Guantanamo and national security litigation to focus, not only on the Bush Administration, but also the Obama Administration. We've seen that in the cases here in Portland. When I went and argued in the Ninth Circuit Court of Appeals, Pete Seda's case that we tried in Eugene in 2010—Pete is an arborist from Ashland who was charged with trying to funnel money to Chechen Mujahedeen in the year 2000—actually, he was charged with filing a false tax return. But the essence was \$150,000.00

donation that allegedly was supposed to go to Chechnya, at a time when we're supporting the Chechens in their fight against the Russians. At a time when the Russians have destroyed Grozny, but, whatever.

When I argued the case in the Court of Appeals six months ago, last December, I'm arguing against the Obama Administration's positions, and the positions that they took on the State Secrets Doctrine. The positions that they were taking on the discovery issues, where we're saying that "You had material that you should have given to us," no different from what was said during the Bush Administration.

MO: Still playing hardball. *[laughs]*

SW: Oh yes. Absolutely.

Implications of the Patriot Act

MO: I'm glad that we got into the Obama Administration, because that brings us into the present time. I'm wondering about the continuing existence of maybe not exactly the same bill, but the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001.

SW: *[chuckles sarcastically]* Ye Olde Patriot Act.

MO: Yes. What do you think of what's in the Patriot Act, the pieces of that are still

on the books. Is that okay, do you think, or is it a threat to our democracy?

SW: I don't think we can talk about it as "the Patriot Act." I think that there are aspects of it that are important, necessary, and there were some changes that it made that were needed. Other aspects of it, I think, give the government far too much authority and are far too intrusive into our lives. As people think about the War on Terror, as people think about the government's policies, I think that we find it more difficult to do so than we do in many other areas of criminal law or law, generally, because there are bad guys out there. The country was attacked, generally, on September 11, 2001. Since then, there have been a number of other terrorist attacks in this country. The Boston Marathon bombing of last month is another example of the fact there are either bad guys out there, there are people who are connected to international terror networks—or, there are people in this country who, for a variety of reasons, want to do things to try to change our policies, and do it in violent, terroristic ways.

On the one hand; nothing new. That's happened throughout history in this country and around the world. On the other hand, when it happens, it does engender fear. Part of what the Bush Administration did so effectively was prey on the fear that September 11 generated to get the Patriot Act through Congress; to effectuate a number of other changes; to cow us, as a citizenry. "If

you're talking against my policies, you are not a patriot." That's just not true! Dissent is the essence of patriotism in this country. When you have your national leaders questioning that, that begins to resonate in the populace as a whole. That continues.

While I question some of the policies of the Obama Administration and some of the things that the president has and has not done in this War on Terror, that have affected us with our clients here in Portland and Eugene—I loved his rhetoric last week. Because his rhetoric was so different than President Bush's rhetoric in terms of appealing to our better nature, rather than our baser nature. Reminding us, really, of the American values. Not being afraid to say, "You know, if we treat people unduly harshly and lock them up with process, it affects *us* as a nation. It undermines our values. And it also jeopardizes American citizens around the world when they're caught."

These are not easy issues. We need to be willing to question, to challenge. One of the things that gets very little press is this business of national security letters, which we've dealt with in our cases here in Portland, where the FBI, through the director or deputy of a field office—so this is dispersed. Hundreds of resident agencies of the FBI around the country are given the authority to issue subpoenas on our internet service providers, our telephone companies to get records from those entities without a search warrant, without any judicial

involvement. And with an order that prohibits Google, Yahoo, Verizon, ATT, whoever is receiving this, from telling us that those subpoenas have been issued and they've turned our records over to the FBI. Wow! That's scary!

National Security Letters have been issued here in Oregon against some of our clients. We find out about that *only* if a person is prosecuted *and* if the government chooses to disclose it to us. If there's evidence that they want to use from having issued those National Security Letters. That's pretty intrusive. Telling these companies, "You can't tell your subscribers that we've gotten their records."

MO: I guess there was an adjustment of the Patriot Act, at a certain point. I can't quite remember the details now, must have been the first Obama term.

SW: There were amendments probably '07, '08 under Bush, and then more amendments, which really did nothing to shrink the government's powers. I should say, nothing substantial. Maybe there's a little thing, but, no.

