

HART-SCOTT-RODINO
Interview #2
Wednesday, December 10, 2003

RITCHIE: In our last interview, you mentioned several major legislative fights we should talk about, including the Hart-Scott-Rodino Antitrust Improvements Act. You indicated that you had more to say about it because it really was your trial by fire on the floor of the Senate. Exactly what was it all about, what was your role in it, and what does it say about the Senate as an institution? Then we can talk about the Airline Noise bill and other matters.

LUDLAM: It's been fun for me to go back and to review the record of that bill and to match it with my memories of what happened. The Hart-Scott-Rodino bill was a titanic struggle. The floor fight on this bill occurred in 1975, less than a year after I arrived in the Senate. The debate went right to the character of the Senate—focusing intensively on the rights of individual senators to thwart the will of the majority.

I doubt if there is any other struggle in Senate history where one individual attempted so strenuously to stop action on legislation supported by a very determined majority. At several points, the struggle led the Senate to a precipice. It was an incredible drama for a young staffer like me, new to the Senate, to witness this brawl from a front row seat.

In terms of statistics, we were on the floor for sixteen days. There were eighty-four roll-call votes. It's hard to imagine a fight today where they would take up that much time and endure that many votes. In fact, the Senate has changed the filibuster rules since then, so some of the post-cloture filibuster tactics that were used against this bill could not be utilized now.⁶⁶ During this brawl, we made hundreds of formal and informal parliamentary inquiries. Murray Zweben, the parliamentarian at the time, told me that he retired early because of the fight with Senator Jim Allen, the leader of this filibuster.

RITCHIE: Do you have any idea why it got so intense on this particular bill, the antitrust bill?

LUDLAM: The antitrust bill was very threatening to the business community. This was the first big fight for the Business Roundtable, which has become a formidable lobby for the business community. This bill basically empowered all of the state attorneys general to file class action antitrust lawsuits on behalf of consumers against businesses for price fixing and other antitrust violations. The antitrust law calls for treble damages, so the liability was potentially very large.

We all know that state attorneys general tend to be very ambitious and aggressive—witness Elliot Spitzer in New York. So the bill was going to lead to an awful lot of trouble for the business community. By current standards, this was a very left-wing bill—and it’s inconceivable that it’d be given serious consideration today.

RITCHIE: Although the Republican minority leader was a co-sponsor of the bill.

LUDLAM: Yes, Hugh Scott was involved with the bill and supported it. Some conservative Democrats had heartburn about the bill, led by Jim Allen, and Peter Rodino hated the bill. Rodino eventually went along with the bill because his committee was more liberal than he was and he settled for getting his name on it. In the Senate, there were some Republicans supporting the bill and President Ford eventually signed it into law. That didn’t persuade Allen not to fight nearly to the death to kill it.

Jim Allen was an absolutely fabulous individual for whom I had and have great respect.⁶⁷ He was very kind, very bright, and very principled. He knew the Senate rules because he had been president of the Alabama senate, and the Alabama senate used the U.S. Senate rules. So he already knew the Senate rules before he got here. He didn’t learn them here. Allen was a typical Dixie senator, very pro business. He was a Democrat, but a very conservative Democrat and he saw that the antitrust bill would be very tough on the business community.

Despite the fact that I was fighting to pass the bill and Allen was trying to kill it, I came to revere him. I remember one incident with Allen that shows what kind of man he was. I was working on some issue—I don’t recall the substance—and Allen had an interest in it. He asked to meet with the staffer who was handling it—not to meet with another senator, but to meet with the staffer. I went over to his desk on the Senate floor. He had a desk on the aisle and we started talking. It didn’t seem right for me to stand next to him when

he was sitting, so I sat down on the floor next to his desk, in the aisle. We had an extended discussion of the matter. This was before TV came to the Senate. No staffer would sit on the floor now! We talked for a very long time, perhaps an hour. I was partially blocking the aisle. He didn't mind negotiating with a lowly—literally lowly—staffer. He was not a man with the usual arrogance of senators in this institution. I don't recall if I satisfied his concerns, but I vividly remember what a kind and engaging person he was. I admired him greatly as a human being. I was very sad when he died. On the antitrust legislation, however, he was our mortal enemy.

