

THE SENATE LEGAL COUNSEL

Interview #1

Tuesday, December 2, 2003

RITCHIE: This year is the twenty-fifth anniversary of the Ethics in Government Act that set up the office of the Senate Legal Counsel. [The Act was signed into law on October 26, 1978 as part of Public Law 95-521. The Legal Counsel and his or her office handle legal matters and litigation on behalf of the Senate. It is basically the in-house law firm that represents and defends the constitutional powers of the Senate, and the separation of powers upon which our government system is based.] Since you were very much involved in that, I wondered if you could tell me something about its origins, and how you got involved?

LUDLAM: First, let me explain the reasons why I'm presenting this oral history of my public service career. Some who read this oral history may be interested in how the Senate Legal Counsel office was established. I will provide here an insider's view of how it happened. A few weeks ago I met with the staff of the Senate Legal Counsel office to brief them on the origins of their office. Going back to 1978 when it was established, I had not been in contact with them. So none of the staff had any idea who I was or why I had requested the meeting. They assembled wondering what I had to say. I gave them a detailed explanation of how their office had come to exist and why it was set up the way it was. I think they were quite surprised and pleased to know more about the history of their office. For me it was an enjoyable reunion! So I am happy to present that same history to you here for others to review.

Going beyond the Legal Counsel history, I'm also interested in presenting an overview of what a career on the Hill and in public service looks and feels like. I have been endlessly involved with the Stanford in Government (SIG) program, going back to my first SIG Capitol Hill internship nearly forty years ago. I hope that this oral history might be read by Stanford students who are contemplating a career on the Hill or in public service. My story may give them some idea of the highs and lows, the satisfactions and failures, of such a career. I hope what I say here encourages them to follow in my footsteps.

I want them to see a range of issues in which one might be involved in a public service career and the intense intellectual stimulation that comes with this. I've been

involved in issues ranging from separation of powers to embryonic stem cells, organizational conflict of interest to Social Security funding, patent reform to bioterrorism preparedness, and tax incentives for entrepreneurs to U.S.-China cultural engagement.

One theme you'll see throughout this oral history is the crucial role of staff. Most oral histories probably focus on the public officeholders, but it's my view that the staff often deserve the principal credit for what gets done or not done in this town. You will see that I have deep respect, bordering on reverence, for the many professional staff I've had the privilege to work with over the years. I want to highlight their contributions and give them a moment in the spotlight. They are unsung, but to me they are the real heroes of the public sector.

Finally, I'm coming to the end of this career. My wife, Paula Hirschhoff, and I have applied to rejoin the Peace Corps. We both served as volunteers in the '60s, I in Nepal from 1968-1970 and Paula in Africa from 1968-1970. We loved that experience so much that we want to repeat it—this time together. With my retirement looming, this is a good time for me to look back and to tell here some stories that shed light on the Senate as an institution. Whether my career has been especially productive or not is for others to judge. I know it's been a privilege to work all these years as a public servant and it's been a fascinating journey. It's certainly going to be fun for me to reminisce with you.

Let me first give you some of my background—how I came to work in the Senate and Congress—and then I'll focus on how I came to propose and enact the legislation setting up the Senate Legal Counsel office.

I first came to work in the Congress in the summer of 1965 as a Stanford in Government (SIG) intern in the House with Congressman Burt Talcott.¹ My grandmother knew Burt in Monterey, California, and she landed me the position. My grandmother would die a thousand deaths if she knew that her setting me up with that internship with Burt had led to my career as a Democrat! It was a great summer with Burt. There were then hardly any interns in Washington, Burt was in his second term so he had plenty of time to spend with me, and that was the summer the Great Society raced through the House—perhaps the most intensive legislative session in congressional history.² I was impressed with the Congress as a fascinating place to work.

Two summers later, I was a SIG summer intern with Congressman Glen Lipscomb, who was my local congressman from San Marino, California.³ I ran SIG's program here in Washington that summer. I had many conflicts with the right wing Republicans in that office, but it was another fascinating introduction to the Hill.

Both Burt and Glen were very conservative Republicans and I guess back then I was still nominally a Republican. San Marino was a John Birch Society (JBS) stronghold, ultra conservative.⁴ The JBS controlled the school system. I remember being quizzed by parents about my political beliefs before they permitted me to date their daughters. I remember assembly after assembly where the JBS surrogates railed against the communist menace.

From my days in high school, through my graduation from Stanford in 1967, I completely overhauled my world and political views. This was the '60s and it had a huge impact on me and my generation. I was ready to question the San Marino/JBS values. I've always had a rebellious streak. Just ask my parents! But they nurtured this side of me. In first grade, they placed me in the training school for teachers, the University Elementary School (UES), at UCLA, an experimental "progressive school."⁵ For one entire year, we studied the Navajo Indian, an experience that influenced me many years later to join the Peace Corps. We had no grades or formal lessons, but they taught us how to think. When we moved into the San Marino School District, I went through a brutal transition. At UES I had not been taught any of the basic skills—to add, subtract, and multiply, or to write in script. The San Marino folks didn't know what to do with me. They gave me three days of one-on-one tests to find out if I was retarded.

My evolution continued in high school. My junior year in high school I remember reading *Black Like Me*.⁶ It was an eye-opening account of the racism in the South. I also had a friend, Bink Garrett, who founded a high school paper called the *Inquisitor*, which drew the ire of the school board for its free thinking and left-leaning articles. The school board tried to ban it. I got in trouble for organizing a "heaven and hell" party at the school; my principal wouldn't let me use the word "hell" in any of the promotion materials. My principal also castigated me for organizing a coed overnight to Palm Springs for all the top school scholars. I was president of the scholarship society and wanted to go have some fun. I had to ask the school board for permission to do that! I was beginning to discover that the right wing can be quite reactionary.

San Marino was a wealthy, insular and ideological community, but my best friend, Janet Zarem, was one of the few Jews who lived there. I was always attracted to bright and outspoken people like Janet who helped me to think independently. My government teacher, Bear Stevens, and my drama teacher, Paul Clopper, were brilliant teachers who taught me how to think for myself. They're still doing that!

Despite all these influences, I was then still a Republican. My car sported a bumper sticker that said, during the early Kennedy years, "I miss Ike, hell, I even miss Harry." The neighborhood gang often referred to the only Democrat who lived on our street as if he inhabited a haunted house. I was becoming more political, but hardly on the liberal side. I ran for student body president my senior year—my slogan was "Out of the Muck with Chuck"—but I got trounced. I also ran for head cheerleader. I was certainly the noisiest candidate, but I got trounced in that election also. In my high school annual, under my picture, the editors chose "enthusiasm with a purpose" to characterize me. I think it proved to be apt.

My freshman year at Stanford I was the social chairman, hardly a political post. I organized a school-wide casino party. But on Big Game weekend President Kennedy was assassinated and that spring some of my classmates went to Mississippi and were beaten up by Klan members. The '60s had begun, when questioning authority became a lifestyle, and many of us railed against the forces of reaction whether they were bigots, chauvinists, or war hawks.

Around 1964 I began turning fiercely against the Vietnam War and quickly became a Democrat. Bink, who had joined me at Stanford, had a big impact on my thinking about the war. I organized the protest at the 1967 Stanford graduation—those opposed to the war wore white armbands—and this was a huge crisis in my family. My mother had a fit—she thought people at the graduation would blame her for raising a son who would dare to ruin the event for everyone. This generational split was occurring across the nation—tearing families apart.

I was also heavily influenced by my best friend at Stanford, Jack Wenzel, who was a true intellectual and vastly more informed culturally than I was. When I got to Stanford I had never heard of Beethoven, while Jack knew every composer, symphony, and opera. Jack has been a totally loyal and generous friend for more than forty years.

My four years at Stanford occurred during the height of the "Sixties," with the assassination of President Kennedy, the Free Speech Movement at Berkeley, the civil rights clashes, the assassination of Malcolm X, the Black Panther Party, Betty Friedan starting the woman's movement, the Watts Riot, Cesar Chavez's grape boycott, the Fillmore and the Jefferson Airplane, Haight Ashbury and the Hippies, Timothy Leary's LSD/Acid and his Merry Pranksters, Ken Kesey and Lawrence Ferlingetti, and all the other manifestations of a generation in revolt. Martin Luther King, Jr., came to speak at Stanford and I'll never forget his charisma. When Hubert Humphrey came, I helped organize the protest. It was the height of the Cold War and the deepening conflict in Vietnam. All this turmoil had a huge impact on me and still does.

The summer after the graduation, I worked in Congressman Lipscomb's office where my opposition to the Vietnam war did not sit well. It was a very uncomfortable summer. They also hated the fact that I did some canvassing in favor of a fair housing initiative in Montgomery County. They didn't think I was a Republican and, in fact, I no longer was a Republican. During that summer of 1967, I witnessed some history. One of my SIG roommates was one of Al Lowenstein's best friends and Al came to stay with us as he attempted to recruit a senator to run against Lyndon Johnson in the 1968 presidential primaries.⁷ When Al finally persuaded Eugene McCarthy to run, I went "clear for Gene" and worked for McCarthy in the 1968 primaries.

Right after the Robert Kennedy assassination I headed off to serve in the Peace Corps in Nepal for two years. I basically collapsed into the Peace Corps, totally wrung out from the horrors of 1968. At the end of my Peace Corps experience I met one of the giants who have shepherded me thorough life, Peter Hoagland. We met on a beach in Greece. We were both chasing after women, fortunately not the same one! Peter was another Stanford alum. He gave me good advice—to get back to law school and get my degree. I was thinking to bum around the world for awhile, and was a bit aimless. Peter was my first true mentor and remains one, as well as being a dear and trusted friend. He later became a distinguished state senator in Nebraska and a member in Congress. He would have been a fabulous U.S. senator, but being a Democrat in Nebraska, that was never possible.⁸

In the summer of 1971 I was again an intern, this time in the office of the secretary at HEW [Health, Education and Welfare] working on housing and welfare issues. That was after my second year at the University of Michigan Law School. It was quite clear by now

that I was headed into politics and public policy for my career. My first government employment after graduating from law school was as a lawyer at the Federal Trade Commission, Bureau of Consumer Protection, from 1972 to 1975. I prosecuted companies for deceptive advertising.⁹

In 1975 I got back to the Hill for my first job as a lawyer. I was hired by the Senate Judiciary Committee working with Senator Jim Abourezk.¹⁰ That's where I worked on the Senate Legal Counsel legislation. Irene Margolis, my first boss on the Hill, was a superb mentor.¹¹ When Abourezk retired in 1978, I served for two years in the Carter White House with the Domestic Policy Council working on regulatory reform issues. Si Lazarus, my boss, was another superb mentor.¹²

When President Carter was defeated by [President Ronald] Reagan in 1980, I was unemployed for six months and then served as a consultant for the next six months with the Alliance for Justice. I wrote a report railing against the Reagan corruption of the regulatory process. Then I became counsel with my father's law firm, Musick, Peeler, and Garrett, which was just then opening a Washington office. I focused on the 1982 tax bill and efforts to save the tax exemption for non-profit university and hospital construction, and related bonds. I won that fight.

I finally landed back on the Hill with Congressman Gillis Long,¹³ from 1982 to 1985, working with him to staff the House Democratic Caucus, of which he was chairman; the Joint Economic Committee, of which he was a member; and the House Rules Committee, where he served as the second ranking member. When Gillis died suddenly in 1985, I came back to the Senate again, this time with Senator Dale Bumpers.¹⁴ I served as chief tax counsel of the Senate Small Business Committee for eight years, until 1993.

In 1993 I began seven years of service as the principal lobbyist for the biotechnology industry with the Biotechnology Industry Organization (BIO). I was the vice president for government relations and represented one thousand companies on the cutting edge of molecular and genetic research. Now I'm back with Senator [Joseph] Lieberman as his economics legislative assistant and counsel, focusing on high tech, budget, tax, and industrial policy issues.

So I've bounced around a bit over these forty years. Three internships, the Peace

Corps, the F.T.C., Senate, White House, House, Senate, and downtown as a lobbyist.

RITCHIE: A varied career.

LUDLAM: Yes. I'm not sure you could say my career has always trended upward! It's gone horizontal a few times! But as I hope to explain in this oral history, I've had some wonderful opportunities to serve and make public policy.

RITCHIE: Were your Capitol Hill internships important?

LUDLAM: Yes, Stanford in Government (SIG) was critical to much of my transformation and to my whole career. I've always been grateful to SIG for the role it played. SIG is over forty years old and this year it's commemorating its history. They asked me to write the overview and introduction for a brochure they're issuing. SIG is a fabulous organization. I've had the privilege of working with it for many decades to bring new generations of Stanford students here for internships. Jeanne Halleck¹⁵ and Suzanne Abel,¹⁶ both with Stanford's Hass Center for Public Service, have been critical mentors to SIG. They are both beloved by the students and I am deeply grateful to them for helping SIG to thrive.

SIG's success led me and some others—principally Catherine Milton at Stanford—to found a year-round academic campus here—Stanford in Washington (SIW). Catherine was the assistant to Don Kennedy, Stanford's president and former FDA commissioner. Don and Catherine were visionaries who led the founding of both SIW and the Haas Center for Public Service at Stanford, institutions that have changed the whole university for the better. Catherine remains a dear friend. The first director of the SIW campus, David Danelski, and his successors, Elie Abel and Adrienne Jamison, have created a first-rate program.

It's an inspiration to me to see so many capable and enthusiastic students coming here each year for internships with SIG and SIW. Many of them have become friends, including Andy Weis, now a lead staffer with the House Homeland Security Subcommittee, and Jon Welner, Gary Rosen, and Pilar Keagy. I know the country is in good hands with them.

RITCHIE: How did you become involved with the Senate Legal Counsel proposal?

LUDLAM: The Senate Legal Counsel proposal has a strange and tortured history.

The proposal emanated from the Watergate scandal. The Select Watergate Committee proposed in its final report that Congress enact legislation to address a variety of abuses and problems that the committee had documented. These recommendations were bundled together and introduced as a bill called the Watergate Reform Act, introduced as S. 495 on January 30, 1975.

My base at the time was as a counsel to the Separation of Powers Subcommittee of Senate Judiciary. Jim Abourezk of South Dakota was the chairman. He was one of the wildest members ever to serve in the Congress, and I will later recount some stories of his antics. It was a frenetic four years working with him, and we got a lot done.

One person you should interview about this bill is Dick Wegman, who was the staff director for [Senator Abraham] Ribicoff for many years.¹⁷ Ribicoff was the chairman of the Senate Government Operations Committee, which was the key committee for this legislation, and Dick led the committee work on the bill. Dick fully qualifies as an "old war horse."¹⁸ Dave Schaefer, now a lawyer up in Connecticut, was a key player on this bill.¹⁹ So was Ira Shapiro, who served in the Senate for many years with that committee and also with [Jay] Rockefeller and the Clinton administration.²⁰ Dick, Dave, Ira, and I, and a few other staffers are the ones who were responsible for enacting this bill into law. We worked on this project intensively over a four-year period—often meeting every day to chart strategy. The law we enacted, eventually called the Ethics in Government Act, includes the Senate Legal Counsel provision.

When S. 495 was introduced, I had just come on the scene with the Separation of Powers Subcommittee. I was the designee for the Judiciary Committee for this bill, a fabulous first assignment.

The Judiciary Committee had jurisdiction over the bill jointly with the Government Operations Committee [now the Homeland Security and Governmental Affairs Committee]. Judiciary had jurisdiction over the special prosecutor provision in the bill and perhaps some other provisions. My first contribution to the effort was to arrange for my committee to waive its jurisdiction over the bill. This meant it was only considered in Gov. Ops. where its chairman, Abe Ribicoff, was a strong supporter of the legislation. So waiving Judiciary Committee jurisdiction was critical.

RITCHIE: How did you get the Judiciary Committee to waive its jurisdiction?

LUDLAM: Strangely, it wasn't too difficult. Normally committees fight to the death to gain or retain jurisdiction. In fact, there's no legislation that is more contentious than legislation reforming committee jurisdictions!

In this case, [Senator James] Eastland, the Judiciary Committee chairman, didn't believe in ethics reforms or Watergate reforms, but he did not care enough to work to block ethics or Watergate reforms.²¹ He wasn't the most active of chairmen. He wasn't looking for work. He was focused mostly on keeping his tenure as chairman of a committee whose membership included many extreme liberals. This is when Democrats were in firm control of the Senate; there were sixty-one Democrats in the Senate in 1975. Judiciary has always been a very liberal committee because that's the kind of member who loves nasty constitutional and criminal law debates and the judgeship confirmation fights. It's always been, and always will be, a very left-leaning committee on the Democratic side, with members like Ted Kennedy and John Culver. On the Republican side it's always been, and always will be, a hard right-leaning committee, with members like Roman Hruska and Strom Thurmond.

Eastland was an old-line Southern racist and right-wing demagogue, a classic Dixiecrat.²² He was fiercely anti-Communist. He required that all staffers on the Judiciary Committee secure FBI clearances. He feared a Communist might be found to be working on his committee! Eastland probably thought that Joe McCarthy was the greatest patriot in history for attacking supposed Communists working for government.

Eastland was also accustomed to working in smoke-filled rooms. When the Senate passed a resolution requiring committee markups to be open to the public, he came into the markup room and said, "Press can stay but staff gotta go." I guess he blamed the staff for the sunshine rule. So all the staff left and the markup collapsed!

His strategy for retaining his chairmanship of the Judiciary Committee was to delegate vast amounts of power and funding to the subcommittees chaired by the liberal Democrats. It was a bargain for the liberal members of the committee because there was no centralized hoarding of the power or money with the chairman.²³

Eastland let the subcommittees run wild. For example, Phil Hart ran all his antitrust work out of his subcommittee, Birch Bayh ran all his constitutional rights work out of his subcommittee, and Kennedy ran all his deregulation work out of the Administrative Practices Subcommittee.

This was Eastland's bargain with the liberal members—bribe them with subcommittee funding so he could retain his chairmanship. With the Watergate Reform bill, he delegated to me the authority to waive jurisdiction over the Watergate bill. We knew it'd be easier to move this bill through the Senate if we kept Judiciary quiet, so waiving Judiciary Committee jurisdiction was very important.