Guantanamo case outcomes

MO: Maybe you could tell me a little bit more about your accomplishments and failures in terms of trying to help the Guantanamo detainees. You actually got Adel out of there, and you were talking about that particular case, about the

Sudanese visit. So can you tell me how it sort of unfolded that you got him out of Guantanamo?

SW: You know, Michael, one of the things about the Guantanamo work is it's impossible to know whether anything we did had any effect. I've got to put that out on the table. We know we fought. We know we provided information to the military. We know we got the evidence of innocence, and we know for four of the clients that they went home after we had provided that information, but nobody ever tells us, "Oh, god, guys! Thank you! This was really useful. It was great to see that your Afghan clients—one is mistaken identity; the other actually fought with the Northern Alliance against the Taliban. Gee, how did he get arrested? How did he get seized? How did he get put in Guantanamo for five years?" That's a long story, but unquestioned that he fought with the Northern Alliance against the Taliban. Okay. Did our evidence, our presentations cause them to go home? Did the work we did with Adel, going to Sudan, providing the information to the military. Is that why he went home? We like to think so.

Our other two clients, we had hearings. For those two, I think it's a lot easier for us to see that the work we did was instrumental in their transfer, can't use the word release, but their transfer from Guantanamo. They could not go home. They were from Syria and Yemen, and it wasn't safe to send them home. So they were sent to safe third countries and

good countries. Not little desert islands in the Pacific, where some of the guys went, tropical islands in the Pacific, where some of the guys went.

After the third decision of the Supreme Court; this was the 2008 decision, *Boumediene's* case [*Boumediene v. Bush/Al Odah v. United States* Nos. 06-1195 and 06-1196] where the Supreme Court said to President Bush, "You're wrong. You don't have the power. The Constitution requires hearings." We pushed and pushed to get hearings for our last two clients who were still there. We were ready to go; we had done our investigation. We were able to get pretty much to the head of the line in the District of Columbia District Court. Steve Sady did one of the hearings alone; he and I did the other hearing together.

Fascinating, because with the hearings I had Bryan Lessley, Assistant Defender, go down to Guantanamo, sit with the clients in the prison in Guantanamo with an interpreter while the hearing is taking place in Washington, D.C. They're on the line at the hearings by phone, but only in the unclassified portions; when the hearings go into classified session, of course the clients can't participate because they're not allowed to hear anything classified. In the one case for the client who had been tortured by the Taliban—extensive evidence—we had the assistance of the former head of the Human Intelligence for the entire Department of Defense. A guy who under President Bush had this top level position in the Department

of Defense, an intelligence officer who spent hours and hours with us in the secure facility in Washington, D.C., going through all of the intelligence reports and explaining how bogus they were and why the government did not have evidence sufficient to support this man's imprisonment. At the end of that hearing, the judge, known as a conservative judge on the D.C. District Court, used the words, "defies common sense;" "his detention defies common sense."

And he ordered him—well, he can't actually order him released, but he grants the *writ*. And all he was permitted to order, because of rulings by the D.C. Circuit Court, was "All right, now, Government. Use your best efforts please to find this man a place to go, and get him out of the island as quickly as you can." Congress had prohibited the Obama Administration from spending any money to take guys out of Guantanamo.

We got lucky. We pushed and we were able to get the administration to work hard for him, get him resettled in a third country. We now have beautiful photographs of he, his wife, his two babies in the office here. That's wonderful.

The other client, the hearing was a different type of hearing. We convinced the court that it was impossible to call that client an enemy combatant. Whatever he had done before could not any longer be called an enemy combatant, and he eventually was resettled as well.

Then we wanted—for two of the guys who said, "Look, I'd like to be paid for my time." One of the Afghan clients

said, "I just want my back wages. You kept me in prison for five years. Just pay me! A couple thousand bucks back wages."

"No."

For Mr. Hamad, he would have liked a little bit more. One of his kids dies while he's in the prison. He has another kid born who he's never seen until he gets out.

We pursued the *habeas* cases, saying that they were entitled to exoneration. It was only less than a year ago that the Supreme Court denied our petition for *certiorari* and said, "No. These guys are out of the prison. They have no right to appear in court." Gwen Skinner, who runs a clinic at Willamette Law School, she took on Adel's civil suit and that has not yet been dismissed. She is still trying to get him a little money for the time that he was in the prison, but I am not hopeful because the Obama Administration is fighting that tooth and nail, saying that the men have absolutely no right to bring any lawsuit because they were at one time in Guantanamo. The statute that was passed under the Bush Administration, the military commissions, that says that they have no right to appear in U.S. court for any purpose, ever. And we're saying, "Hey. You held them there illegally. This portion of the statute can't be Constitutional." We're not saying that; Gwen is saying that on Adel's behalf.