The fight on this bill basically was between Bobby Byrd, who then aspired to become majority leader to succeed Mike Mansfield, and Senator Allen. Byrd wanted to prove to the liberals that he could be trusted.⁶⁸ Passing Phil Hart's antitrust bill at a time when Phil Hart was dying of cancer was one of Byrd's political strategies to ingratiate himself within the Democratic caucus. It pitted Byrd's superb knowledge of the Senate rules against Jim Allen's superb knowledge of the rules.

I was involved because my boss, Jim Abourezk, was one of the champions for the bill in the Judiciary Committee. Jim was a liberal and anti-business, so he was a natural supporter of a bill to increase antitrust enforcement. The other leaders were Phil Hart and Ted Kennedy. Other members were involved, but it was Phil Hart's bill with Kennedy and Abourezk serving as his principal assistants. Hart was chair of the Judiciary Committee's Antitrust Subcommittee. Jim Allen was very pro-business, so he led the opposition to the bill. The bill was considered to be Phil Hart's swan song in the Senate. And of course, Hart was beloved, absolutely beloved, by his colleagues.

I'm not sure Byrd had any firm views on the antitrust issues in this bill, but he was the assistant majority leader and he was going to pass Hart's bill if he died trying—and he almost did die trying. Let me describe a series of dramatic events I witnessed during those sixteen days.

The first major confrontation occurred on May 28, 1976. Jim Allen was holding the floor tenaciously to prevent Byrd from bringing up the bill and filing a cloture petition on it. Allen's strategy was to run out the Senate clock on the session. Byrd needed to get recognized to bring up the bill and file a cloture petition on it to stop the filibuster. Allen was filibustering Byrd even bringing up the bill, so Byrd couldn't file the cloture petition. A bill

has to be made the “pending matter” before cloture can be filed.

At one point Allen innocently asked for unanimous consent for something trivial, and Byrd used that as an excuse to take him “off his feet,” to secure the recognition of the chair, bring up the bill, and file the cloture petition. It was an incredibly dramatic moment. Recognizing Byrd was probably not appropriate as a parliamentary matter, but Byrd forced the chair to recognize him so that he could do what he needed to do. This event and Jim Allen’s response to it is printed in the May 28 *Record*.

When the Senate got around to the cloture vote on June 2, Jim Allen put in a long, pained statement explaining how aggrieved he was, personally, that his friend Bobby Byrd had screwed him on this parliamentary maneuver. Three months later this event still rankled with Senator Allen. He was engaged in a second filibuster on the antitrust bill and said, “I trust that the substitute [amendment he was offering] will appear in the *Record*. However, I am not going to ask unanimous consent that it appear in the *Record* because I recall all too vividly that on one occasion in the Chamber, the Senator from Alabama, as the rules allow, did make a unanimous consent request and the Chair ruled that the Senator from Alabama lost the right to the floor by making that unanimous consent request. That was clearly in contravention to the rules, but what could the Senator from Alabama do?”

On August 27 Allen commented in amazement that he’d managed to get recognized at a time when Senator Byrd was also seeking recognition. Allen said he had approached the senator who had been the presiding officer and said, “I thought you had been sent to the Chair to do the day’s dirty work” (of recognizing Senator Byrd over Senator Allen, as had happened on May 28). Senator Allen explained that he’d used that “indelicate expression”—“dirty work”—because “the Senator from Alabama had not been recognized on a number of occasions when the rules would have required him to be recognized.” Senator Allen refused to name the individual, referring to him as “a faceless, nameless entity.”

All of this, of course, refers back to May 28 when Senator Byrd had taken Senator Allen “off his feet” in order to make the antitrust bill the pending business and file the cloture petition.

