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 Hirschoff, 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.

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

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 trail 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 from1955-1961. 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 a 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 nineteeth 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 Ruckelshaus 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

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[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] Eutrification 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.