That last little chapter of our Oregon Guantanamo work for our clients is not yet closed. But I'm not doing it; that's being handled by the clinic in Salem.

Mohamed Mohamud case

MO: You, of course, have recently, your office has unsuccessfully, defended the Pioneer Square Bomber. The case is now on appeal.

SW: Sentencing is the end of this month. Then we'll be on appeal. We still don't know what Judge [Garr] King will say about how the entrapment, and partial entrapment, and all the mitigation plays into this.

But you were probably going to say I can't say anything about too much about it. You're correct. [*laughs*] But your question is?

MO: [*laughing*] Well, you said you could talk about it a little bit.

SW: I can tell you that it was an exceedingly emotional case. It highlighted, in some respects, some of the significant policy issues in this War on Terror in the way in which our government is responding to the threat from terrorism. Mohamed's case was but one of a series of prosecutions that arose from sting operations where the government focuses on a person, and then through its agents creates a plot, moves a plot forward, keeps it going in motion to the very end. There are all sorts of ways to define it. Those are some of the issues that were litigated at the trial, will be litigated, perhaps, at sentencing, will be litigated on appeal, that I shouldn't get into.

But they're tough policy questions. How should the government be dealing with the threat of domestic terrorism? How do you deal with Muslim kids who disaffected? With Muslim kids who are looking at fundamentalist radical violent websites online? What should we do as a society? Dealing with those issues was difficult. One of the things about dealing with Mohamed's case, as contrasted with some of the other prosecutions that have been brought, was—I can say this, it will be coming out in detail at the sentencing—he was a wonderful kid to work with. We've known him now for two and a half years. There are some people who are caught up in these types of schemes, charges, offenses, stings, however you want to define it, who are perhaps not so easy to work with, not so open to dealing with non-Muslims; people who are bitter and worse able to see where they went astray. Mohamed, in some ways, a remarkable kid, which makes the tragedy of it that much more palpable.

You'll have to pick up on that after the sentencing for me to get into any specifics.

Needed changes to Patriot Act

MO: It's anticipated that there might be interest in talking to some more at a later date. I'm not sure where else we might go here. You talked about needed changes that the Patriot Act addressed. What are some examples of that?

SW: One of the things that it did that I think was appropriate and significant was to revise what had been the wall between intelligence gathering and law enforcement. To a certain extent I think we were hamstringing ourselves as a nation in the '80s, '90s and up to the passage of the Patriot Act by making it exceedingly difficult for one branch of the government to share with another branch of the government some of the information that it had come up with. The Patriot Act enabled a sharing of information. I think it went too far; I think that it relaxed it too much on the criminal side and permits the government to withhold too much information from defense attorneys when they do decide to bring a prosecution. But, a better integration and communication among the various entities, I think, was necessary and a significant thing to do. That's probably the most important piece of it that, as I see it, made sense.

MO: What about examples of things that don't make sense?

SW: Oh, the "sneak and peek" searches. The Mayfield case is one of the very few examples that we have of how the government can terrorize its citizens. I use that phrase advisedly. The Mayfield family was terrorized by what happened to it. Because of the way in which the sneak and peek searches of their home were carried out, they became aware of it. Government mistakes? Maybe. Intentionally? I don't know. But, as with the National Security Letters, the ability of

the government to intrude into our lives in the most fundamental and personal of ways, I find pretty bloody scary.

Patriot Act, the Foreign Intelligence Surveillance Act, the government has the tools now, so that remotely it can access your home computer. And if your home computer has a camera on it, the government has the tools to turn on the camera on your computer, in your home, and film you. Of if you're carrying your laptop around, they can film, "Oh! You're now meeting someone else." Or you're sitting in a coffee shop.

Now, the ability to do that to us, seems to me, gets to be overly intrusive. The standard that the law requires the government to show to engage in that kind of incredibly intrusive personal surveillance, under the Foreign Intelligence Surveillance Act, under the Foreign Intelligence Surveillance Act as amended with Patriot Act amendments in 2007, '08, whatever year it was, it's a very low standard. You don't have to show any evidence of criminal activity. The regular probable cause standard doesn't exist.