Another factor in this was that [Senator] Sam Ervin had served on both the Judiciary and Gov. Ops. Committees and he had the practice of taking bills back and fourth between the two committees depending on where he had the most clout at the time, and the most support.²⁴ So there had been some tradition through Sam Ervin of the Judiciary and Government Operations working closely together, with Ervin using one venue or the other, but never both. He always managed to keep it at one venue rather than two.

Waiving Judiciary Committee jurisdiction over the Watergate bill was a crucial transaction; it's never easy to work a bill through two Senate committees. We had little or no support on Senate Judiciary for this bill and we had high-ranking support over at Gov. Ops. The Judiciary Committee clearly had jurisdiction over the special prosecutor title of the Watergate Reform Act. It's shocking that the committee didn't fight for its jurisdiction so that it could defend the Justice Department's interests in the matter. It's inconceivable today that the Judiciary Committee would waive its jurisdiction over these issues.

The White House, if it had really wanted to kill this bill, probably could have pressed Judiciary to assert its jurisdiction. The White House never did that—a major oversight or miscalculation. Pat Wald made, or failed to make, this decision. I'll talk more about Pat shortly. She was one of the critical players in this saga. I had a personal relationship with Pat, which involves our common trips on the L2 bus. My relationship with Pat turned out to be rather important as we processed this bill.

So the Watergate Committee had made these reform recommendations, which were quite voluminous. They were all packaged into this one bill. It turned out to take a tortuous

four years to enact these recommendations into law. The Watergate Reform bill in the Ninety-fourth Congress, S. 495, passed the Senate on July 21 of 1976 by a vote of 91-5. Then the bill died at the end of the Congress. The House had no interest in the reforms. The Watergate bill was reintroduced as the Public Officials Integrity Act, S.555, on February 1 of 1977. It passed the Senate 74-5 on June 27, 1977 and finally passed the House (as H.R. 1) by 368-30 on September 27, 1978. This is the bill that became law on October 26 of 1978 as the Ethics in Government Act. All told, it took us forty-six months to enact this bill into law.

Our problem was that as time passed from the Nixon resignation on August 8 of 1974, the momentum for reform dissipated. Worse than that, there were essentially no members in the Congress who wanted to enact the specific reforms the Watergate Committee proposed.²⁵ There was essentially nobody in the executive branch that wanted any of these reforms.

Basically, this was a staff triumph. We staffers, Dick, Ira, Dave, and I, knew that if we ever got the bill up for a vote in the House or Senate, we would win the vote. The problem was getting that vote scheduled. When we got a vote, the votes for the bill were overwhelming because people were forced to vote for anything called "ethics" or "Watergate" reforms. Getting the bill scheduled was the bitch. In a moment I will tell you about the maneuver that I personally managed with regard to Tip O'Neill which was critical to the scheduling of the bill in the House.

The Senate Legal Counsel proposal was included in both the 1975 and 1977 bills, S. 495 and S. 555. Its enactment was contingent upon passing the larger Watergate Reform bill. It was a hostage in the larger bill. So if the larger bill had failed, we would not have established the Senate Legal Counsel office. We did have some problems with the Legal Counsel proposal, which I will explain, but it was the least controversial provision of the larger bill.

The other titles, especially the requirements for public financial disclosure by high ranking officials, members of Congress, and senior congressional staff, the procedures for the appointments of special prosecutors, and the revolving door restrictions when congressmen and congressional staff leave the Hill to lobby, were all very controversial.

Special prosecutors have proven to be very controversial, especially with the special prosecutors appointed to investigate President Clinton and his administration. The revolving door restrictions and financial disclosure have also been extremely controversial. Over twenty-five years, most public servants have come to accept financial disclosure and the revolving door restrictions, with all of the warts and problems, but at the time the idea that you should disclose your personal finances to the public, and that there would be restrictions on post-Hill employment downtown with a lobby firm, were wildly controversial. These ideas were hated by the members and congressional staff. I mean the members and the staff hated financial disclosure. The members and the staff hated the revolving door restrictions because that forced them to observe a cooling off period of one year before they could lobby their old colleagues or employers on the Hill.

In addition, the Justice Department hated the special prosecutor provision. It clearly implied that the department lawyers were not independent enough to investigate high profile allegations against executive branch officials. The department viewed the special prosecutor proposal as a pejorative statement about its honesty and prosecutorial zeal. The special prosecutor became unavoidable in the case of Watergate when Attorney General [John] Mitchell himself was implicated in the scandal.²⁶ But, despite this clear need for a special prosecutor to investigate Watergate, the career lawyers at Justice wanted to kill this practice. Institutionalizing the appointment of special prosecutors was anathema to them. It was a slur on their integrity.

The Congress was appalled at the idea that the special prosecutors would be appointed to investigate and prosecute members of Congress. They didn't much mind appointing them to harass executive branch officials. They hated the idea of applying it to themselves.

This was especially true of Tip O'Neill, who at the time was involved with Koreagate, a scandal about his and other members' contacts with some lobbyists for Korea. He was fearful that he would be prosecuted.²⁷ O'Neill was sitting on the reform bill in the House, partly for fear that it would apply to him and other high ranking Democrats—that there would be a Koreagate special prosecutor.

The purpose of the special prosecutor provision is to avoid a direct conflict of interest when the Justice Department is investigating the president or attorney general or other

higher-ups in the executive branch. There is no conflict in the department investigating a member of Congress, so we never had any sense that the special prosecutor should be appointed to investigate a member of Congress. But O'Neill feared that the Republicans might offer an amendment to the bill that would do that, and cite Koreagate as the rationale. No such amendment was ever offered and the final bill only applied to executive branch officials. Despite these facts, O'Neill feared the worst and was holding up our bill.

So one of the things that I did—and it's one of the rougher things that I've ever done in my career—was to plant a story in the paper that O'Neill was holding up the ethics bill and special prosecutor provision because of his possible Koreagate involvement, because he feared that a special prosecutor might be appointed to investigate him.²⁸ Planting that one story was sufficient to force O'Neill to take his hold off the reform bill and schedule it for a House floor vote. That one story had an immediate and decisive impact. One article, one reporter, nicely done, sprung the bill in the House. I did nothing more than was necessary to pry the bill loose in the House. It was surgical, elegant.

I'm not sure Dick, Dave, and Ira knew I was planting this story. I'm sure that none of the senators knew about it—they'd have blocked it. Sometimes staff just has to be creative and entrepreneurial! I do not recall feeling terribly at risk in "outing" O'Neill. He was a very popular Speaker and I'm sure if I'd been caught I'd have been summarily fired. I was careful, of course, and didn't get caught. I recall feeling this was something that would help our cause and get the bill unstuck. In fact, I think if I hadn't done this, we might have lost the bill in the House. So it was definitely worth the risk—especially because I didn't get caught and it worked! What did Churchill say, "There's nothing more exciting in life than having a bullet pass by your ear and surviving the experience"?

The political game can get rough and you have to know when and how to take risks. You have to know when they're worth it and how not to get caught. We knew why O'Neill was holding up our bill, so we had to "out" him, and I did. Simple as that. Nothing personal, and leaving no fingerprints. In fact, I rather admired and liked O'Neill. He was a great guy, but he was holding up our bill. I had no choice but to get rough. We knew we'd win if we could only get the bill scheduled for a vote, which was exactly what happened.

The only members in either house that supported the bill were Ribicoff, [Charles] Percy, [Jacob] Javits, and Abourezk. [Peter] Rodino, House Judiciary Chairman, hated it,

absolutely hated it, along with everybody else who counted in the House. If members had to vote on it, they were going to vote for it. As I've said, S. 495 and then S. 555 passed the Senate by a 20 to 1 multiple in 1976 and 1977. In 1978 the reform bill passed the House by a multiple of 200 to 1. The House voted against striking the special prosecutor provision by a vote of 344 to 49, a multiple of 7 to 1. It was clear if we were to get a vote on it, we were going to win. The problem was getting a damn vote on the bill.

One key player was Pat Wald. Her role in this process is largely unknown and unsung. Pat was the head of the Office of Legislative Counsel at the Justice Department during this time. She was the chief lobbyist for the department. She is well-known now as a former member of the D.C. Court of Appeals and judge with the International War Crimes Tribunal.²⁹ She is a distinguished, brilliant, and wonderful woman.

I'd gotten to know Pat during a six-month internship I'd had in 1971 at the Center for Law and Social Policy, where I worked for the environmental plaintiffs on the Alaska pipeline lawsuit. This was a landmark case because it defined what it meant to prepare an environmental impact statement. More on this later. Pat was a lawyer at the center and a friend. My friendship with Pat is one of dozens of such relationships that have proven to be crucial over my career. This is a small town and relationships can make all the difference. The rule is that you need to be careful with your relationships because you never know when someone will turn out to be on the other side or a crucial ally. The staff who take shortcuts and abuse others find that there are costs to this that cripple their effectiveness.

Pat and I both lived in upper Northwest D.C. and happened to ride the L2 bus together down to the Federal Triangle and the Hill. Probably twenty different times, twenty-five times, she and I rode the bus together. She'd get off at Justice and I'd continue up to Capitol Hill. During those many trips I educated her, or I think the better word is "lobbied" her, on all of the issues relevant to the Watergate Reform bill.

These captive audience educational sessions helped our team a great deal. Pat was instrumental in persuading the Justice Department to back off its opposition to the bill. She didn't push the Judiciary Committee to assert jurisdiction. I think she didn't in part because of our personal relationship and those L2 bus rides. She became convinced that the bill would not lead to the demise of the Justice Department. Pat deserves tremendous credit for the enactment of the Ethics in Government Act.³⁰

In addition [President Jimmy] Carter was a moralistic guy, who won against [President Gerald] Ford because of Watergate. Carter was probably the president more interested in ethics than any president we've ever had. So the combination of Pat Wald and Jimmy Carter, and incredible maneuvering by Dick Wegman and the rest of our team, finally got it enacted. Paul Rosenthal was involved. Jim Graham, who's now a D.C. city councilman, was involved as well. He handled the revolving door provision in the bill. Dave Schaefer handled the special prosecutor part. I handled the Senate Legal Counsel title. If there was ever a bill that was driven and enacted by staff, and staff alone, this was it.

RITCHIE: Why is the Senate Legal Counsel's office important?

LUDLAM: Its importance is easy to explain. Every institution in this country gets involved in litigation—businesses, churches, hospitals, and universities. In every case the powers of the institution can be put at risk. In many cases they are defending immunities and powers. This is also true of lawsuits against government, and lawsuits against the House and Senate. So all of these institutions need vigorous, expert legal representation. This representation is critical if the Congress is to prosper as a co-equal branch of our government in a constitutional scheme based on separation of powers and checks and balances.³¹

The problem is that there was no office in the Congress that was handling this critical litigation function in defense of the separation of powers and checks and balances. Can you imagine an institution in the private sector or an agency of the government with no general counsel, no law firm on retainer, and no strategy for handling litigation? Well, that's what we had here on the Hill. We had a badly flawed, ad hoc system, a patchwork system that left us mostly defenseless against attacks on our constitutional status.

The inclusion of this provision in the Watergate Reform bill arose from a vague reference in the Watergate Committee report on the need for a better system to handle congressional representation in court.³² That committee had struggled with a massive litigation docket. It was involved in fifty or sixty different legal actions, and had to do all of it from scratch with no Senate institution to help it. James Hamilton, one of the committee litigators, wrote a book on the subject, *The Power To Probe*, which outlines the struggle of the Watergate Committee to deal with the myriad legal and litigation issues that arose in the course of its investigation. The committee couldn't enforce its subpoena for the Nixon tapes and it had to enact a jurisdictional statute to bring this lawsuit. I'll get into this problem later.

The committee had endless litigation problems, and they knew how inadequate the representation of Congress was in court. So they included a vague reference in their final report to the need for someone to take care of litigation involving the Congress.

I was the one who fleshed it in, fashioned it into a workable concept, and made it happen. I used the Watergate bill as the vehicle to get it done. It's hard to believe, but the Justice Department was then serving as legal and litigation counsel to the House and Senate, to the committees, and to the members. With the Watergate Committee investigation, it was obviously inappropriate to ask the Justice Department to handle all the litigation that the investigation spawned. So they'd created an ad hoc law firm in the middle of the committee staff to handle it.

While the Watergate investigation is an extreme example of conflict between the legislative and executive branches of government, it was clear to me that it was never appropriate for the Justice Department to handle the litigation involving members of Congress. Today we would look at that arrangement and view it as ridiculous. It's obvious that the Justice Department represents a separate and often competitive branch of government. The Executive Branch, represented by the Justice Department, is in conflict with the Congress on many subjects. Separation of powers and checks and balances is often a zero sum game. If one branch gains powers, it's often at the expense of the other branch. If one believes that the separation of powers is fundamental to our freedoms, as I do, then having the Congress represented in litigation by the Justice Department is totally unacceptable.

We did not have to set up the Senate Legal Counsel office by statute. We could have set it up informally or by a simple Senate resolution.³³ Indeed, it's very strange that we have a Senate office that's been created by statute. Statutes are rigid, hard to change, hard to amend. Amending them requires the concurrence of the other House and the president.

It's even stranger that the Legal Counsel statute is rather detailed. For example, it has provisions regarding terms of office and removal. This is pretty unusual stuff for the Senate, which does not like to get bound up with statutory requirements. But I thought this was the way to get this office firmly established, to give it stature and power, and to make it permanent. So I wanted to ride this proposal on the Watergate bill. Given the opposition of the Justice Department to the Legal Counsel office, I thought it was especially important to

set up this office in a statute and give it full legal powers and standing.

To establish the rationale for the office, I organized a series of hearings on the issues regarding representation of Congress in litigation.³⁴ The hearings focused on what the Justice Department was doing and not doing to represent Congress in court. I crafted the hearings as a prosecution of the department, highlighting every instance of conflict or arrogance. I had two goals, to end the representation of the Congress by the department and to set up the Legal Counsel office. To accomplish these goals I had to indict and convict the department. It wasn't personal. It was a necessary and unavoidable strategy.

The hearings we had on this issue in the Separation of Powers Subcommittee were especially interesting because we invited Phil Kurland, who was a consultant to the subcommittee and an expert on separation of powers, to appear on the panel to ask questions. Abourezk had the delightful habit of leaving in the middle of the hearing and letting consultants and staff ask all the questions. In those two days of hearing, I asked 170 questions of the witnesses, with no member present. Other questions were asked by Phil and our chief counsel, Irene Margolis. Basically I chaired the hearing, which was a lot of fun. We certainly don't handle hearings this way anymore now that we have C-SPAN!

The hearings highlighted the obvious conflict of interest in Justice Department representation of Congress. If a member needed legal counsel, he or she either had to pay for it or go begging to the Justice Department. The member could retain counsel at his or her expense and then seek reimbursement, but getting reimbursed required the enactment of a special resolution appropriating Senate "contingent funds" after a debate and vote on the Senate floor—a very cumbersome, intensely public, potentially embarrassing, and uncertain process.

At one point Senator Bill Proxmire had been sued by someone in connection with his Golden Fleece Awards.³⁵ He was sued by some researcher who felt he was being defamed when he received one of Proxmire's awards. Proxmire had to get a Senate resolution passed to get reimbursed for his legal bills in defending himself.³⁶ His argument, which I thought was completely valid, was that in defending himself he'd also been defending the constitutional prerogatives of all the members.

The debate on the resolution presented an interesting problem for Proxmire because

he held the record for the longest continuous record of not missing a vote, yet he was being asked to vote on a resolution to cover his legal bills. We explored whether he could vote "present," but in the end he voted "no" and kept his continuous voting string alive and did not vote for something in which he had a direct financial interest.³⁷

I was involved with the debate on this resolution—strongly favoring Proxmire's claim for reimbursement—and helping him to avoid breaking his consecutive vote string. If we'd had a Senate Legal Counsel at the time, it would surely have handled Proxmire's case, so he would never have had to front the costs for his attorney and risk that he'd not be reimbursed. His dilemma demonstrated exactly why we needed to establish the Legal Counsel office.

In the executive branch, of course, officials are sued all the time and their cases are routinely handled by the Justice Department. My view was that Congress needed its own Justice Department. This ad hoc scheme for congressional representation was not a small problem. It is common for the Congress, members, and committees to get involved in litigation. In our hearings, we found that the Justice Department had handled fifty-five congressional cases in the previous five years.³⁸ It had hired private counsel in eight cases because it thought these cases involved a conflict of interest in pursuing the point of view of the congressional defendant, and it had refused to provide representation in five cases.

It was a complete mess. There was no reliable, predictable place where a member or a committee could go to secure legal and litigation services. There was no place to go for advice in crafting a subpoena, in discerning the rights of witnesses in a congressional hearing, and in granting immunity to a witness or handling a grand jury problem. There was no office to give advice to members and staff on how to avoid litigation.

It was an outrageous conflict of interest for the Justice Department to handle these issues. There are natural—and desirable—tensions between the branches of government. Fundamentally, the executive branch is institutionally opposed to a stronger and more powerful Congress. It views the separation of powers as a zero sum game; the more powerful Congress becomes, the less powerful is the executive branch.

The Justice Department opposed the Senate Legal Counsel provision of the Watergate bill, saying there was no need for "drastic measures" such as establishing the Senate Legal

Counsel office. The department said that the bill I'd drafted to establish the Legal Counsel office, S.2731—which was introduced separately from the Watergate legislation to give it more prominence—contained “substantial constitutional infirmities.” It said this even though it admitted, “There is no doubt that in certain instances the Department’s interests and functions are at odds with an expansive view of the speech and debate clause” immunity for members of Congress and their staff.