RITCHIE: Were they arguing that if he asked for unanimous consent, it was the second speech on that issue?

LUDLAM: No, the bill wasn't pending and we hadn't invoked cloture on it. The issue was whether Allen in making this unanimous consent request had lost his right to the floor. When Allen made the unanimous consent request, Byrd jumped, he asked for recognition, got recognition, brought up the antitrust bill and filed the cloture petition on it—all in about five seconds.

Doing this at this time was critical to the passage of the bill. Allen was trying to prevent Byrd from getting the floor to bring up the bill and file the cloture petition. Then he asked for unanimous consent to print something in the *Record* and that was Byrd's opening. He pounced.

I don't know if Senator Byrd and Murray Zweben had talked about this strategy in advance, and had a friendly senator posted in the chair poised to recognize Byrd, or whether this just happened spontaneously. Murray was there advising the chair on how to rule. The chair is required to recognize the majority leader or his substitute—but only if the floor is open. The chair is required to protect the rights of individual senators who are holding the floor. Senator [Gale] McGee, a reliable supporter of the legislation and of Senator Byrd, was in the chair at that crucial time on May 28, and he was the one who recognized Byrd instead of letting Allen continue his filibuster.

Despite Senator Allen's suspicions, I think that this event occurred spontaneously, without any plan set in advance. Byrd is a forceful man, he's quick on his feet, he sensed an opportunity, he demanded recognition, and then McGee recognized him. Bam, bam, bam. McGee was the "faceless, nameless entity."

Allen's protests were to no avail. Allen was screaming for recognition and demanding his rights, but McGee had the power of recognition and he used it to recognize Byrd. This proves that the chair's power of recognition—who to recognize as next to speak—is truly a critical power. In this case it saved the bill.⁶⁹ So Phil Hart's bill became the pending business and the Senate then invoked cloture on it to bring the debate to a close. However, this turned out to be only the bare beginning of the fight.

Allen launched into an unprecedented post-cloture filibuster. This sounds like a contradiction in terms—a vote for cloture is supposed to end filibusters. But in this case Allen had a strategy for filibustering after cloture was invoked—by calling up amendment

after amendment, making repeated motions and appeals, and engaging in other obstructionist and dilatory tactics. There were supposed to be only one hundred hours of debate, but this didn't count the time it took to take a vote. So he'd use five seconds of his time and then the vote would take twenty to thirty minutes. This tactic could tie the Senate in knots for months, all within the "one hundred hour" post-cloture debate limit.

When they'd written the "hundred hour" rule, everyone thought that after cloture was invoked, the senators would let the bill pass. No one imagined that invoking cloture would be the bare beginning of the fight. The Senate is a gentle body and everyone just thought that the senators would be gentlemen when a sixty-vote margin for a measure was established in the cloture vote. So they didn't write the rule so that it'd prevent the type of post-cloture filibuster Allen launched. He was operating within his rights, but there is no doubt that he was pushing his literal reading of the rule to the point of absurdity. If his interpretation of the rule was permitted to stand, the whole cloture procedure for limiting debate would become a sham and meaningless.

As I will explain in a minute, Allen's tactics several times led the Senate to the precipice as it moved to crush his very small group, which was thwarting the will of the overwhelming Senate majority.⁷⁰

The second dramatic event occurred on June 7. We had an incredible turn of events in connection to an amendment from Senator [Quentin] Burdick.⁷¹ This was one of many amendments Allen and his group proposed to the bill after cloture had been invoked. Burdick was not a noted legislator of substance during his career, but the industry folks who didn't like the antitrust bill got him to offer an amendment that would have prevented the use of contingent fees by plaintiffs in private antitrust cases. This would have pretty much killed the type of antitrust litigation we hoped to spawn. The plaintiff's antitrust bar file these cases on a contingent fee basis, where the lawyers are paid only if they win a judgment for their client. The Burdick amendment was popular because nobody likes contingent fees. Burdick was—shall I say—the "shill" for this amendment. [Laughs]

Burdick offered the amendment, and we knew the whole bill was a risk. We knew this amendment would kill the bill. The Senate voted on this amendment on June 7, vote number 227. We're sitting there, and we don't know whether we are going to win or lose this vote. It was razor thin.