I think that we should all be concerned about that. And whether or not there are bad guys out there, which there are, the fact that the government can access your computer, turn it on, download your whole bloody computer. Download your whole email. Get access to whatever email information your service providers have, and turn on a camera? *[recording stops, then resumes]*

FISA Court

MO: FISA, of course, dates back way before—

SW: Jimmy Carter. 1978.

MO: It's always seemed to me to be, well, I don't know. In your opinion, is it necessary to have that type of court? I guess they've only heard one case, and people still aren't aware of even what they're charged with?

SW: The Foreign Intelligence Surveillance Court has two levels. There's a trial level court to which the government goes to get authorization to engage in certain types of surveillance, the sneak and peak surveillance, this electronic surveillance. Then there's an appellate court. The appellate court, if the lower court says "No warrant," then the government can appeal and go to the Foreign Intelligence Surveillance Appellate Court. That, there's been one case only. Our own Judge Leavy was on that court and has been able to talk about the non-classified portions of that decision. If I'm understanding correctly, only one time has the FISC, the Foreign Intelligence Surveillance Court, said "No" to the government, and that one time, it was reversed.

Is it necessary? *[pauses]* There is certainly a need to engage in electronic surveillance. The question is: How far? What standard? And what protections

do we have? What we know from our cases here, from Mohamed's case, from Seda's case, from Mayfield's case, is that the Foreign Intelligence Surveillance Act can lead to highly intrusive invasions into innocent people's privacy. It can lead to highly intrusive invasions into the privacy and lives of more than the subject, or suspect, of the government's interest.

What happens with them? In Mayfield's case, one of the things that we filed a motion for, and that ended up as part of his civil suit was, "Give us back all the stuff that you obtained, Government." But then you stop and think about, is that even a practical reality? How many different field offices of the FBI, the CIA, the NSA, the Department of Defense, Interpol, the Russians?—received the information that came from the Mayfield's home? Information about his wife and kids as well as himself.

In Pete Seda's case, the government made an agreement with the Russians. The local prosecutors traveled to the Lubyanka, the infamous prison of KGB days to meet with—it's no longer called the KGB, the Soviet spy agency, but one of its successors, the FSB. They provided the Russians with hard drives that had been seized from Pete Seda's charity in Ashland, from the Al-Haramain local charity. A civil lawsuit was filed by Seda's ex-wife because there was personal information about her on those hard drives that were given to the Russians. Where is that information now? They were concerned because she's of Iranian extraction, and in her family there had been some people

who had gotten in trouble with the Mullahs after the revolution there in '79. They're all worried about, "What are the Russians going to do with this?"

Once the information is out there, online, just as we have no control of stuff we put on Facebook, or when we use a credit card to buy from Amazon, how many different times does that information get sold and reused? They figure out profiles about us to market this and that and the other thing to us. Same thing is true with the government. We've seen that here in Oregon. That's part of the fight that we have had here locally in some of our cases. "Give it back!" Well, is that even possible?

Judges on terrorism cases

MO: What was your experience with the two Oregon judges who have had these cases? I know that Judge King has had a number of these cases. Judge [Anna] Brown, I guess, handled—

SW: Mr. Nicholson, who I didn't personally represent, but our office represented Nicholson the Younger.

MO: What would you say about the ability of these judges to sort through these kinds of international issues and difficult issues, such as the government's need for secrecy or not?

SW: I think they're put under tremendous pressure. You go back to some

Supreme Court cases in the '50s and '60s. One case in particular, name is Alderman. The Supreme Court said, "Trial judges are ill-equipped to know what is helpful to a defendant in a criminal case." They're not equipped, because a nuance of this, or a nuance of that, could be useful; a defense attorney could know that this is helpful to his case. A trial judge can't know that. Supreme Court was explicit in saying that. Supreme Court was *explicit* in saying, in a series of cases in the '50s and '60s: "The government has to make a choice. If it wants to maintain secrets under the under the state secrets doctrine [State Secrets Privilege (SSP)], it's got to choose: dismiss the case, or turn over the information to the defendant and the defense attorney so they can use it." But that's not how the law has developed in the '80s and '90s and this century. So, our judges here are put in the position in which there are statutes and cases which say, "Well, this is how you're supposed to handle national security information you need to look at."