Few understand the critical importance of the speech and debate clause in preserving the separation of powers.³⁹ Defending this immunity was one of the critical functions that we could not entrust to the department. The Justice Department asserted that the executive branch must, should, and would control all government litigation, including that of the Congress. The Justice Department completely dominates all the executive branch litigation and has always fought to control the litigation of the independent regulatory commissions, so its position regarding congressional litigation was part and parcel of its larger war to dominate all government litigation. It wanted the Congress to be dependent on the department. This would give it opportunities to limit the power and independence of the Congress. I viewed this as a fundamental threat to the Congress and our whole system of government. I viewed creating the Legal Counsel office as an important strategy in defense of the separation of powers.

Another source of tension was the Justice Department’s assertion that it alone represented the “United States.” Even when its viewpoint was exclusively that of the executive branch and in contradiction to the viewpoint of the Congress, the department asserted that it still represented the “United States.” The executive branch is responsible for taking care that the laws be faithfully executed—that’s what the Constitution says—but that doesn’t mean that only the executive branch can say that it represents the “United States.” As a partisan of the Congress, I found the department’s views to be arrogant.

The Justice Department also opposed the provision I inserted in our bill to provide jurisdiction in the courts to enforce congressional subpoenas. Let me explain why we need this provision. The Watergate Committee had not been able to enforce its subpoenas for the Nixon tapes for lack of standing and lack of court jurisdiction. They had to enact a special statute conferring jurisdiction on the courts to hear the Watergate Committee legal action to enforce the subpoenas against Nixon. But it only applied to that one committee in that one investigation.⁴⁰

To remedy this problem, I inserted a provision in our bill providing for civil subpoena enforcement of congressional subpoenas using the courts—across the board.⁴¹ Originally the provision I drafted applied to any subpoena, including a subpoena to an executive branch official. Of course, the Justice Department hated that! In the end, I was forced to agree to limit that jurisdictional statute for civil enforcement against private citizens and corporations and not the executive branch. It became 28 USC 1365. This was one of the compromises I was forced to make during the consideration of the Senate Legal Counsel proposal.

RITCHIE: What is the history of subpoena enforcement for the Congress?

LUDLAM: Before I enacted this subpoena enforcement statute, there were very limited and cumbersome ways for Congress to enforce its subpoenas. One way was to refer the matter to the Justice Department to bring a criminal contempt action against an individual who refused to comply with a congressional subpoena. There were times, however, when the department determined not to indict that person. And it had a monopoly over all criminal indictments.

In addition, in criminal enforcement proceedings the courts were often reluctant to send a recalcitrant witness to jail. In many cases the witnesses were claiming what they believed were legitimate constitutional rights and immunities—like in the McCarthy era. As an alternative to criminal indictment, Congress could attempt to enforce a subpoena through “direct contempt.” This involved sending the House or Senate sergeant at arms to arrest somebody and jail them in the Capitol. In the hearings, I went to the Architect of the Capitol and found out where the old Capitol jail was located. There was at one time a jail here in the Capitol where the Congress could imprison citizens who refused to comply with its subpoenas.

RITCHIE: Where was it?

LUDLAM: The AOC [Architect of the Capitol] reported to me, “Several rooms in the Capitol have evidently been used for detention of offenders. They were called Guard Rooms and it is not always clear whether those rooms were kept strictly for custody of prisoners or whether they were also used as a guard station.” In addition, there’s an article in the [Washington] *Evening Star* on October 6, 1902, that refers to a guard house located

in the "room now occupied as the House of Representatives post office, in the southeast corner of the ground floor of the Capitol." This is the room that was used by the infamous House bank. There are quite a few other references to guard rooms.

The reason I tried to locate the old Capitol jail was because it was relevant to the subpoena enforcement proposal I was championing. In explaining the "direct contempt" option, it became obvious that we needed to establish a modern system. History has its uses!

With only criminal and direct contempt available, it was very difficult to enforce a congressional subpoena. It's not always appropriate for Congress to beg the attorney general to indict someone, and it's not realistic for Congress itself to imprison someone. The Congress should not have to depend on the goodwill of the separate and often antagonistic branch of government. Also, criminal prosecutions are a crude way to pressure a witness to produce documents or testify.

In drafting my proposed civil subpoena enforcement mechanism through the courts, I spent an entire congressional recess researching every case I could find on civil subpoena enforcement in any court, in any context. I took every precedent that was pro-enforcement and put them in the legislative history. In essence, I wrote a brief in favor of the new subpoena enforcement mechanism. I attempted to give the new Senate Legal Counsel every advantage when the new mechanism was used—and challenged. I cited twenty-five cases, all of which would help the Senate Legal Counsel defend the new mechanism, and secure enforcement of the subpoena. I knew that the first enforcement case would be critical.

With the enactment of this law, civil subpoena enforcement through the courts is available to the Senate. This approach has been held to be constitutional and it's been utilized quite successfully.⁴² It would have been used much more if the Senate were serious about launching investigations, which it isn't. I find it disgraceful that the Congress shows so little interest in its investigations power. I attribute this to the decline in serious, as distinct from political, members on the Hill. For the new, Yuppified members, investigations are just too much work for them!

Another provision in the Senate Legal Counsel title, which was original to me, is the right of Congress to defend the constitutionality of statutes when the executive branch refuses to do so. I was rather amazed that the executive branch, which was supposedly

responsible for taking care that the laws be faithfully executed, was failing to defend the constitutionality of some statute. It had a practice of saying, "The United States believes that this statute is unconstitutional." There had been five cases in three years where it had failed to appeal a finding that a statute was unconstitutional.

In one case the Justice Department had actually intervened to attack the constitutionality of a statute. It might not like the statute, and it might not defend it quite as vigorously as we would like, or it might use arguments that are not the same arguments we'd make, but it is an outrage for the Justice Department to intervene in a case to attack the constitutionality of a statute. In my view, this completely violates the constitutional duties of the executive branch to "take care" that the laws be "faithfully executed."

As a congressional partisan, my view is that the executive branch is required to defend the constitutionality of all statutes. I attempted to address this issue in the Senate Legal Counsel bill. Part of this issue focused on the right of Congress to intervene in cases where the constitutionality of a statute was at issue. When a party is permitted to intervene in a case, he gains many rights, including the right to appeal. If you file only an amicus brief, you have none of the rights of a party and no opportunity to appeal. So intervention was critical in cases where the Justice Department failed to appeal a court ruling that a statute was unconstitutional.

The fascinating history here is that there is a jurisdictional statute—section 2403—giving the executive branch the right to intervene "for argument on the question of constitutionality." It doesn't say, "To intervene to defend the constitutionality of a statute." It says to intervene "on the question of the constitutionality." The Justice Department had interpreted Section 2403 to permit it to intervene either to defend or oppose the constitutionality of a statute. And it had, in fact, relied on Section 2403 to intervene to attack the constitutionality of a statute.

I was curious about the legislative history of Section 2403, so I went down to the Archives to look up the internal Justice Department memos about it. All of the files had been made public. It turns out that Section 2403 was the only part of the Roosevelt court packing plan that became law. Roosevelt's only purpose in enacting Section 2403 was to intervene to defend the constitutionality of the statute. The reactionary Supreme Court was declaring many New Deal statutes unconstitutional. I looked at all of the memos between the attorney

general and Roosevelt about the whole court packing plan. It was a fascinating story of how they researched the number of justices that had been on the Court, and all the historical precedents for increasing the number of justices.⁴³

This history of Section 2403 confirmed that its only intent was to permit the executive branch to intervene to defend the constitutionality of statute, and not to intervene to attack the constitutionality of any statute. But, some staffer screwed up the drafting of the provision! The text of the statute was not written tightly enough to prevent its misuse by the executive branch. The statute should have said the intervention was authorized only to "to defend" the constitutionality of a statute. In this case, congressional staff misdrafted the statute and permitted the executive branch to intervene to attack the constitutionality of a statute. Sometimes staff can make some horrendous mistakes if they aren't paying attention to the details. This is one of the problems we're seeing with so many inexperienced staffers here in the Congress.

I wanted to amend Section 2403 to limit its use by the executive branch to intervention to defend the constitutionality of a statute, and I also wanted to give the Congress the right to intervene to defend if the executive branch didn't do so. My intent was to ensure that someone defended these statutes. I didn't manage to get this done in the bill. This was a second compromise I was forced to make. The bill says that the counsel office has a right to file amicus briefs—not the right to intervene—and it does that quite frequently.

Another major reason for establishing the Senate Legal Counsel office was to provide legal counseling on how to avoid litigation. How should subpoenas be drafted? What rights of a witness must be observed?

I also wanted to provide an institutional memory on congressional powers and prerogatives, speech-and-debate-clause immunity, and other areas of the law that the average lawyer doesn't know anything about. We needed somebody who had command of all of the legislative history back to the founders and who would manage a long-term strategy to defend the congressional institutional powers. As I've said, speech-and-debate immunity has been attacked, and will be attacked again. Somebody needs to know the precedents and the line of cases and the trends. We need to anticipate test cases and make consistent and tough arguments in defense of the Congress. We need to develop a respectful relationship with the key courts. We need lawyers in the Congress, crack litigators, who are completely ready to

defend the institution in court.

Another key issue was whether it'd be a joint House-Senate congressional legal counsel to represent the whole Congress or just a Senate counsel. I fought every day to make it a joint counsel. My idea was that the Congress as an institution rises or falls as a whole, and the Senate and the House should come together to defend congressional powers, bringing the full weight of the entire institution, with the prestige of both houses, to bear in defending the Congress. These are congressional powers, not just Senate powers. I wanted the Congress to appear in court as a coequal branch of government.

The House had a very different system of litigation support from the Senate because the House Administration Committee and the general counsel of the House Clerk handled litigation as it arose. The House was not quite as defenseless as the Senate in litigation. Right in the beginning of all of this process, Stan Brand arrived to serve as the general counsel to the House Clerk. He is somebody who could give you reams of stories about these issues. I went to see him a couple of weeks after he arrived, and I said, "Stan, you're going to handle all the litigation for the entire House." This was completely new information to him. He had no concept that he would handle any litigation for the House. He turned out to be a fabulous litigation counsel for the House.⁴⁴ Steve Ross succeeded him, and did a great job as well. Charles Tiefer worked there with Stan and Steve, and then Charles served in the Senate Legal Counsel office.⁴⁵

They ran a first-rate litigation operation in the House Clerk's office. It's still run out of the House Clerk's office. But it was entirely managed by the Speaker, then by O'Neill. There was no bipartisanship about it. I thought that was dangerous. I did not think they had done anything to abuse their litigation power, to say, "The House" or "The Senate" represents some position that was only the Democratic position. I'd never seen that, but I was worried that one bad case would destroy the bipartisanship, or make it a partisan office, and make it a partisan function.

Because the House had established this system for handling litigation, it wasn't interested in my proposal to establish a joint congressional counsel. I think this was very short-sighted. So establishing only a Senate counsel was a major compromise I was forced to make.

One of the strangest provisions in the counsel law is the conflict of interest provision. Basically we said that we recognize that there may be cases where the client has a point of view that is not consistent with the institution's point of view. If the Senate Legal Counsel is serving as the member's legal counsel, under the canons of ethics the counsel is obligated to defend the client. In the case of congressional litigation, the client could be seen as being both the individual and the institution, and there might be a conflict between their interests. So I wrote a provision in the law that recognizes that possibility and provides ways to deal with it.

Writing this provision into law was getting fairly elaborate. But the conflict of interest issue—between the Justice Department and the Congress—was the core rationale for the office. So it made sense to me that it should address the other conflict of interest issue—between the individual client and the Senate as an institution.

This second conflict of interest issue—between the client and the institution—led to my launching a major investigation of the Justice Department for its defense of the COINTELPRO buggings and break-ins. I'll tell that story in another interview.

In short, conflict of interest issues were a core rationale for the Senate Legal Counsel and an ongoing problem for it once it was established. When the counsel represents a senator or staffer, the individual client might want to raise arguments that are not consistent with the institution's interests. My point is that the Senate is a very unusual and special client. I think the canons of ethics do not always tell us exactly how to handle the conflicts that might arise.

RITCHIE: One good thing about Watergate was that it provided a lot of bad examples. There were just a lot of very specific situations in which government was misapplied, and the abuse of power was so obvious that at least when you were drafting the statute you had some specific goals regarding things that you knew could go wrong with the counsel once it was established.

LUDLAM: Watergate itself was fairly black and white. It was not gray. But the bill contains many gray issues.

My highest priority was to ensure that the Senate counsel would be seen as a non-partisan office that defended the institution, not the interests of one party. To accomplish this,

I set up strong bipartisan control of the office in the Senate. The mechanism I set up was thought by many to be too cumbersome, but in my view the counsel's office would be effective only if it were seen as non-partisan. To this end, I set up a joint leadership group that oversees the office. It's completely bipartisan. Both parties have an absolute veto over decisions regarding the counsel. The counsel would be authorized to take action only by a two-thirds vote of that group. If you did not get that authorization, you had to get a resolution through the Senate itself.

Everybody kept telling me that this was going to be cumbersome, and bureaucratic, and everything else. I think it has worked beautifully. When the first Senate Legal Counsel, Michael Davidson, survived the change and control from Democrats to Republicans in the Senate in 1981, I think that proved that it had become a nonpartisan post and office.⁴⁶ It is now viewed as an institutional post, not a partisan one. The governance structure I imposed on the office is the single wisest element of the legislation I crafted. I do not take its nonpartisan status for granted. The parliamentarian's office has become somewhat of a partisan office. I think they do their best in the parliamentarian's office to be nonpartisan, but there has been some erosion of its independence.

That's never happened with the Senate Legal Counsel. I think there's never been a case where they were viewed as partisan. The cumbersome governance mechanism has proven to be crucial. I fought to keep that mechanism; it was one of my highest priorities. I now feel vindicated. The Watergate Reform law, including my Senate Legal Counsel provision, became law on October 26 of 1978. Michael Davidson was appointed in May of 1979, so this May [of 2003] was the twenty-fifth anniversary of the opening of the office.

I have been pressing the Senate Legal Counsel to organize a day-long conference on the office, its strange clients, its strange history, its strange problems, and the strange area of law it cares about. I thought this was appropriate on the twenty-fifth anniversary of Michael's appointment. I wanted to bring in Michael and the other counsels to talk about what it's been like to lead this strange institution, in this strange context, with these strange clients and issues. Unfortunately, the office has declined to organize such an event. Apparently it's fearful that such a conference might attract too much attention; it wants to remain anonymous. I respect that decision, but I think it would have been fun for the office to spend at least one day in the sun.

RITCHIE: When the House backed out of having a joint congressional counsel, was there any opposition in the House to passing something that just related to the Senate?

LUDLAM: No, the House went along with the Senate's wishes on how to organize itself. I was concerned about the House opposing a Senate counsel, but there is a strong tradition up here that each house should be able to handle its own internal affairs as it wishes, a live and let live philosophy. I argued that it was none of the House's damn business what the Senate did.

RITCHIE: How about within the Senate? What about the Republicans in the Senate, like Senator [Howard] Baker, who was minority leader. Did they have any reservations about this at the time?

LUDLAM: We didn't really have any opposition other than from the Justice Department. We had some difficulty with the executive branch on the subpoena enforcement. It was resentful of my setting up the office as a competitor with the department, but I neutralized most of that through Pat Wald. When they looked at the current arrangements, senators thought that the counsel office was a reasonable new institution. Because of the bipartisan control, nobody feared it would get out of control.

RITCHIE: How about Senator Abourezk? What was his role in all of this? You said he absented himself from large parts of the hearings.

LUDLAM: Well, Abourezk was an unusual member. We would normally brief him for a hearing on the walk between his office and the hearing room. He didn't want to have a briefing before that. He would normally stay for about half of the hearing and then leave, and leave it up to us to run the hearing. He played a minimal role supervising the subcommittee. I mean minimal. Those years were unbelievably active and productive, so he was happy. He was a visionary, not a manager.

In terms of the Senate Legal Counsel provision, he left it to me. It was probably 99 percent me, 1 percent Abourezk. He didn't add any concepts or ideas to the mix. Abourezk was a delightful guy to be around, incredibly bright and funny, and very committed to his causes.

The staff was a very liberal staff, and once, we wrote him a memo on a pending child pornography bill. We told him that we thought the bill was probably unconstitutional, which I think is what the courts eventually determined. We assumed he'd vote for it anyway, but we just told him, "You might want to know that we think it's unconstitutional." One day we started getting phone calls and it turned out that the vote was 99 to 1 on the child pornography bill, and he'd been the one to vote against it. That was the kind of guy he was, principled, courageous, and outrageous.

In another interview, I will recount what he and I did on the Hart-Scott-Rodino Antitrust Improvements Act. I'll also recount some incredible stories about the closing hours in 1978 when Abourezk was retiring and we killed the Airline Noise bill. He got especially wild at the point after he had decided he wasn't going to run for reelection. He's also famous for the natural gas deregulation filibuster with [Senator Howard] Metzenbaum.

Sam Ervin will go down in history as the perfect man at a crucial time in our nation's history. He was unique. The fact that he understood the critical importance of separation of powers, and had even established a "Separation of Powers Subcommittee" in the Judiciary Committee—that couldn't have been more timely given the Nixon abuses of power. He cared about the powers of the Congress as an institution as few have ever cared for them.

In all my years up here, I have seen how members' respect for the institution has declined. When I came here, Carl Hayden was a senator. Men like that, who really cared about the institution, were more common twenty and thirty years ago. Now, so many of the members run for the Senate without ever having held another office. They don't first become mayor, and House members, and then come to the Senate. Some of them do, but a lot of them come straight to the Senate.

Concomitant with this fact is a huge decline in civility, and a huge decline in institutional memory. The staff tends to be increasingly inexperienced, and doesn't know anything about the institution, the legislative branch, administrative law, Senate parliamentary procedure, congressional investigative powers, or the other relevant disciplines.⁴⁷ The Senate has really become very much an "ends justify the means" institution—short-termers with no respect for the institution.

Sam Ervin, however, was the kind of man who said, "There are issues that transcend

partisan interests. We need to protect this institution." He was a unique individual in this institution. He was here at the time when his values and expertise perfectly coincided with the issues that were pending in Watergate. It is unimaginable that anyone else could have so effectively chaired the Watergate Committee. And Sam Ervin deserves tremendous credit for the fact that we enacted these ethics and Senate representation reforms.