Well, we go to the judges, and we say to them, "We have no idea what the government is giving you." Our experts—and in one of the cases, Pat Lang, who helped us so much in the Guantanamo case, we hired him and he worked with us here, provided declarations saying, "Based on my knowledge of the intelligence world, the government should have given you this much material to review, judge." We have no idea if the government gave them this much, this much, or nothing. We can't even know

that. Then the judges are supposed to look at it and decide, "Well, gee. Does the defense need any of this?"

As Pat's work in the Guantanamo cases that went to this hearing that I talked about showed us, on its face a lot of these intelligence reports from the government, are wrong, bogus, stupid. What we saw on the Guantanamo case, I can't get into any of the details, but I can tell you this. You have a report by an FBI intelligence person saying, "A," and a report by a CIA intelligence agent saying, "B." Inconsistent, contradictory. How is a judge supposed to evaluate? How is a judge supposed to figure it out?

Yet, our judges are put in that position. And we're not permitted to participate under the Classified Information Procedures Act (CIPA) under FISA and under the case law the way it's developed. I think that's wrong. I think that our clients here have likely suffered because the judges are given something by the government. The government comes in and says, "If you release this, the nation will collapse!" Because in order to maintain the state secrets privilege to keep the stuff from us, they have to file declarations that the national security will be threatened. Then the judges are told that they're supposed to presume those statements by the government lawyers are correct. Here we are, saying, "Wait a minute, Judge! We'll speculate that there's something here that's good, bad, or indifferent."

That's one of the issues we argued in classified session up in Seattle in

Seda's case, and we're still waiting for the decision. I don't know if the Ninth Circuit is going to say Judge Hogan got it right or got it wrong. I just know the process that was used, in my judgment, needs to be changed. I made the arguments!

Document access for client defense

MO: While you were talking about that I remembered one more thing, a little detail from Guantanamo, and that was that apparently the government had at its disposal a great number of documents that they supposedly seized from some of the Guantanamo detainees, and had not even looked at them in the four years or so that they were holding on to these people because they had "valuable information."

SW: I'm not sure that they were documents that the government had seized from the men, or that the government had amassed in intelligence reports. One of the things that President Obama said, his first week in office, was, "We're going to set up a process of reviewing all the material and do an individualized review of each man's situation," because that had not been done for any number of these men. I mean there was no question about that.

What we saw in the cases on which we had hearings, were thousands and thousands of pages of intelligence reports, and other reports: some, interviews of the clients; some, interviews of other people;

some, just field reports. The Obama Administration recognized early on that a lot of that stuff had sat in warehouses and no one had looked at it. They had no clue.

The Obama Administration did set up a task force to do an individualized review of each person's case, and that's how they came up with the list that still exists of the people they call "eligible for transfer." But because they can't go home, because their countries aren't safe, eighty of them we won't send to Yemen because we don't think Yemen is safe, and we can't bring them into this country, they just sit in the prison.

MO: So you're giving the Obama Administration some credit, then, for trying to at least—

SW: I will give with the right hand and take with the left. Yes, Michael, they have done some things differently; they have done some things better. But there are still 166 guys sitting in the prison, and that's not right.

MO: But it also sounds like the Bush Administration wasn't exactly doing due diligence in their prosecution of these people.

SW: I think that's a fair characterization. [chuckles] And one that I think the Obama people recognized when they said, [mumbling] "We'd better actually review these files."

Career retrospective

MO: Well, we need to wrap this up at this point, but maybe I'll ask you a general question about your experience. Looking back on it, are you happy that you made this choice early in life, and where are you at now with respect to your professional involvement?

SW: [*unhesitatingly*] Yes, I'm happy I made this choice. It's been a great thirty years here. Oregon is a wonderful place to live. It's been a professionally wonderful place to work. This job has been exciting. It's been fulfilling. It's been difficult. It's offered challenges. On occasion it feels a little bit routine, and then, next day, a fascinating case walks in the door, and it's no longer routine.

The future, I turn sixty-five in a little over a month, and I am seriously thinking about it having been enough. It's been a great ride; it's been a long ride. It may be time for someone else in the next year or two to take this position and see what he or she can do with it.

[End of Recording Six. End of interview]