RITCHIE: He retired at the end of '74. Did he continue to play any role after that?

LUDLAM: No. He was one of the only members who ever went out at the top of his game. Most of them get defeated or go out in a box. You have to admire the few who go out on top, and he did. His retirement opened up the Separation of Powers Subcommittee for Abourezk.

RITCHIE: But he didn't consult with you or anything like that?

LUDLAM: No, he believed that retirement meant retirement. We never saw him, never heard from him once. Ervin had left us Phil Kurland, who had worked with him closely, and Phil was a man of stature on these arcane issues.⁴⁸ The long and the short of it is that Watergate was a momentous event and we successfully used that sorry chapter in the nation's history as an opportunity to enact some important ethics and institutional reforms.

The Senate Legal Counsel office has been a success. The statute I wrote has not been amended in any significant way. The office staff tells me that there have been no problems with any of the minutia that I wrote into the statute. The office has proven to be non-partisan and non-controversial. It has intervened or filed amicus briefs in a fair number of cases. It's provided counseling services on an ongoing basis to the committees. It was critical in helping the Senate prepare for the Clinton impeachment proceeding. I think it's been a great success and has given the Senate more power to defend itself and its role in the constitutional separation of powers.

The office has published some very useful summaries of its functions and involvement in defending Congress. It's helped Senate committees on fourteen major investigations. It's represented the Senate in ninety-seven reported court decisions, including thirteen in the Supreme Court. It's been authorized by 505 Senate resolutions to represent members, thirteen in 2004 alone and a high of thirty-eight in 1997. I assume it's handled

hundreds of other matters that have never become public. Indirectly, the House gets represented in these cases as well, because the powers at issue are those of the Congress as a whole.

The office's workload sounds like that of a small law firm. It keeps four lawyers busy, and has a budget of \$1.2 million. I think this is a bargain given what's at stake in these cases—the powers and effectiveness of the whole institution. I don't believe we will ever get a joint House-Senate counsel. We had an opportunity for a joint counsel back then, and will never have one again. Managing a joint House-Senate counsel would have been cumbersome, but I have no doubt it would be worth the effort. But, it'll never happen.

I doubt that the House will ever institutionalize their litigation function in the same degree as we did in the Senate. They handle it much more informally, and that seems to be working fairly well for the House.

Even with the Senate Legal Counsel defending congressional powers, I am fearful about the erosion of these powers by the executive branch. The courts wax and wane on these issues, and it's a litigious society, so the Congress needs to be completely ready, at a moment's notice, with competent counsel, and institutional memory, to defend itself. It may well need to take the offensive to defend itself regarding its constitutional powers. Litigation and bad precedents are a big threat to the Congress.

The bottom line is that I helped one of the branches of the government defend itself, defend its powers, and remain a co-equal branch of government. This is historic stuff that involves the greatest strength of our constitutional system, the separation of powers. I view this one accomplishment as justifying my entire public service career. If I'd never done anything else, this would be sufficient.

RITCHIE: This is a very interesting story. You were doing this at the end of a period in which the Democrats had controlled both houses for about a quarter century. It was probably the one time when you had the possibility of enacting all these reforms. Since then, we have had several periods in which the House and Senate have been controlled by different parties and probably would not have wanted to go along.

LUDLAM: Yes, on ethics issues this was a critical and unique time. When we passed

this bill, Nixon had just been ousted out of office on ethics charges. The Democrats were completely in control and wanted to prove that, in contrast to Nixon and Ford, Democrats believed in ethics. Carter won because of Watergate—Ford's pardon of Nixon was a political disaster and Carter was a righteous man. This gave us the pretext and context we needed to enact the Ethics in Government Act.

So I agree, it was a unique opportunity to get this statute enacted. With regard to the Senate Legal Counsel, we had just had this big litigation experience for the Watergate Committee, which was the perfect argument for institutionalizing this function. I can't imagine any other time they could have gotten the Senate Legal Counsel's office so firmly established.

RITCHIE: Have you kept in contact with the Legal Counsel's office? You mentioned going up there recently, but have you followed their progression over the years?

LUDLAM: The answer is no. Charles Tiefer was working there, and I kept up a friendship with him. I knew Michael Davidson well, but only as a friend. Once I'd set up the office, I moved on to other issues. I had no desire to be a litigator and I played no role in the decisions or work of the office. My work was over.

Shortly thereafter, I left the Senate and moved down to the Carter White House. There I was working on separation of powers issues from the executive branch's perspective! That's another whole story I'll tell later in these interviews. Occasionally I'd hear something about the counsel office and it always sounded to me like the office was doing well. I saw no need to come to its rescue. When I showed up last year, the office counsel didn't know who I was.

RITCHIE: Well, the office seems to have gotten through it's adolescence stage and seems very well established at this point. The Senate probably can't imagine operating without a Legal Counsel right now.

LUDLAM: That's right. Today, the idea that the Justice Department should handle all the Senate litigation would be viewed as pretty bizarre. The old scheme would never have lasted. It had to end, but we needed to establish an institution here with the competence and status to take over this function.

The basic question was whether we'd hire a string of private legal counsel, or would they set up an in-house office. I strongly preferred the latter. They could have given the Legal Counsel function to some other office, like the legislative counsel's office, but its function is to draft bills, not litigate. This function could have gone to the Rules Committee, but it has never shown any interest in these issues.

It's hard to imagine that over the last twenty-five years the Congress wouldn't have established an independent capacity to handle litigation on behalf of the institution. But to get it set up so firmly and permanently, on a bipartisan basis, that was my accomplishment. We had a unique opportunity to get this done right, to set up a powerful office, to make it nonpartisan, to give it civil subpoena enforcement power, and give it stature vis-à-vis the executive branch and in the courts. And we took full advantage of that opportunity.

RITCHIE: I sat in the galleries during the Clinton impeachment trial and there was the Senate Legal Counsel sitting right down there at his own little table by the door, beside the chief justice. So he was very much a visible part of the institution.

LUDLAM: The office helps this institution to stand tall. Even in a partisan context, they provided good legal advice. It's not possible to conduct a serious investigation without this knowledge and legal representation. Unfortunately, committees up here really don't do investigation like they did with the [Senator John] McClellan Permanent Subcommittee on Investigations. They conduct a few small investigations, but there really are very few subpoenas and full-blown investigations. The Congress organized the Iran-Contra investigation, which was a House-Senate committee and a full-blown investigation. Charles Tiefer was detailed to that investigation from the House Clerk's office.

There are cases where the Senate Legal Counsel has not been authorized to represent members. My understanding is that there are not many of those. By and large the attitude of the leadership, which controls the office, is that "there but for the grace of God go I." So-and-so was sued and I may not like what he did, but I do understand why we ought to defend him as a way to defend the institution.

RITCHIE: Having completed the story of an early triumph in your career, I'd like to go back and get a little more information about you and how you got here in the first place.

You've gone into some of this, but I want some more details. I know you were born in 1945, but I don't know where. And I know you went to Stanford University but I wondered what went on in between. Where did you grow up, and what was your family like?

LUDLAM: Well, I grew up in California in the Los Angeles area. My parents were Republicans. They voted for Goldwater. My grandparents were rabid Republicans. I recall that my grandfather was on the California central committee for the Republicans.

I was sitting around in the winter of 1964 trying to decide what to do the next summer. I had been a summer camp counselor on a cattle ranch in Arizona—the Orme Ranch—and was wondering if I should do that again.⁴⁹ My grandmother said, "Why don't you go back and work for Burt?" So I came back here because she knew him. She had actually run his campaign in the Monterey area. He was a conservative Republican.

So they sent me back here as a summer intern, in the summer of 1965, which of course was the summer when the Great Society went through the House. It was a very dramatic time, and there were hardly any interns here. That was back before the intern programs really got going. There were so few that Lyndon Johnson invited all of the interns in the entire town to the White House in the summer of 1965. He referred to us as "fellow revolutionaries" and praised our protests, something he probably later regretted!⁵⁰ Of course, in 1967, when I was back here again as an intern, he couldn't invite us to the White House because there would have been a nasty and embarrassing Vietnam War protest.

I came back here at a time when intern programs were just really getting started. There was only one intern in an office, or often no interns. In 1973 there was established an LBJ congressional intern program, which actually paid stipends to all the offices to hire interns. That was abolished in 1994.⁵¹ Stanford had the biggest, oldest, best summer intern program in the country, which is celebrating its fortieth anniversary this year. It started in 1963, and I've been involved with the Stanford intern program for the last thirty years.

RITCHIE: Were you actually a Stanford intern or did you just come on your own?

LUDLAM: Well, the first summer I actually got the job on my own, but then I glommed onto the Stanford program. During my second summer as an intern, I ran the SIG summer program. We set up meetings with seven cabinet members. Three of them I

remember vividly.

We met with Secretary of State Dean Rusk, the leading defender of the Vietnam War. As the organizer of the event, I sat right next to him. After a long and benign session, I asked the last question. I said, "Isn't it now clear that the Vietnam War is civil war where we're the new colonialists?" I'll never forget how he glowered at me, like he was ready to strangle me. He gave a perfunctory answer and stormed out.

We also met with Tim Wirth, later a U.S. senator, who was then a White House fellow. We met with him in the West Wing. A few days before, an article had appeared entitled, "The Dark Side of Lyndon Johnson," about the president's crude way of subjugating his staff. I asked Tim about it. He obviously hated the question and scrambled to change the subject.

We also met with Speaker John McCormick. When President Kennedy had been assassinated, McCormick became second in line to Lyndon Johnson. There existed no way to appoint a replacement as vice president. So I asked him what it was like, in effect, to be the vice president and he said, "I'm the Speaker," emphasizing that that was much more important than being vice president. Incidents like these made a big impression on a summer intern!

In the decades since my SIG internships, I've been endlessly engaged as a mentor to SIG. I am proud to say that the Stanford in Government room at Stanford's Haas Center for Public Service is named the "Chuck Ludlam Room" in honor of my support for SIG. Every summer I fund two fellowships here in Washington. My father has endowed two other SIG fellowships. I was awarded the Centennial Medallion by Stanford during its centennial celebration, one of a hundred Stanford alums honored for their service to the University and SIG.

I'm a big believer in internships because it made a huge difference to me. I got really interested in politics and eventually came back for two more internships. I got a law degree from Michigan, and then went to the Federal Trade Commission for three years to firm up my legal skills, and then decided to come on up here, and came up here in 1975.

RITCHIE When did you first come back here as an intern?

LUDLAM: I was first an intern in Burt Talcott's office, and then I was an intern in Glen Lipscomb's office. Talcott knew my grandmother and Lipscomb was my local Congressman in San Marino, California. Then I served as an intern at HEW. Talcott and Lipscomb were Republicans, but it was clear with the civil rights movement and the Vietnam War that I was becoming a Democrat. By 1975 Abourezk was not too liberal for me.

RITCHIE: When did you feel that you made the switch from a Republican family to a Democrat?

LUDLAM: It was the Vietnam War and civil rights. I was very active in the antiwar movement at the time, so it was clear which party I wanted to go with. Also, I was a Peace Corps volunteer.

RITCHIE: At Stanford were you a history major or a political science major?

LUDLAM: I was a history major.

RITCHIE: Did you have any professors who were particularly influential?

LUDLAM: I did. Gavin Langmuir was a Stanford history professor and he specialized in medieval history. He taught a course on medieval anti-Semitism in Europe. I took that course and eventually created a major in the history of anti-Semitism. I took ten courses that I rigged to focus on the history of anti-Semitism.

This subject gives me a lot of ideas about the radicalism we're seeing in so many Muslim communities. Anti-Semitism began during the plagues in the Middle Ages, which was a period of intense paranoia, fanaticism, and irrationality. And anti-Semitism is a core element of the Muslim radicalism. Anti-Semitism is an amazing and critical issue and I still find it compelling.

I was very interested in social causes and political fights. I had often been a class officer. I didn't know it then, but looking back, it's clear I was geared towards politics. When I finally got back to the Hill, this time as a lawyer, everything else followed.

I left the Hill for two years to work in the Carter White House. There I was involved

with executive branch intervention in regulatory proceedings, which was very controversial. Many thought this intervention violated the Administrative Procedure Act, which requires everything to be on the public record. And many others thought it violated the separation of powers.

Strangely, I found myself fighting against Dick Wegman, who was the leader on the congressional viewpoint on the intervention issue. Dick and I basically negotiated a standoff. The bill that we were working on eventually died, and the intervention issue was what killed it.

When I came back to the Hill, I worked with the House Democratic Caucus Chairman, Gillis Long, who was a ranking member on the Rules Committee. Then I worked for Senator Bumpers for eight years, focusing mostly on regulatory and economic issues. After that I served as the principal lobbyist for seven years for the entire biotechnology industry.

Now I've come back up for the last two and a half years with Joe Lieberman, who I've known since the late '80s. He's an old friend for whom I have the greatest respect.

RITCHIE: You went off to Nepal with the Peace Corps in the late '60s. What kind of experience was that?

LUDLAM: I was the first Westerner that ever visited, let alone lived in, my village in Nepal. I was on my own in the middle of a very interesting culture. I lived with an aboriginal tribal group that had no written language—the Tharus. They were delightful people. Nepalis and Indians had come into the area and were in conflict with the Tharus. The three groups spoke three different languages and had different holidays and customs. It was a fascinating jumble.

Physically it was difficult. I was sick a lot with various kinds of dysentery. I had to walk sixteen miles to get my mail. I had no outhouse, electricity, running water, or hot water. I killed hundreds of rats in my dwelling. I thought it was great! [Laughs]

As I've said, the principal reasons why I was inclined towards the Peace Corps go back to grade school. As a kid I attended a progressive school, the training school for

teachers at U.C.L.A., the University Elementary School. There we spent a whole year studying the Navajo Indians. That was my first exposure to exotic cultures. Then for seven summers, I worked on the Orme Ranch in Arizona where I spent considerable time on the Navajo reservation and learned to love the rugged outdoor lifestyle. The Peace Corps was an extension of these experiences.

I also met my wife, Paula Hirschhoff, through the Peace Corps. She was a volunteer in the late '60s. In fact, as I've said, we are planning to go back into the Peace Corps.

RITCHIE: That's terrific. You know, Mike Davidson, the first Legal Counsel was a Peace Corp volunteer.

LUDLAM: I didn't know that!

RITCHIE: In Kenya.

LUDLAM: Oh, Paula was a volunteer in Kenya.

RITCHIE: Yes, that was a very important part of his career.

LUDLAM: Oh yes, the Peace Corps is the best thing my wife and I have ever done.

RITCHIE: So you came back from Nepal and then you went to the University of Michigan Law School. How did you decide to go to law school?

LUDLAM: My dad was a lawyer, no better reason than that.

RITCHIE: And Michigan?

LUDLAM: Well it was the best law school that I could get accepted by. I hated law school and Michigan was not a good law school for me to go to because it was mostly focused on commercial law. I was never destined to be a commercial lawyer.

The best part of it was that I came back here to work at the Center for Law and Social Policy, a famous innovator and leader in the public interest movement.⁵² That's where I met

Pat Wald. There, I was one of the lawyers—a legal intern—working on the Alaska pipeline lawsuit in 1970 and '71. A fascinating case.

It was the first big environmental case, and it was the first NEPA case—the National Environmental Policy Act requires the preparation of environmental impact statements.⁵³ NEPA has wrought a revolution in government consideration of environmental issues. And it was the Alaska pipeline case that first and decisively defined what NEPA meant.⁵⁴

One of my jobs in the lawsuit was to lay out a legislative history of NEPA to find out what the Congress intended it to mean. The legislative history was completely and totally inadequate to answer any relevant questions about what NEPA meant. Even on the basic question: Is it procedural or substantive? Does it mean that you can prepare an impact statement and as long as it has a table of contents and a few sections, then you can go ahead and do whatever you want? Or does it mean that you must pick the least environmentally damaging option for the pipeline? The distinction between procedure and substance is pretty basic! Unfortunately, there was nothing in the legislative history that told us what NEPA meant.

We had argued, of course, that NEPA was substantive, that the government had to pick the least environmentally damaging option. We lost on that argument, lost the NEPA count in our complaint. The Interior Department published a huge NEPA statement outlining all kinds of environmental problems with the pipeline and then went right ahead with its original plan. The courts found that was perfectly acceptable.

Fortunately, NEPA wasn't the only count in the environmentalists' complaint. The government was proposing to grant a right of way to build the eight-hundred-mile oil pipeline. And it needed to comply with the Mineral Leasing Act to grant this right of way.

One night we interns were sitting around the center. We'd been spending all of our time focusing on the NEPA count. Someone said, "Let's spend a few minutes checking out the Mineral Leasing Act count." The Mineral Leasing Act said that the government could grant right of way not to exceed "twenty-five" feet. We wondered if "twenty-five" feet meant "twenty-five" feet. With no exceptions?

We went to work in the law books and stayed up all night finding case after case

saying, low and behold, that "twenty-five" feet meant "twenty-five feet." Not an inch more. Not an inch for a road next to the pipeline. It was, of course, completely impossible to build this pipeline in a right of way of only twenty-five feet. So in the Supreme Court, we won on the Mineral Leasing Act count. "Twenty-five" feet meant "twenty-five feet." The Interior Department lost and the right of ways were blocked. That was the winning count, not anything to do with the environmental/NEPA issues.⁵⁵

Then, unfortunately, the Congress amended the Mineral Leasing Act to permit a wider right of way! So the pipeline was built despite the environmental problems. I think it's fair to say, however, that NEPA and this lawsuit had a massive impact in forcing the government and companies to think about the environmental impact of their actions. The original Alaska pipeline would have been an utter disaster and the final pipeline was dramatically less environmentally damaging. The lawsuit forced changes that raised the cost of the pipeline from about \$1 billion to \$8 billion.

After this incredible experience, I figured my career as an environmental lawyer had peaked and I'd never be involved in a more fascinating environmental case. So I've never done any environmental work since then.

This past summer I visited Alaska and, using my Lieberman connections, I asked if the Alaska pipeline company would give me a tour of the oil terminal in Valdez. They agreed and gave me this huge spiel arguing that the Exxon Valdez disaster could never happen again. I never told them of my role back in 1971 in trying to prevent the construction of the pipeline! They noted that I was unusually well informed about the pipeline.

During my six months at the Center for Law and Social Policy, I took a month off to work with Phil Hart and his lead staffer Len Bickwit⁵⁶ on the Senate Commerce Committee. I worked with them on one of the first environmental hearings on the Hill focusing on phosphate pollution and eutrication of the northern lakes.⁵⁷ What we found was that the environmentalists had completely overstated and misstated their claims that phosphate detergents were the key cause of eutrication. Hart—an avid environmentalist—didn't blink and laid it out on the record. This proved to be an early black eye for the environmental movement. I've had the pleasure of working with Len on a variety of the projects since 1971.⁵⁸

So even when I was in law school, I was already intensely involved with legislative histories, oversight hearings, and public policy debates.

RITCHIE: Since we are meeting in the Phil Hart building, could you tell me a little bit about your experience with Phil Hart and what he was like?

LUDLAM: Actually, I have an incredible story about him. It involves the Hart-Scott-Rodino Antitrust Improvements Act. We'll talk more about this in the next interview, but let me recount one story that tells you all you need to know about Phil Hart.

Hart was chairman of the Antitrust Subcommittee at Judiciary. Hart cared a lot about antitrust issues. He led the fight for a bill which would dramatically increase antitrust enforcement—eventually named the Hart-Scott-Rodino Antitrust Improvements Act. We faced an unbelievable filibuster by Jim Allen [of Alabama] on the floor of the Senate. I had tremendous affection and respect for Jim Allen, a terrific guy, but he was killing the Hart/antitrust bill with the first post-cloture filibuster. He filed hundreds and hundreds of amendments and was calling them up one after the other after cloture had been imposed. It was a brawl, and it went on for week after week and many dozens of recorded votes. Our Bataan Death March.

Byrd led the charge to enact the bill to prove to the liberals that he could be trusted. Doing a favor for Phil Hart was a way to please liberals, who loved Hart. So Byrd put his considerable talents into it. Murray Zweben [the Senate Parliamentarian] was in the middle of this. We set new precedents on the floor of the Senate almost every day of this prolonged debate.

After we'd reached the precipice several times, we finally worked out a deal with Allen that gave the bill a haircut. We could probably have rammed the original down his throat probably, but the Senate was getting pretty upset about this process and we worked out a compromise. Typical Senate. Phil Hart was then getting chemotherapy treatments for cancer and was too sick to sit in his seat. He would sit on the couch with the staff, day after day. He was very sick, and everybody knew he was dying. It was obvious and very sad, and it animated the debate. There really was an incredible desire on the part of the Democrats to pass this bill to honor Hart before he died.

We were trying to figure out whether we would do this deal with Allen. Considering the offer were Ted Kennedy, Bobby Byrd, my boss, and Hart. We were sitting on the couch in the back of the Senate during a quorum call. We had two or three staffers from the Antitrust Subcommittee, and some of Kennedy's people. Everybody goes on and on about this and that part of the proposed compromise. And then Phil Hart says, "I want you to tell me whether you would do this deal if I wasn't dying?" [Pause]

We all said that we would still recommend accepting the deal. We assured him that we were not inclined to accept the offer as a fig leaf to give Hart a "victory" before he died.

Later I was on floor of the Senate when they named the building after him, when he was still alive. Naming a Senate office building after a living person is certainly not something that they tend to do around here. It was quite a testament to him that they would do that while he was still alive.

RITCHIE: A certain irony, because he was the only one that dissented when they named the Russell Building after Richard Russell.

LUDLAM: Yes, it's ironic. Can I say Phil Hart had one hundred times the stature of Richard Russell.⁵⁹ Hart was an incredible man and obviously was known to be that by everyone here.

RITCHIE: Your first official job in the government as a lawyer was at the FTC. What did you do there?

LUDLAM: We sued companies for deceptive advertising. My main case was against Bayer for deceptive claims about branded aspirin, claiming it was therapeutically superior to generic aspirin.

But my most interesting project focused on corporate image advertising. We had the energy crisis, so all of the oil firms were stuck with big advertising budgets that they could not spend on promoting gasoline sales given that there were long gas lines. So the oil companies diverted their advertising budgets into corporate image advertising.

All of this occurred long before last July's Supreme Court case in *Nike vs. Kasky*,

which focused on the distinction between “commercial” and First Amendment speech. Indeed, my work on this issue preceded the ruling by the Supreme Court that “commercial” speech was entitled to less protection than other speech.⁶⁰

The issue I faced was whether or not the Federal Trade Commission could sue these companies for false corporate image advertising. For example, there was one ad where they showed a healthy lobster next to an oil-drilling platform. They didn’t tell you that the lobster had come from an aquarium nowhere near the platform. There was another ad showing a fly fisherman landing a huge trout right near a Bethlehem Steel strip mine. They didn’t tell you that the fish was caught upstream. Everything downstream was dead.

The question we asked was whether the Federal Trade Commission could sue these companies for deceptive advertising. The companies would, of course, argue that these were protected First Amendment statements. We argued that the ads were a convoluted form of commercial speech—pressing consumers to buy products from environmentally responsible firms. The companies were taking tax deductions for the ads, which meant that they considered them to be commercial speech. Also, they argued that the FCC “fairness doctrine” did not apply. The “fairness doctrine” required TV stations to grant equal time to present opposing political views. So, again, the companies were, in effect, arguing that this was commercial speech. So in the tax and FCC context, they argued that this was commercial speech, but we were sure they’d argue the opposite if we went after them at the FTC. In fact, I wrote a law review article about this “both ends against the middle” strategy of the corporations.⁶¹

The Commission voted 3-2 not to issue subpoenas I’d drafted to these companies about the truth of their ads and also about their motives in placing them. I couldn’t get the FTC to take this on. Close but no cigar. The constitutional status of corporate image advertising is still a controversial issue, of course. It’s still a ripe issue twenty-five years later.

RITCHIE: You went to work for the FTC when Nixon was president. Did the Nixon administration have much influence over the FTC?

LUDLAM: No

RITCHIE: It's supposed to be an independent regulatory commission.

LUDLAM: Yes.

RITCHIE: But Nixon was trying to exert some authority towards——

LUDLAM: Oh, nothing like they do now. I mean, I was there in the early days of executive branch aggrandizement. Nixon was a moderate compared to what happened under Reagan and what's happening now under Bush. The issue of White House control of the regulatory process is an issue that I focused on intensively within the Carter White House. It was under Nixon and Ford that the White House began intervening in regulatory proceedings at agencies such as the Environmental Protective Agency and OSHA [Occupational Safety and Health Administration].⁶²

It was not clear whether that intervention behind the scenes was legal. Environmental statutes say, "The secretary shall do this." They don't say, "The president shall do it." So it's not clear what role the president has in supervising and restraining the cabinet secretaries. Can the White House intervene to stop a secretary from following the commandments of a statute and intervene secretly off the record? What is the president's power to supervise appointees of his own administration? A pretty fundamental question.

Back in the late '70s, that was a new and very controversial issue. No court had then ruled on it. They hadn't even ruled on whether it was appropriate for the White House to impose a cost-benefit analysis before a regulation could be issued. I was in charge of trying to make sure that the White House didn't get in legal trouble for its behind-the-scenes intervention and I was handling this issue as it arose in the pending regulatory reform legislation.

Part of my job was to keep Jim Tozzi, who was the OMB guy managing the White House intervention, out of jail. That was the glib way we defined my job. Jim went on to manage the Reagan White House intervention in regulatory proceedings and was very controversial. The *Washington Post* interviewed Tozzi and published a picture of him sitting on the edge of his desk, with not a single piece of paper in evidence. He said something like, "We don't keep any paper here." Typical Tozzi.⁶³

The issue of White House intervention—an overriding issue with separation of powers connotations—became the key issue in the regulatory reform bill that was pending in the Government Affairs Committee. Dick Wegman was opposed to White House intervention. So here I was, a former defender of congressional prerogatives and the separation of powers, defending the White House intervention. I admired Dick, so it was strange to be opposing him.

The other key issue was “hybrid rule-making,” which was the industry proposal to convert all regulatory proceedings into full blown trials. I was the leader of the opposition to the idea, which I thought was an open invitation to obstructionism against environmental and health and safety regulation. Jim Tozzi has now successfully enacted hybrid rule-making, but it took twenty-two extra years to enact it!⁶⁴

RITCHIE: The Congress has always looked at the regulatory commissions as an extension of its commerce powers, while the executive branch has always seen them as an extension of the executive branch. The president names them and therefore one would think that they ought to reflect the president’s policy, but his control over them has always been a gray area between the branches.

LUDLAM: Even though I’m a congressional partisan, I think it’s hard to explain how you can set up a regulatory agency that is not subject to presidential control. It’s a little hard to imagine why the independence of these commissions should be constitutional, but it’s been held to be so.⁶⁵ I think the Supreme Court ruling on this might some day be overturned.

RITCHIE: Watergate had a big influence on the 1974 elections. Democrats won large majorities. They already had the large majorities, but the liberal Democrats in particular got a big edge. How did you wind up then with Senator Abourezk on the Separation of Powers Subcommittee?

LUDLAM: Judiciary seemed right because I was a lawyer. I had no idea what “separation of powers” meant. I didn’t know anything about Abourezk. I landed the job because I had a great interview with Jim focusing on photography. Nothing relevant to the job. Typical Abourezk.

Irene Margolis, my boss, was a holdover from Ervin's days and she basically hired me. She was an absolutely superb boss. She turned us loose. She let us have fun. She had very good judgment. She was a kick to be around and had a wicked sense of humor, a contagious laugh. A perfect boss for someone early in their career. A mentor. An editor. A resourceful strategist. And she really cared about the substance of separation of powers. She had keen instincts for the congressional powers that were at risk and knew how to fight to protect the congressional interests.

RITCHIE: What was the Senate like when you first got here in '75?

LUDLAM: Actually, I have memories that go back before that, because Carl Hayden had gone to Stanford. Back in '67, Stanford, as one of their first political ventures, held a big banquet in honor of Carl Hayden. For some reason, I happened to be in town. I think it was in the spring, and something like sixty senators came. I was a student at Stanford and I sat at the table with seven senators.

By and large the stature of the members has really declined. I see that many of them are simply partisan hacks with no larger view of what's good for the society and what's good for the institution. My boss, Senator Lieberman, is a notable exception to this rule.

RITCHIE: The early '70s was also a period when the staff was really beginning to grow. They were putting minority staff on the committees. They were squeezing subcommittees into apartment houses across the street, anywhere they could stick them, because this building hadn't been built yet and there was a tremendous overflow. What was the subcommittee like at that time? Was there much of a staff?

LUDLAM: We had five lawyers. Our offices were small; our chairs would bang against each other when we moved. We were shoehorned into an office over in the Russell Building. It was an open area, without any cubicles to give us some privacy. It was really marginal as an office.

In terms of the fighting over space, I have a great story. I've had offices in every building up here: all three main office buildings on the Senate side and House side, and the Immigration Building, and the old O'Neill Building.

At one point, we had a big negotiation with the Republicans about office space. Democrats were in power, but we were forced to give the Republicans some extra space. I'm sure we were hogging most of it.

We were located in the Immigration Building. The Republicans were going to get an office behind the one that we occupied. There was no door between our office and the one they were going to get. We knew that there was a massive closet attached to the office we were going to lose. It was four times the size of your room here. Really large and really useful. There was no door between our office and the closet. But the closet wall did abut the wall of the office we were going to keep. Do you see where this is going?

We brought in the Architect of the Capitol. We closed off the door to the closet in the room the Republicans were getting. And we opened a door from the closet into the office we were keeping. Then, we repainted their room so they wouldn't notice that we'd taken away a door and stolen that closet. So we kept the closet, at some expense to the public. But that's how competitive it was for space at the time. [Laughs] What we did was outrageous, but we really wanted the closet. It was a nice closet!

Actually, I've always enjoyed pranks. Back at Stanford I was involved in a series of pranks. First, we stole the Cal Bears victory cannon—the field piece they fired on the rare occasions when their football team scored a touchdown. Then they stole Stanford's cards for the card section, the Stanford banner, and wrote "Indians [the Stanford mascot] blow dead buffalos" on the bookstore wall. We eventually arranged to exchange everything that we and they had stolen. Of course, we had no intention of returning the cannon, so we made a plaster of Paris replica. We met at the airport, one of our guys firing a tear gas canister into the cab of their pickup truck with all the stolen Stanford stuff, and their guy puts on a gas mask and pulls out a revolver! So much for the exchange.

Eventually they found the cannon and stole it back. The next morning they ran a huge article in the student newspaper about their stunning recovery of the cannon. Unfortunately, the night before the article ran, we went up to Berkeley to see if we could steal the cannon a second time. We found that it was being held in the Student Union in the manager's office. We told the guards that we were the Cal students who had stolen the cannon back, but we had not managed to recover the brackets for the cannon. We said we had a welder ready, on double overtime, ready to make some new brackets. But we needed the cannon to get the

right fit for the brackets. They gave us the cannon!

So Cal ran the article the next morning glorifying in their retrieving the cannon, but we'd re-stolen it! Eventually we gave them back the cannon and all the other stuff was exchanged. We'd had our fun. Do you think this was the end of it? Of course not.

The Big Game against Cal that year was going to be held in their stadium. We had some smart chemists in our dorm and they concocted some methyl mercaptan, the natural substance released from decaying matter. It stunk up the dorm so bad everyone had to evacuate. We put the substance in some small test tubes and sealed them with paraffin. We ran wires around each tube. We then broke into the Cal stadium and wired the entire Cal rooting section with these tubes, with wires laid in the cracks covered by a cement laying team. The wires ran up the hill behind the stadium to some car batteries. With a flip of a switch, the wires would heat up and melt the wax, releasing the stink. Unfortunately, the Cal maintenance people found the whole system and pulled it out before the game. About a month later, they called us and said, "We won't indict you if you will just tell us how to dispose of this stuff."

I almost flunked out of Stanford that quarter, but all this strategizing and organizing, and the pranks, were perfect preparation for working here in the Senate.

RITCHIE: We've covered the Senate Legal Counsel history, but you've mentioned several other major fights we can talk about in the next interview.

LUDLAM: There are some pretty wild stories connected to the Hart-Scott-Rodino Antitrust Improvements Act and noise bill fights. I've asked CRS [Congressional Research Service] to locate some of the key documents. I have vivid memories of the events, but I need help pinning down some dates and bill numbers and finding the exact language in the *Congressional Record*.

With regard to the noise bill, I will recount how my knowledge of arcane parliamentary procedures provided the margin of victory in a fight worth \$10 billion. It's quite a story.

RITCHIE: Well, I'm interested in hearing that and also your observations regarding

Murray Zweben [former Senate parliamentarian] as well. So perhaps in our next interview, we can start with Hart-Scott-Rodino and then cover the noise bill.

LUDLAM: Good. The CRS is a critical institution here and now it's got computers to search the databases. I was here when they didn't have computers and it's certainly easier now!

RITCHIE: The Senate Library might also be able to help you. They have some very good computerized source materials.

LUDLAM: Yes, there are some very helpful professionals there. When I have the records together, we'll meet again. The story about the noise bill parliamentary maneuver was truly outrageous, and perfect, and it was also completely anti-democratic.

RITCHIE: What was that bill?

LUDLAM: It was the Airline Noise bill of 1978. The bill offered a massive, multi-billion dollar bailout to the aircraft industry to buy quieter planes. I killed that and Murray was right in the middle of it all.

RITCHIE: Well it would be a good place to start then next time.

LUDLAM: Okay. But first, I want to cover the Hart-Scott-Rodino bill. It was a titanic fight.

RITCHIE: Well this is fascinating. I came here in 1976 and my first office was in the Immigration Building, so I can understand exactly what you were describing.

LUDLAM: It was not a great office building.

RITCHIE: What I remember is that I had my window open all the time because the building was too hot in the winter and too cold in the summer. Whatever the season, you had to let the outside air in.

LUDLAM: Up here, you take whatever you can get in the way of offices. No one

"Chuck Ludlam: Counsel to the Subcommittee on Administrative Practice and Subcommittee on Separation of Powers, Senate Judiciary Committee (1975-1979), Legal Counsel to the Joint Economic Committee (1982-1985), Chief Tax Counsel to the Senate Small Business Committee (1985-1993), Counsel to Senator Joseph Lieberman (2001-2005)," Oral History Interviews, December 2, 10, 2003 and October 18, 20, 2004, Senate Historical Office, Washington, D.C.

works here for the amenities.

End of the First Interview

Endnotes

¹ Burt Talcott was born in Montana in 1920. He graduated from Stanford University and the Stanford University Law School. He served in the United States Army Air Corps, 1942-1945, became a bomber pilot, and on a mission over Austria was shot down, wounded, and held for fourteen months in a German prison camp. He became a lawyer in private practice in Salinas, California and was elected as a member of the County Board of Supervisors from 1954-1962, serving as chairman of the board in 1962. When the Republican candidate for Congress suddenly died, Talcott stepped in—with the help of my grandmother, Bernice Ludlam—and was elected as a Republican to the Eighty-eighth and to the six succeeding Congresses (January 3, 1963-January 3, 1977). He was an unsuccessful candidate for reelection to the Ninety-fifth Congress in 1976, beaten by Leon Panetta. He then served as president and consultant for legislative affairs with Talcott, McCabe and Associates, from 1977-1986 and as associate deputy administrator for congressional affairs, Veterans Administration.

² In addition to Medicare, in 1965 the Congress enacted Medicaid, the Voting Rights Act, historic elementary, secondary and higher education legislation, Head Start, food stamps, and many other elements of the Johnson "war on poverty." In all, in his three and a half years as president, the Congress implemented parts or all of 226 of Johnson's 252 legislative requests.

³ Glen Lipscomb was born in Michigan and moved to Los Angeles with his parents in 1920. After attending the University of Southern California and Woodbury College in Burbank, he became an accountant. He served in the Army's Financial Corps during World War II and in 1947 was elected to the California state assembly, where he served until 1953. That year he won a special election to the U.S. House to replace Norris Poulson, representing California's twenty-fourth district. Lipscomb continued to serve in the House for the remainder of his life. He died of intestinal cancer at Bethesda Naval Hospital at the age of fifty-four and is interred at Forest Lawn Memorial Park Cemetery. The submarine USS Glenard P. Lipscomb was named after him.

⁴ The John Birch Society, an organization of the radical Right, was established in Indianapolis in 1958 to combat what was perceived to be the infiltration of communism into American life. Its founder, Robert H. W. Welch, a Massachusetts businessman, named the society after a Baptist missionary who had been killed by Chinese Communists in 1945. Starting with only eleven members, the John Birch Society grew rapidly, drawing considerable support from rich conservatives; by the early 1960s it had an estimated annual income of \$5 million and a membership of 60,000 to 100,000. John Birchers placed their principal emphasis on the extent to which communism had established control over the U.S. government; among those they accused of being "dedicated, conscious agents of the Communist conspiracy" were President Dwight D. Eisenhower, CIA director Allen Dulles, and Chief Justice Earl Warren. The society has produced an extensive list of publications, offered cash prizes for college essays on topics like the impeachment of Warren, and

maintained that the United States must become as conspiratorial as the communists in order to combat their subversion of American society.

⁵ Since its start in 1882 as a training school on the site of the Los Angeles Central Library, the University Elementary School has come to be recognized as a national educational resource. In its first years, UES was an integral part of the Los Angeles State Normal School, which trained teachers for California's public schools. In 1919, when the Normal School became the Southern Branch of the University of California, UES was made a part of the new university. The school moved to its current home on the UCLA campus in 1947, with its first permanent buildings completed three years later. UES enjoys a proud history of dynamic leadership. During the 1930s and 1940s, it was an outstanding example of progressive education. It was led by Corinne A. Seeds, a student of John Dewey, from 1925-1957. The term "progressive education" has been used to describe ideas and practices that aim to make schools more effective agencies of a democratic society. Although there are numerous differences of style and emphasis among progressive educators, they share the conviction that democracy means active participation by all citizens in social, political, and economic decisions that will affect their lives. In the 1950s, during a time of cold war anxiety and cultural conservatism, progressive education was widely repudiated, and it disintegrated as an identifiable movement.

⁶ Concerned by the lack of communication between the races and wondering what "adjustments and discriminations" he would face as a Negro in the Deep South, the author, John Howard Griffin, a journalist and self-described "specialist in race issues," left behind his privileged life as a Southern white man to step into the body of a stranger. In 1959, Griffin headed to New Orleans, darkened his skin, and immersed himself in black society, then traveled to several states until he could no longer stand the racism, segregation, and degrading living conditions. Griffin imparts the hopelessness and despair he felt while executing his social experiment, and professional narrator Childs renders this recounting even more immediate and emotional with his heartfelt delivery and skillful use of accents.

⁷ When I met Al that summer of 1967, I was living in the "Stanford house" on McComb Street in Cleveland Park. Al had a Stanford connection, having been a dean of students there. Al was one of the most important American political figures of the 1960s and 1970s. Aside from his brief tenure as a congressman (1968-1970), he was involved in every major reform campaign of those tumultuous decades: the civil rights movement, the anti-Vietnam War movement, the student movement, the movement for political party reform, South African anti-apartheid actions, and the Biafra War, among others. He is most famous for his role in 1967 in launching the "dump Johnson" movement and many credit him with deposing a sitting president. He turned the antiwar movement into a mainstream movement. I had become very active in the antiwar movement at Stanford and organized the protest at the Stanford graduation that June—I think it was the first protest in the history of Stanford graduations. Al is credited with bringing a generation of young activists—the famous "'60s generation"—into an electoral process that had until then seemed to us too closed and corrupt to bother with. After attempting unsuccessfully to recruit Robert Kennedy and others to run

against Johnson, Al convinced then U.S. Sen. Eugene McCarthy, D-Minn., to make the run in the Democratic primaries against Johnson. When Johnson scored a narrow victory over McCarthy in the New Hampshire primary, Robert Kennedy joined the race. Just a few days before the Wisconsin primary, President Johnson dropped out. I was then working in a McCarthy storefront in the Polish ward of Milwaukee and all of us felt we'd personally deposed Johnson. Four days later, Martin Luther King was assassinated in Memphis, sparking massive riots across the country. In June Robert Kennedy was assassinated in Los Angeles after winning the California primary. Then in late August, we suffered through the "police riot" at the Democratic Convention in Chicago. At that point I was in Peace Corps training and desperate to leave the country. Tragically, Al was assassinated in his NYC law offices by Dennis Sweeney, a former acquaintance, on March 14, 1980. Sweeney had been a civil rights volunteer in Lowenstein's voter registration drives in Mississippi in the mid-1960s and a Stanford graduate. During his trial, Sweeney testified that Lowenstein and others controlled him through radio receivers planted in his teeth. He was diagnosed as a paranoid schizophrenic and found not guilty by reason of insanity. The inscription on Lowenstein's headstone is from a note to him from his hero, Robert F. Kennedy: "If a single man plants himself on his convictions and there abide, the huge world will come around to him."

⁸ Peter Hoagland was born in 1941 in Omaha. He served in the U.S. Army during the Vietnam War; and as a law clerk for U.S. District Judge Oliver Gasch (1969-70); public defender (1970-1979); senator in the Nebraska unicameral legislature (1979-86); and U.S. representative (1989-95). He was a member of the Ways and Means Committee. He was defeated in the Gingrich revolution of November 1994 by Jon Christensen, who was awarded "Moron of the Month" for campaigning for election as Nebraska governor on the ground that he was about to get married to a virgin bride, who has been saving herself for these twenty-five years, just for him. The virgin bride-to-be was Tara Dawn Holland, Miss America 1997. Christensen got only 28 percent of the vote, ending his political career.

⁹ My biggest project was an attempt to bring suit against companies for deceptive "corporate image" ads. The issue was whether these image ads—which made claims about the environmental performance of the companies—were commercial ads or political free speech. The FTC decided 3-2 that the ads were free speech and ruled against my proposal to sue them. I was also involved with a number of other deceptive advertising cases, the biggest of which was against the aspirin makers for deceptively claiming that their branded aspirin was superior to unbranded, generic aspirin. I also secured a consent decree for deceptive reliability claims in an ad, the first such FTC case.

¹⁰ Jim Abourezk was born in Wood, South Dakota, in 1931. His parents were Lebanese traders on the Rosebud Reservation. He graduated as a civil engineer from the South Dakota School of Mines and the University of South Dakota Law School. He commenced practice in Rapid City and served in the United States Navy, 1948-1952. He was elected as a Democrat to the Ninety-second Congress for one term (1971-1973) and to the United States Senate for one term (1973 to 1979). He was the first Arab-American to be elected to the Senate. He didn't run for reelection. When asked what he missed most about the Senate, he

said, "My WATS line" (A WATS line is a long distance service at fixed rates for fixed zones and an acronym for wide area telephone service.). In 1980, Abourezk founded the American-Arab Anti Discrimination Committee, a grassroots civil rights organization committed to empowering Arab-Americans and encouraging a balanced U.S. foreign policy in the Middle East. He was referred to as "Ayatollah Khomeini's lawyer," for his support for Arab causes and criticism of Israel. He wrote a biography: *Advise & Dissent: Memoirs of South Dakota and the U.S. Senate* (Lawrence Hill Books, 1989).

¹¹ Irene Margolis, later Irene Kaplan, started with the Separation of Powers Subcommittee in 1970 and stayed on with the Judiciary Committee until 1981. She then went on to a distinguished career with the American Bar Association until she retired in 1999. She did all this despite the fact she had no law degree. With Irene, it made no difference. She had great analytical and writing skills, and honed instincts as a negotiator.

¹² Si Lazarus served as associate director of President Jimmy Carter's White House Domestic Policy Staff (1977-81), as a partner in Powell, Goldstein, Frazer, and Murphy LLP (1981-2002), and as senior counsel to Sidley Austin Brown & Wood LLP (2002-). He is a trustee of the Center for Law and Social Policy, and writes frequently on issues of law and policy. His articles on federal rights have appeared in the *Atlantic*, the *Washington Post* Outlook (Sunday opinion) Section, the Democratic Leadership Council's magazine *Blueprint*, and *The American Prospect*. His *Atlantic Monthly* article, "The Most Dangerous Branch?" has been re-published in two anthologies, *The Best American Political Writing 2003* by Royce Flippin, ed. (Avalon Press 2003), and *Principles and Practice of American Politics: Classic and Contemporary Readings*, 2d ed., Samuel Kernell and Steven S. Smith, eds. (CQ Press 2003). He graduated from Yale Law School, where he was Note & Comment editor of the *Yale Law Journal*.

¹³ Gillis Long was a cousin of Louisiana Governor and Senator Huey Long and Governor Earl Long. Gillis was born in Winnfield, Louisiana, in 1923, and his family lived in a chicken coop during the depression. He graduated from Louisiana State University with a B.A. in 1949 and from the law school of the same university with a J.D. in 1951. During the Second World War he served in the infantry as a private and rose through the ranks to captain. He was awarded the Purple Heart and was with the Internal Security Detachment at the Nuremberg war trials. He served as legal counsel to the Senate Select Committee on Small Business, 1951-1952; and chief counsel to the House of Representatives Special Committee on Campaign Expenditures, 1952-1954, and 1956. He was elected as a Democrat to the Eighty-eighth Congress (January 3, 1963-January 3, 1965). He supported President Kennedy and paid the political price, suffering defeat in the next election. He was an unsuccessful candidate for the Democratic nomination for governor of Louisiana in 1963; assistant director, Office of Economic Opportunity, 1965-1966; resumed the practice of law 1970-1972; president, board of commissioners, Louisiana Deep Draft Harbor and Terminal Authority, 1972; and an investment banker. Finally, after many years in the political wilderness, he was elected to the Ninety-third and to the six succeeding Congresses and served from January 3, 1973, until his death in Washington, D.C., on January 20, 1985.

President Reagan paid tribute to him in his second inaugural address, held in the Capitol Rotunda due to inclement weather. He said, "There is...one who is not with us today: Representative Gillis Long of Louisiana left us last night. I wonder if we could all join in a moment of silent prayer. (Moment of silent prayer.) Amen." Gillis was the chairman of the House Democratic Caucus and led the strategy for the Democrats to recover from the Reagan landslide, an effort that led to the founding of the Democratic Leadership Council. Gillis was succeeded by his widow, Cathy Long. In 1985, Congress provided Loyola University with federal funds to create an endowed Poverty Law Center in the name of Gillis, who had been known for his commitment to poor people of Louisiana. His district was one of the most impoverished in the nation. The U.S. treatment center for Hanson's Disease (leprosy) is named for Gillis and located in his district.

¹⁴ Senator Dale Bumpers was born in Charleston, Arkansas, in 1925. He attended the University of Arkansas, Fayetteville, and graduated from Northwestern University Law School. He served in the United States Marine Corps 1943-1946; and as Charleston city attorney 1952-1970; special justice, Arkansas Supreme Court 1968; and two-term governor of Arkansas 1970-1974. He was elected as a Democrat to the United States Senate in 1974 for the term commencing January 3, 1975. He was reelected in 1980, 1986, and again in 1992 for the term ending January 3, 1999. He returned to the Senate as the lead defender of President Clinton during his Senate impeachment trial in 2000.

¹⁵ Jeanne first came to Stanford in 1983 and for more than twenty years has overseen the John Gardner Fellowship, Stanford in Government, and Stanford in Washington programs. She couldn't have a better touch with the students and has an impressive background in public policy, having served as staff director for a presidential advisory committee on juvenile justice and delinquency prevention, and worked at the Metropolitan Washington Council of Governments, the National League of Cities, National Urban Coalition, and at Westinghouse administering a Department of Justice contract.

¹⁶ Suzanne came to the Haas Center in 1995, after spending over a decade as the founding director of a public museum of art, history, and anthropology in Mendocino County, California. Prior to becoming a Californian by moving to the North Coast, she lived in Costa Rica for several years, where she worked for the National Museum of Costa Rica and the Associated Colleges of the Midwest Tropical Field Research program. She has a longstanding interest in native peoples of the Americas and in U.S.-Latin American relations. She's also lived in the former Yugoslavia, India, and the U.K. Her father was the distinguished print and broadcast journalist Ellie Abel.

¹⁷ Abe Ribicoff was born in New Britain, Connecticut, in 1910. He graduated from New York University and the University of Chicago Law School. He served as a member of the Connecticut legislature from 1938-1942; judge of Hartford Police Court, 1941-1943 and 1945-1947; chairman, assembly of municipal court judges for the State of Connecticut, 1941-1942; member of the Charter Revision Commission of the city of Hartford, 1945-1946; and hearing examiner, Connecticut Fair Employment Practices Act, 1937-1939. He was elected

as a congressman to the Eighty-first and Eighty-second Congresses (1949-1953). He ran unsuccessfully for election to fill a vacancy in the United States Senate but served as governor of Connecticut from 1955-1961. He served as the secretary of the Department of Health, Education, and Welfare in the cabinet of President John F. Kennedy. Then he was elected to the United States Senate in 1962; reelected in 1968 and 1974 and served until 1981. He was chairman, Committee on Government Operations (Ninety-fourth and Ninety-fifth Congresses), Committee on Governmental Affairs (Ninety-fifth and Ninety-sixth Congresses). He died in 1998.

¹⁸ Dick Wegman is now a partner in the law firm of Garvey Schubert Barer. He's been in private practice since 1981. He served as a legislative assistant to Senator William Proxmire; an appellate attorney in the Antitrust Division of the U.S. Department of Justice, staff director of the Subcommittee on Executive Reorganization of the Senate Committee on Government Operations; and chief counsel and staff director of the Senate Committee on Governmental Affairs (1975-1981). During the period he directed the work of the committee, the panel focused on regulatory reform, administrative law, civil service reform, and national energy policy. More than one hundred pieces of legislation handled by the committee were signed into law, including Department of Energy Act, Energy Research and Development Act, Nuclear Non-Proliferation Act, Regulatory Flexibility Act, Department of Education Act, Civil Service Reform Act, Ethics in Government Act, Government in the Sunshine Act, Federal Paperwork Reduction Act, Inspector General Act, and the Energy Conservation and Production Act. In 1979, Dick was appointed by President Jimmy Carter to direct the president's Commission on a National Agenda for the Eighties, a blue-ribbon panel of corporate chief executives, university presidents, former governors and cabinet officers, and other national leaders. President Carter asked the Commission to develop a ten-year agenda of international and domestic priorities for the United States. During the Ninety-fourth and Ninety-fifth Congresses, the Senate Committees on Commerce and Governmental Affairs were chartered to conduct a U.S. Senate Study of Federal Regulation. On the local level, Dick chaired the Commission on Efficiency and Effectiveness for Montgomery County, Md., a twelve-member panel appointed by the county council to develop recommendations on programs and budget priorities for Montgomery County government. The commission's report was presented to the county council and county executive in December 1991. He also served as vice chairman of the Montgomery County Commission on the Future. The commission's final report, "Envisioning Our Future," was submitted to the Montgomery County Council in June 1988. Dick graduated from Brown University with a B.A. in applied mathematics (1960, Sigma Xi), and from New York University's Graduate School of Arts and Sciences with an M.S. in mathematics (1962). He received his J.D. from Harvard Law School in 1965.

¹⁹ After his service with Senator Ribicoff and the Government Operations Committee, Dave moved to Boston to work for Foley, Hoag and Eliot and then to Brenner, Saltzman and Wallman in Connecticut, where he's the managing partner. He's an active member of the Federal Bar Council, a member of the National Executive Committee of the Anti-Defamation League and its National Civil Rights Chair, and chairman of the Town of Hamden

Farmington Canal Commission, which is building a linear park on the abandoned Farmington Canal Railway Line. David is past president of the New Haven County Bar Association, past president of the Greater New Haven Jewish Federation, and past president of Congregation Mishkan Israel, in Hamden, Connecticut. He received his B.A. (1971) from the University of Wisconsin at Madison and his J.D. (1973) from New York University School of Law, where he was chosen the outstanding graduate of his law school class and was elected to the Order of the Coif.

²⁰ Ira served in the Office of the United States Trade Representative (USTR), 1993-1997; general counsel, 1993-1995; and chief negotiator with Japan and Canada, 1995-1997, with rank of ambassador (nominated by President Clinton, and unanimously confirmed by the Senate, in June 1995.). From 1988 to 1992 he practiced international trade law. On the Hill he'd served as chief of staff to Senator John D. Rockefeller IV, January 1985-December 1987; minority staff director and chief counsel, Senate Committee on Governmental Affairs, January 1981-January 1985; staff director and chief counsel, Senate Subcommittee on the District of Columbia and Government Efficiency, June 1979-January 1981; counsel to the Senate majority leader, February 1979-June 1979; counsel, Senate Committee on Governmental Affairs, January 1979-February 1979; staff director and chief counsel, Senate Special Committee on Official Conduct, January-April 1977; legislative legal counsel to Senator Gaylord Nelson, October 1975-December 1977. He started his legal career with Jenner and Block from 1973-1975. Since 1997 he's resumed his practice in international trade law, now with Greenberg, Traurig.

²¹ Jim Eastland was born in Mississippi in 1904. He graduated from the University of Mississippi, Vanderbilt University, and the University of Alabama. He was a member, state house of representatives from 1928-1932; and appointed in 1941 to the United States Senate to fill the vacancy caused by the death of Pat Harrison. He successfully ran for election to the Senate in 1942; and was reelected in 1948, 1954, 1960, 1966, and again in 1972, serving until 1978. He served as president pro tempore of the Senate during the Ninety-second through the Ninety-fifth Congresses; and Chairman, Committee on the Judiciary (Eighty-fourth through Ninety-fifth Congresses). He died in 1986.

²² In 1948, the Democratic National Convention was splintered by debate over controversial new civil rights planks that had been proposed for addition to the party platform. Adoption of the planks, urged by a group led by Hubert Humphrey of Minnesota, was resisted by delegates from southern states. In the middle, trying to hold together the New Deal coalition he had inherited from Franklin D. Roosevelt, was President Harry S. Truman. As a compromise, he was prepared to settle for the adoption of only those planks that had been in the 1944 platform. But Truman's own civil rights initiatives, including the formation of the Committee on Civil Rights and the Fair Employment Practices Commission, had advanced the civil rights debate to a new level, and he could not turn the clock back. The planks were adopted, prompting thirty-five southern Democrats to walk out. They formed the States' Rights party, which came to be popularly known as the Dixiecrats. Meeting in Birmingham, Alabama, the Dixiecrats nominated South Carolina governor Strom Thurmond

as their candidate for president. In the November election, Thurmond carried four states: Alabama, Louisiana, Mississippi, and South Carolina. He received well over a million popular votes, and his thirty-nine electoral votes represented more than seven percent of the total. The Dixiecrat episode was one of the most significant third-party efforts in America's history. Truman won reelection, but the strong showing put forth by the Dixiecrats signaled impending changes in electoral politics. It was the most visible sign of the postwar erosion of the New Deal coalition.

²³ The decentralization of the money came to an abrupt end when Kennedy became chairman and he held all the money and power at the full committee.

²⁴ Sam Ervin was born in North Carolina in 1896. He graduated from the University of North Carolina at Chapel Hill in 1917 and from the law school of Harvard University in 1922. During the First World War he served in France with the First Division 1917-1919. He practiced law in North Carolina and was elected as a member, North Carolina general assembly in 1923, 1925, and 1931; and as a judge of the Burke County criminal court from 1935-1937; and judge of the North Carolina superior court from 1937-1943. He was then elected as a congressman to the Seventy-ninth Congress to fill the vacancy caused by the death of his brother, Joseph W. Ervin. He served from 1946 to 1947. He didn't run for renomination in 1946 and resumed the practice of law. He became an associate justice of the North Carolina supreme court from 1948-1954. In 1954 he was appointed to fill the vacancy caused by the death of Clyde R. Hoey for the term ending January 3, 1957. He was reelected in 1956, 1962, and again in 1968 and served from June 5, 1954, until his resignation at the end of 1974. He was chairman, Committee on Government Operations (Ninety-second and Ninety-third Congresses), the Select (Watergate) Committee on Presidential Campaign Activities (Ninety-third Congress). He died in 1985.

²⁵ I believe the Watergate hotel and office building is named after features of the old C & O and Washington City Canals, perhaps a gate that permitted water from the Potomac River to enter the canal. In 1810 work began on converting Tiber Creek into the Washington City Canal, a feature in L'Enfant's 1791 plans for the Capital. It followed what is now Constitution Avenue, then turned in front of the Capitol, and connected the Potomac and Anacostia Rivers. It provided a convenient way for canal traffic to dock and unload their goods close to the commercial center of the town. Eventually it was connected in 1832-33 to the C & O Canal, which runs two hundred miles to Cumberland, Maryland, connecting the Chesapeake Bay with the Mississippi River. The Lockkeeper's House is the only remnant of the C & O Canal extension. The lockkeeper of the canal collected the tolls and kept records of commerce on the canal. The C & O Extension was built between 1832 and 1833 to connect the Washington City Canal with the C & O Canal. These canals served as major thoroughfares until railroads became the dominant form of transportation in the nineteenth century. The Washington City Canal was beset by problems of poor maintenance, was subject to tidal and seasonal flooding, became a fetid swamp, and was filled in 1872 to become Constitution Avenue.

²⁶ The first special prosecutor, Archibald Cox, was appointed in May of 1973 as the Watergate scandal spun out of control. He was appointed by Attorney General Elliot Richardson, a former law student of his at Harvard. When the Senate investigation revealed the existence of audio tapes of Oval Office discussions, Special Prosecutor Cox subpoenaed them from his employer. The president offered to give the Senate and Cox written summaries of what was on the tapes. Cox turned down the deal. On October 20, 1973, in an event termed the Saturday Night Massacre, U.S. President Richard Nixon ordered that Cox be fired as Watergate scandal special prosecutor, upon Cox's insistence on enforcing the subpoena for the tapes. Rather than comply with this order, both Attorney General Elliot Richardson and Deputy Attorney General William French Smith resigned. The order was ultimately carried out by the Solicitor General, Robert Bork. The firing of Cox illustrated the need for independent counsels—prosecutors specifically appointed to investigate official misconduct.

²⁷ It's easy to see why Koreagate made it difficult for us to pass the special prosecutor provision in the House. The scandal revealed dozens of congressmen who had taken money or gifts from agents of the South Korean government. The key player for the Koreans was a Korean CIA agent and rice dealer, Tongsun Park, who had for a number of years been making large payments to members of Congress, above all to Democratic members of the House of Representatives who opposed Richard Nixon, in order to secure their support for legislation that was of interest to Park Chung Hee, the South Korean leader. The goal was first and foremost to reverse Richard Nixon's troop withdrawal strategy, and then to nip in the bud any other problem that got in the way of business as usual between Washington and Seoul. There was a wave of hysteria in the House when the story broke because literally hundreds of members of Congress had attended parties organized by Park, who had become the Perle Mesta of the 1970s when it came to entertaining congressional bigwigs. Park also had a stable of call girls available, and could provide other services. The Rev. Sun Myung Moon, whose "Unification Church" has struck deep roots into the American system over the past quarter-century was also implicated. Moon is, of course, best known for converting thousands of young Americans to his faith and for serving U.S. prison time for income tax evasion. The U.S. House investigation of Koreagate demonstrated that the KCIA gave all kinds of help to Moon's activities in the U.S. as part of this scheme. Several congressmen were investigated, including Bob Leggett and Joseph Addabbo, for allegedly accepting bribes from the Korean government. Both men were linked to Suzi Park Thomson, who had been hosting parties of the Korean Embassy. Later it turned out that Speaker of the House Carl Albert had kept Suzi Park Thomson on his payroll for all of the six years that he had been Speaker. Congressmen Hanna, Gallagher, Broomfield, Hugh Carey, and Lester Wolf were all implicated. The names of Tip O'Neill, Brademas, and McFall also came up. The *New York Times* estimated that as many as 115 congressmen were involved. In reality the number was much lower, but former Watergate Special Prosecutor Leon Jaworski was brought back from Houston to become special prosecutor for this case as well. This underlined the press line that "the Democrats' Watergate" had finally arrived. Eventually Congressman Hanna was convicted and sent to jail, while Congressman Otto Passman of Louisiana was acquitted, largely because he had had the presence of mind to secure a venue in his own state. A number of other congressmen quit, and it is thought that the principal reason for the decision

by Democratic Speaker of the House Carl Albert to retire at the end of 1976 was the fact that he had been touched by the breath of this scandal, which would go into the chronicles as "Koreagate." See Boettcher, Robert. *Gifts of Deceit: Sun Myung Moon, Tongsun Park, and the Korean Scandal* (New York: Holt, Rinehart and Winston, 1980).

²⁸ The purpose of the special prosecutor provision was to avoid a direct conflict of interest when the Justice Department is investigating the president or attorney general or other higher ups. There is no conflict in the department investigating a member of Congress, so we never had any sense that the special prosecutor should be appointed to investigate a member of Congress. But O'Neill feared that the Republicans might offer an amendment to the bill that would do that, and cite Koreagate as the rationale. No such amendment was ever offered and the final bill only applied to executive branch officials.

²⁹ She's now been appointed to the Bush Iraq War intelligence panel.

³⁰ Later Pat was Clinton's first choice to be attorney general, but she took herself out of the running for the job because she and Clinton could not agree on who her assistants would be—Pat wanted the authority to appoint her own assistants, and Clinton refused to give it up. She served for twenty years on the U.S. Court of Appeals for the District of Columbia, the most important federal appeals court in the country, and certainly was on every Democrat's short list to be appointed to the Supreme Court. She served for two years on the International Criminal Tribunal regarding war crimes in Yugoslavia.

³¹ Of the doctrine of the separation of powers, the Constitution says not a word. Yet the framework of government outlined in the Constitution of 1787 presupposes the separation of powers, gives expression to it, and in so doing further refines the meaning of the doctrine. Much of the controversy over drafting and ratification turned on this question of meaning. At issue was not whether the proposed Constitution embodies the separation of powers to some extent (few denied that), but whether its separation is sufficient. Among Americans reflecting on new political arrangements in the latter half of the eighteenth century, no political authority was invoked more often than "the celebrated Montesquieu." Thanks in some measure to those Americans themselves, the name of Montesquieu is firmly attached to the doctrine of the separation of powers. John Adams's early *Thoughts on Government* confirms the high expectations held for the separation of powers and the broad spectrum of ills that it would guard against: passionate partiality, absurd judgments, avaricious and ambitious self-serving behavior by governors, and the inefficient performance of functions. The experiences under the early state constitutions and the Articles of Confederation reinforced the belief in separation. Jefferson's critique of the Virginia constitution raised the familiar concerns with safety and efficiency; both to establish free principles and to preserve them once established required a division and balance that went beyond those embodied in existing arrangements. Despotism is no less despotic because "elective." The Philadelphia Constitutional Convention usually discussed the adequacy and proper degree of the separation of powers in terms of the ends to be achieved: stability (Dickinson), defense (Gerry, Madison, G. Morris, Wilson), independence (King), and proper function (Gerry). No

less worrisome, however, was whether the means available to the several branches of government to defend themselves against the others might not be excessive (Franklin). Those who opposed the unqualified ratification of the Constitution thought that not enough had been done to secure the proper degree of separation or that the means of defense would be ineffectual. Against these Anti-Federalist contentions Madison launched the most extensive and theoretically coherent discussion of the doctrine of the separation of powers.

³² For a discussion of earlier proposals on this general subject, see the Senate Government Operations Committee report on S. 495 at pages 13-14. See S. 1384, introduced by Senator Vance Hartke on March 23, 1967; the vote on Senator Hartke's amendment to S. 355 on May 3, 1967 (amendment defeated 66-16); S. 2569, introduced by Senator Mondale on October 11, 1973; S. 3877, introduced by Senator Javits on June 4, 1974; and S. 4277, introduced by Senator Ervin on December 11, 1974. See Senator Hartke's statement during consideration of S. 495 on July 19, 1976 (22677-82) for an excellent history of earlier interest in the congressional representation issue. See Senator Abourezk's statement during the same debate regarding the 1818 House resolution authorizing hiring of private legal counsel to represent the sergeant at arms (July 20, 1976, at 22793).

³³ Statutes must be enacted by both houses and signed by the president or enacted over his veto. A simple Senate or House resolution need only be passed by one house. Such resolutions are often used to regulate the activities of that one house.

³⁴ See *Representation of Congress and Congressional Interests in Court*, Hearings of the Subcommittee on Separation of Powers, Senate Judiciary Committee, Ninety-Fourth Congress, Second Session, December 12, 1975, and February 19, 1976.

³⁵ William Proxmire was a Democratic senator for Wisconsin for three decades. The death of Senator Joseph R. McCarthy in 1957 brought Proxmire into the special election held to fill the seat for the balance of the late senator's term, he won the primary and then won the election. Proxmire's years as a senator were characterized by an independent, often idiosyncratic, stance. To highlight government practices that were costing taxpayers millions of dollars, Proxmire established a monthly "Golden Fleece" award in 1975 for "the biggest or most ridiculous or most ironic example of government waste." The awards received a great deal of publicity, but critics thought they diverted attention from larger, more substantial issues. He did not miss a roll call between 1966 and 1985. See *Proxmire* by Jay Sykes (1972). He won the lawsuit against him by one of the Golden Fleece Award winners in a case upholding congressional speech-and-debate-clause immunity. See *Hutchinson vs. Proxmire*, 443 U.S. 111 (1979). It was a critical case and it was left to Proxmire and private counsel he retained to defend immunities critical to the entire Congress. This was a perfect example of why we needed to establish the Senate Legal Counsel office.

³⁶ See August 9, 1976, *Congressional Record*, 26359-70 (S.Res. 463).

³⁷ Proxmire didn't miss a single vote for more than twenty-one years, the first and only senator in the history of the Senate who achieved that feat. See 134 *Congressional Record* 12527 (September 15, 1988). He gave daily speeches calling for the ratification of the Genocide Convention for nineteen years and it was finally ratified.

³⁸ It later provided a list of thirty-two cases where the department had represented Congress, nine in which representation was not requested, and three in which representation had been declined.

³⁹ Article I, section 6, clause 1 of the Constitution provides: "The Senators and Representatives shall...in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place." This clause represents "the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature." *United States v. Johnson*, 383 U.S. 169, 178 (1966). So Justice Harlan explained the significance of the speech-and-debate clause, the ancestry of which traces back to a clause in the English Bill of Rights of 1689 ("That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." 1 W. & M., Sess. 2, c.) and the history of which traces back almost to the beginning of the development of Parliament as an independent force. "In the American governmental structure the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *Id.* "The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." *United States v. Brewster*, 408 U.S. 501, 507 (1972). This rationale was approvingly quoted from *Coffin v. Coffin*, 4 Mass. 1, 28 (1808), in *Kilbourn v. Thompson*, 103 U.S. 168, 203 (1881).

⁴⁰ The jurisdictional statute was made necessary by the decision of the District Court in *Senate Select Committee on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51 (DDC. 1973) finding that it had no jurisdiction to enforce the committee's subpoena for the Nixon White House tapes. The Congress then enacted Public Law 93-190 (December 18, 1973) to confer jurisdiction on the court to "enforce or secure a declaration concerning the validity of any subpoena" of the committee. See the legislative history of S. 2641 and H.R. 11189 (Senate debate on November 9, House Report 93-661, and House debate on December 3, 1973).

⁴¹ The history of congressional efforts to enforce their subpoenas is found in the report of the Government Operations Committee on S. 495, at page 15. The history goes back to 1857, a

Supreme Court case in 1928, and legislation introduced on May 4, 1953, by Congressman Kenneth Keating (H.R. 4975). Four days of hearings were held on the Keating bill in 1954 and 1955.

⁴² The statute has been successfully used by the Senate in the following cases (with cites to Senate resolutions and reports): *Senate Permanent Subcomm. on Investigations v. Cammisano*, Misc. No. 80-0102 (D.D.C. Dec. 29, 1980), *aff'd*, 655 F.2d 1232 (D.C. Cir. 1981)(S. Res. 502, 96th Cong., 2d Sess. (1980), 126 Cong. Rec. 25284 (1980) and S. Rep. No. 899, 96th Cong., 2d Sess. (1980)); *Senate Permanent Subcomm. on Investigations v. Accardo*, Misc. No. 84-0053 (D.D.C. Nov. 16, 1983, Mar. 29, 1984)(S. Res. 293, 98th Cong., 1st Sess. (1983), 129 Cong. Rec. 34559-60 (1983), 130 Cong. Rec. 3139 (1984), and S. Rep. No. 354, 98th Cong., 2d Sess. (1984)); *Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition v. Secord*, Misc. No. 87-0090 (D.D.C. Apr. 16, 1987)(S. Res. 170, 100th Cong., 1st Sess. (1987), 133 Cong. Rec. 6413 (1987), and S. Rep. No. 16, 100th Cong., 1st Sess. (1987)); *Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings v. Borders*, Misc. No. 89-129 (D.D.C. Aug. 22, 1989)(S. Res. 162, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. 18474-75 (1989), and S. Rep. No. 98, 101st Cong., 1st Sess. (1989)); *Senate Select Committee on Ethics v. Packwood*, 845 F. Supp. 17 (D.D.C. 1994), stay denied, 510 U.S. 1319 (1994)(S. Res. 153, 103d Cong., 1st Sess. (1993), 139 Cong. Rec. S14832 (daily ed. Nov. 2, 1993), and S. Rep. No. 164, 103d Cong., 1st Sess. (1993); and William Kennedy: (authorized by Senate, but not filed)(S. Res. 199, 104th Cong., 1st Sess. (1995) and S. Rep. No. 191, 104th Cong., 1st Sess. (1995).

⁴³ On March 9, 1937, President Franklin Delano Roosevelt sent to Congress a bill to reorganize the federal judiciary. It was soon dubbed the "court-packing bill." In his fireside chat about the bill, Roosevelt stated, "We have...reached the point as a nation where we must take action to save the Constitution from the Court and the Court from itself." He specifically decried the many Supreme Court decisions invalidating key elements of the New Deal. Roosevelt's proposal was "whenever a judge or justice of any federal court has reached the age of seventy and does not avail himself of the opportunity to retire on a pension, a new member shall be appointed by the president then in office, with the approval, as required by the Constitution, of the Senate of the United States." There were then six justices of the Supreme Court over seventy. Roosevelt's motive was clear, to save the New Deal legislation from being invalidated by the Supreme Court. Roosevelt's proposal met with fiery opposition. Many accused the president of seeking to subvert the Constitution and destroy the independence of the judiciary. Even some of those sympathetic to the president's purposes felt that the changes he sought should be made only by constitutional amendment. In addition, Roosevelt antagonized potential supporters within his own party by refusing to consult with them on the bill or consider changes in it. Pressure for passage of the bill was weakened by the retirement of one conservative Supreme Court justice; by the death of Senator Joseph Robinson, who had been leading the fight for the plan; and by the fact that several major pieces of New Deal legislation (including the Social Security Act and the National Labor Relations Act) were upheld by the Court between March and May 1937. The votes in these cases saw "the switch in time that saved nine." In August, the Judicial

Procedure Reform Act was passed instead, incorporating some of the president's recommendations but leaving the number of federal justices unchanged. Over the next four years, a combination of deaths and retirements enabled Roosevelt to make seven appointments to the Court that ended the legal threats to the New Deal.

⁴⁴ From 1976 to 1983 Stan served as general counsel to the U.S. House of Representatives under Speaker Thomas P. "Tip" O'Neill, Jr., and was the House's chief legal officer responsible for representing the House, its members, officers, and employees in connection with legal procedures and challenges to the conduct of their official activities. He represented the House and its committees before both federal district and appellate courts, including the U.S. Supreme Court, in actions arising from the subpoena of records by the House, in contempt proceedings in connection with congressional demands, and in landmark cases (two of which he argued before the Supreme Court) involving the legislative veto, congressional chaplaincies, immunity of congressional employees, separation of powers, and constitutional and common law tort suits, including defamation, discrimination actions, and state and federal wiretapping statutes. When he left the Hill in 1983, he founded a law firm, now Brand and Frulla, which has "specialized in cases at the intersection of politics, criminal law and communicating in the Washington echo chamber," according to former client George Stephanopoulos in his best-selling autobiography, *All Too Human: A Political Education* (Little Brown and Company, 1999). These cases have included representing corporations, trade associations, labor unions, and individuals in major Justice Department, grand jury and independent counsel investigations and trial proceedings, including Whitewater, HUD, the savings and loan crisis, and the campaign finance task force investigations. In addition to Stephanopolous, Stan has represented a succession of high profile clients in political and public corruption cases, including former Congressman and Gore 2000 Chairman Tony Coelho, former House majority whip Bill Gray, and Congressmen Dan Rostenkowski and Joe McDade. In addition, he has served as counsel to the International Brotherhood of Teamsters for twenty years and as parliamentarian and counsel to the Democratic National Convention. Last year he served as counsel to Arthur Andersen in the government's various investigations of and charges against the company. In 1999, Stan was named by the *Legal Times* to the magazine's white collar crime "Top Gun" list for knowing "when to fight and when not to fight." Since 1992, he has served also as vice president of the National Association of Professional Baseball Leagues, the governing body of minor league baseball. Stan received his B.A. from Franklin & Marshall College in 1970 and his J.D. from Georgetown University Law Center in 1974, where he has also taught administrative law and appellate advocacy as an adjunct professor.

⁴⁵ Charles Tiefer has written an excellent law review article on the Senate Legal Counsel Office, reviewing some of the more interesting issues it's faced. See "The Senate and House Counsel Offices: Dilemmas of Representing in Court the Institutional Congressional Client," *Law & Contemporary Problems*, 47 (Spring 1998), 61. Charles is a close friend and has had a distinguished career including expert representation of the House and Senate. He's now a professor of law, University of Baltimore. He was assistant Senate Legal Counsel, 1979-84; solicitor and deputy general counsel of the House of Representatives, 1984-95; and acting

general counsel of the House of Representatives, 1993-94.

⁴⁶ Davidson's nonpartisan style so satisfied the Senate's requirements that he served sixteen years under Majority Leaders Robert Byrd (D-W. Va.), Howard Baker (R-Tenn.), Robert Dole (R-Kan.), Byrd again, George Mitchell (D-Maine), and Dole again, consistently building the office's reputation for being above controversy. Mike Davidson now serves as minority counsel to the Senate Select Committee on Intelligence. He graduated from Cornell and the University of Chicago Law School. He served as Peace Corps volunteer in Kenya from 1964-1966. From 1966 to 1973—with a year's break while he and his wife lived and traveled in South America—Mike served as assistant counsel, NAACP Legal Defense and Educational Fund. He also served as director, Housing Litigation Bureau, Housing and Development Administration, New York City; and chief staff counsel, United States Court of Appeals for the District of Columbia Circuit. From 1979 to 1995, he served as Senate Legal Counsel. Upon leaving that post he served as acting general counsel, Library of Congress; counsel to the Senate Government Affairs Committee; co-director, Campaign Finance Reform Project with The Aspen Institute; counsel to the Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China (minority); and counsel with the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence. He served as counsel to Senators Byrd, Moynihan, and Levin in litigation on the constitutionality of the Line Item Veto Act, 1997-98, and as a member of the advisory board for the A.B.A. Central and East European Law Initiative, 1991-2001, where he helped draft the draft constitutions of Albania, Armenia, Bulgaria, Lithuania, Romania, Russia, and Ukraine

⁴⁷ The Congressional Management Foundation has published surveys of Senate staff tenure: http://www.cmfweb.org/SupportingFiles/documents/CMF_Senate_Salary_Study.pdf This study found that the tenure of Washington-based Senate staff has decreased during the last decade. The time an average Senate staff member remains in his or her position has dropped 29 percent to 2.2 years; the average time the staff remain in the same office has dropped 21 percent to 3.1 years; and the average time staff remain in Congress dropped 12 percent to 5.0 years. This is partly due to the pay gap. The report found that the gap between the pay of Washington-based Senate staff and executive branch staff has nearly doubled in the last decade, with Senate staff now earning about two-thirds of federal government employees. The average Senate staff member earned 18 percent less than an executive branch employee in 1991—that gap increased to 32 percent in 2001.

⁴⁸ Phil Kurland was an internationally renowned scholar of the U.S. Constitution and a University of Chicago faculty member for more than forty years. He is credited with fundamentally reshaping our understanding of the U.S. Constitution, particularly its system of checks and balances, the separation of church and state and the importance of judicial restraint. Gerhard Casper, former provost and dean of the Chicago Law School, portrayed Kurland in words Kurland himself had used to describe U.S. Supreme Court Justice Felix Frankfurter: "A truly civilized man, confident in the strength and security derived from the inquiring mind, unafraid of the incertitudes." Kurland began his legal career after graduation

from Harvard Law School, where he was president of the Harvard Law Review. From 1967 to 1976, he was chief consultant to the U.S. Senate Subcommittee on Separation of Powers, which was charged with, among other duties, studying the Watergate break-in. He died in 1996.

⁴⁹ I'd spent seven summers at the Orme Ranch. It was a forty-thousand acre working cattle ranch. I loved it. I rode every day, we learned to shoot, work with leather, and handle the outdoors. I rode cows in rodeos and roped as well. This outdoor life was perfect preparation for the Peace Corps.

⁵⁰ See Johnson's remarks at <http://www.presidency.ucsb.edu/ws/index.php?pid=27134&st=&st1> (August 4, 1965: Remarks to College Students Employed by the Government During the Summer). He said, "I am proud this morning to salute you as fellow revolutionaries. Neither you nor I are willing to accept the tyranny of poverty, nor the dictatorship of ignorance, nor the despotism of ill health, nor the oppression of bias and prejudice and bigotry. We want change. We want progress. We want it both abroad and at home—and we aim to get it." He said, "I am not disturbed by what some describe as the restlessness among young Americans today, because I share that feeling with you. I want to clear off and clear out the agenda of the past. I want to get ready for the works and the promises of tomorrow. And I know you want to, too....If you feel like protesting, I hope you will. I have been protesting all my life—protesting against poverty, protesting against illness, protesting against ignorance, protesting against injustice and discrimination, and against waste, and above all, against war. And I expect to continue, and I expect you to continue, until all of these evils are overcome in our land and around the world."

⁵¹ See H. Res. 420, 1973. It permitted each office to hire two interns. After 1994, offices could use their regular office accounts to pay interns but only if they had not reached the limit of twenty-two staff.

⁵² CLASP was founded as a public interest law firm in 1968 by Charles Halpern and three other young lawyers, with the assistance of Justice Arthur Goldberg. For fourteen years, CLASP helped develop new areas of legal work on women's rights, mental health, environmental protection, international human rights, health care for the poor, international trade, employment rights, and mine health and safety. Several prominent organizations, including the National Women's Law Center and the Bazelon Center on Mental Health Law, began their work as part of CLASP. In 1981, the CLASP board of trustees decided to focus on issues affecting low-income and disadvantaged persons.

⁵³ The National Environmental Policy Act of 1969, Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970.

⁵⁴ In 1968, large crude oil reserves were discovered at Prudhoe Bay by the Atlantic Richfield Company (ARCO). ARCO joined with BP Oil and Humble Oil to form the Trans-Alaska Pipeline Systems (TAPS). TAPS was proposed to ship crude oil to the southern Alaska

seaport of Valdez (an ice-free port), from where it would be shipped to refineries by tanker. Pipeline construction from Prudhoe Bay required transiting a route where much of the right-of-way was on federal and state lands. The Wilderness Society and others sued to stop the pipeline; they were our clients. We thought the key issue was compliance with the just-enacted National Environment Policy Act (NEPA) that the government issue environmental impact statements (EIS). The EIS for the pipeline was the first major EIS and the litigation regarding its adequacy was the first major test of what was required. I was in charge of preparing a legislative history of the statute. The key issue was whether the law was substantive—requiring that the government select the least environmentally damaging option—or procedural—simply requiring that the government review the options before making its choice. The courts eventually ruled that NEPA was procedural and we lost our claim on that issue in the Supreme Court. But the plaintiffs had also sued claiming that the pipeline violated the Mineral Leasing Act, which limited the right of way for pipelines to twenty-five feet. They needed a much wider right of way than that to build the pipeline. We won on this issue in the Supreme Court, but then the Congress enacted legislation to overturn the decision and the pipeline was built. See the Trans-Alaska Pipeline Authorization Act, P.L. 93-153. The first oil moved through the pipeline on June 20, 1977, and on March 24, 1989, the Exxon Valdez ran aground on Bligh Reef in Prince William Sound. It was a privilege to be involved in this landmark case.

⁵⁵ See the Trans-Alaska Pipeline Authorization Act, P.L. 93-153. The first oil moved through the pipeline on June 20, 1977, and on March 24, 1989, the Exxon Valdez ran around on Bligh Reef in Prince William Sound. Since it was constructed, 550 billion barrels of oil have been transported on the pipeline and 17,000 tankers have picked up oil in the southern terminal at Valdez. About 20 percent of U.S. domestic production comes from this pipeline.

⁵⁶ From 1979 until he joined Miller & Chevalier in 1983, Len served as general counsel to the U.S. Nuclear Regulatory Commission, where he had lead responsibility for all commission litigation and for legal advice regarding the agency's adjudications, rulings, and proposed legislation. From 1975 to 1979, Mr. Bickwit served as chief legislative assistant to Senator John Glenn. Mr. Bickwit also served, from 1983 to 1984, as the national issues director of Senator Glenn's presidential campaign. From 1969 to 1974, Mr. Bickwit served as counsel to the Subcommittee on the Environment of the U.S. Senate Committee on Commerce, where he supervised staff support for Senator Philip Hart, the subcommittee chairman, and participated in the development of many of the principal pieces of environmental legislation of the 1970s. He graduated from Harvard Law School in 1966, Oxford in 1963, and Yale in 1961.

⁵⁷ Eutrophication means, simply, an artificial enrichment of the water, just like gardeners enrich their soil with manure. That may be good for vegetables but it can mean death to the tiny insect larvae that live in water and form the base of the aquatic food chain for fish and birds like heron, kingfishers, and dippers. What happens is that this enrichment causes huge blooms of algae that, in some parts of the world, can be poisonous in their own right: they have been known to kill drinking cattle in Africa.

⁵⁸ Len can be absentminded. There's a story that he was driving his car by the Kennedy Center when the engine died. So the story goes, he pushed it off the road and didn't think to be ready to set the brakes. The car went right into the river! Also, in another story, he kept coming into the office looking very tired. He explained that the switch on his ceiling bedroom light was broken and he couldn't turn off the light. Apparently, it never occurred to him to get on a stepladder and unscrew the light! I don't know if these stories are true; they were told to me by people who admire Len.

⁵⁹ Richard B. Russell, Jr., was born in 1897, served as governor of Georgia and U.S. senator. In 1938 he led the opposition to anti-lynching legislation. The Declaration of Constitutional Principles, also known as the "Southern Manifesto," was released to the press in 1956. Russell wrote the final draft of the Manifesto, which attacked the Supreme Court ruling on *Brown v. Board of Education Topeka*. Only three southern senators refused to sign it: Estes Kefauver, Albert Gore (Sr.), and Lyndon Johnson. In 1959 he made the following statement, which typifies his deep-seated racism: "I can only deplore the invasion of our state by conscienceless agitators from abroad who encourage such litigation and thereby divert our courts from their proper function. I hope that the Atlanta school board will use every means at their command to resist this effort of the itinerant lawyers of the colored people's association to enforce an abhorrent alien doctrine on a people who are proud of their belief in the right of the several states to control their local affairs."

⁶⁰ The Supreme Court dismissed an appeal by Nike Inc. on technical grounds. The shoe and apparel giant was appealing a California state supreme court decision that it can be sued for false advertising over a publicity campaign it used to defend itself against accusations that its footwear was made in Asian sweatshops.

⁶¹ See Chuck Ludlam, "Abatement of Corporate Image Environmental Advertising," 4 *Ecology Law Quarterly* at 247-278.

⁶² The history of White House intervention began in the Nixon White House in 1971 with a little known review group called the "Quality of Life Review" program. The program focused solely on environmental regulations to minimize burdens on business. These reviews did not utilize analysis of the benefits and costs to society. The controversy that resulted from the program began a debate about both presidential review of regulations and the use of benefit-cost analysis that would continue for two decades and to some extent continues today. Soon after Gerald Ford became president in 1974, he held an economic summit that included top industry leaders and economists to seek solutions to the stagflation and slow growth that the nation was then facing. Out of that summit came proposals to establish a new government agency in the Executive Office of the President, called the Council on Wage and Price Stability (CWPS), to monitor the inflationary actions of both the government and private sectors of the economy. It also led President Ford to issue Executive Order 11821, requiring government agencies to prepare inflation impact statements before they issued costly new regulations. The innovative aspect of the Ford program was the creation of a

specific White House agency to review the inflationary actions, mainly regulations, of other government agencies. CWPS was staffed primarily by economists drawn from academia and had little authority beyond the influence of public criticism. The economists at CWPS quickly concluded that a regulation would not be truly inflationary unless its costs to society exceeded the benefits it produced. Thus the economists turned the inflation impact statement into a benefit-cost analysis. This requirement, that agencies do an analysis of the benefits and costs of their "major" proposed regulations—generally defined as having an annual impact on the economy of over \$100 million—was adopted in modified form by each of the next four presidents. The Administrative Procedure Act requires agencies to give the public and interested parties a chance to comment on proposed regulations before they are adopted in final form. The agency issuing the regulation must respond to the comments and demonstrate that what it is intending to do is within its scope of authority and is not "arbitrary or capricious." CWPS used this formal comment process to file its critiques of the agencies' economic analyses of the benefits and costs of proposed regulations. CWPS would also issue a press release summarizing its filing in non-technical terms. The CWPS analyses attracted considerable publicity. But while this system was effective in preventing some unsupportable regulations from becoming law, it had little success in preventing the issuance of poorly thought out regulations that had strong interest group support. Nevertheless, one of the legacies of this approach was that it slowly built an economic case against poorly conceived regulations, raising interest particularly among academics and students who began to use the publicly available analyses in their textbooks and courses. When benefit-cost analysis was first introduced, it was not welcomed by the political establishment, especially the lawyers and other non-economists who comprised many agencies and congressional staffs. But over time, as these analyses became standard fare in textbooks, the value and legitimacy of benefit-cost analysis became evident, and it slowly gained acceptance among the public. After President Carter came to office in 1977, the regulating agencies argued that the Executive Office of the President should not have a role in reviewing their regulations. On the other hand, the president's chief economic advisers argued that a centralized review program based on careful economic analysis was necessary to assure that regulatory burdens on the economy were properly considered and that the regulations that were issued were cost effective. Rapidly escalating inflation in 1978 convinced President Carter of the need to act. In March of 1978, he issued Executive Order 12044, "Improving Government Regulations." It established general principles for agencies to follow when regulating and required regulatory analysis to be done for rules that "may have major economic consequences for the general economy, for individual industries, geographical regions or levels of government." President Carter also set up a new group, called the Regulatory Analysis Review Group (RARG), with instructions to review up to ten of the most important regulations each year. The RARG was chaired by the Council of Economic Advisors (CEA) and was composed of representatives of OMB and the economic and regulatory agencies. It relied on the staff of CWPS and the CEA to develop evaluations of agency regulations and the associated economic analyses and to place these analyses in the public record of the agency proposing to issue the regulation. The analyses were reviewed by the RARG members and reflected the views of the member agencies, including the agency that proposed the regulation. In this way, the Carter administration helped to institutionalize both regulatory review by the Executive

Office of the President and the utility of benefit-cost analysis for regulatory decision makers. Also, in an important legal ruling, the U.S. Court of Appeals for the District of Columbia in *Sierra Club v. Costle* (657 F. 2d 298 (1981)) found that a part of the president's administrative oversight responsibilities was to review regulations issued by his subordinates.

⁶³ See "Paralysis by analysis: Jim Tozzi's regulation to end all regulation," *Washington Monthly* (May, 2004) by Chris Mooney. Jim is the flamboyant head of an industry funded, for-profit think tank called the Center for Regulatory Effectiveness. He's made his career in the decidedly unflamboyant field of government regulation. In the three decades or so since the Environmental Protection Agency, Occupational Safety and Health Administration, and other agencies were formed, industry has become adept both at weighing down the rule-making process with years of preliminaries and at challenging regulations once promulgated. And for years, Jim—thanks to official contacts and regulatory expertise gleaned from two decades in government—has been a master of the game, gumming up the regulatory works and, as he puts it, giving environmentalists and consumer advocates "gastronomical pains."

⁶⁴ Tozzi's new baby, the "Data Quality Act"—conceived by Jim and passed with little debate by Congress three years ago—allows businesses to challenge not just government regulations, but the taxpayer-sponsored science which agencies rely upon to formulate these rules in the first place. This is the essence of "hybrid rule-making." See Section 515 of Public Law 106-554.

⁶⁵ The independence of certain federal agencies from the executive branch dates to the 1935 decision of *Humphrey's Executor v. United States* 295 U.S. 602 (1935). The Supreme Court there held that the distinctive expertise and impartiality of certain agencies justified the power of Congress to insulate agency officers from removal at will by the president. The case was part of a general acceptance of a practical and flexible, or 'functional,' approach to separation of powers—an approach that has led to independent agencies being considered a 'veritable fourth branch' of government.