Then, in a total surprise, the chair announced that it was a tie vote on tabling the Burdick amendment. A tie vote meant that we had failed to table the amendment. To win a vote, you need a majority. A tie means you don't win. The vice president was nowhere to be found. We guessed that he'd support us, but he was nowhere in sight. All of us were looking at each other trying to figure out what happens now. We hadn't tabled the amendment, it was still alive. Burdick didn't have a majority to pass his amendment, but he wasn't dead. Myriad calculations flowed through our heads on what to do next.

Do we hold things up and try to bring in the vice president to help us? Can we do that? If we could find him, would he take our side? Should we move to reconsider the vote on the motion to table? Only a senator who votes in the majority can make the motion, so that option wasn't available.

As our brains scrambled to figure out what to do next, there was a long and pregnant pause. For about a minute nobody said a word. Everybody was stunned as we tried to figure out what this meant for the bill and what would happen next. No one asked for a quorum call to suspend the action. Everyone was silent. Then the chair announces that the legislative clerk had miscounted the vote. I have never seen this!

The chair announced that the announced vote was a mistake and we had won the vote and tabled the amendment. The announcement that they had miscounted the vote is at page 16836 of the June 7 *Record*. The chair was so embarrassed by the situation that he ordered a "recapitulation" of the vote, a second vote. This is the only time I've seen this in the Senate. So the Senate voted a second time. It was a tabling motion against a motion to reconsider the vote, vote number 228. This is in the *Record* of June 7. And we won the second vote, the recapitulation. Not before or since have I heard of a "recapitulation" of a vote. It was a very unusual situation!

I've never seen the clerk miscount before. And the miscount was on the single most threatening amendment to the bill.

RITCHIE: It was an honest mistake?

LUDLAM: Yes, an honest mistake, totally honest mistake, and it occurred when the bill's fate was in jeopardy. They had counted one member twice—Senator [Thomas]

McIntyre.⁷² Senator McIntyre later explained what had happened. He said he'd voted "no" on the Burdick amendment. He said that it was "the understanding of the Senator from New Hampshire that the motion was to reconsider and I voted 'no.'" He learned of his mistake and "came to the floor and changed my vote" before the vote was announced. You can change your vote before the vote is announced, but thereafter you can only change your vote by unanimous consent if it doesn't change the outcome.

We'd had so many different types of votes. We'd had votes to table, votes to reconsider, votes to table motions to reconsider, and other votes. So it's not surprising that McIntyre was confused. He explained, "I think an error was made at the desk in failing to expunge my original vote on the motion to table." So McIntyre was counted as voting both "yes" and "no," which yielded the initial "tie" vote. When his duplicate vote was deleted, we won on the vote to table the Burdick amendment. But we still had to endure the "recapitulation," which was nerve-wracking.

The third series of dramatic events began on June 8. As the debate proceeded, we all become increasingly stressed. We had endured an incredible numbers of votes, live quorums, motions to table, motions to table motions to reconsider. Just bizarre stuff. So as was his practice, Senator [John] Pastore started a series of speeches as only he could do, saying, "It's six o'clock and we should be home with our children and our wives. We are embarrassing ourselves." There was a fabulous speech of Pastore's on June 8 at 1639-16941 and another one on June 9 at 17241. He even threatened to make some unprecedented points of order against what he considered to be dilatory tactics. It got wild. You can hear the emotion when you read the *Record*.

At one point, there was a vote on a motion to adjourn, and then there was a motion after that on a motion to recess. You can see in the *Record* that the members were saying "Why? Why?" The level of frustration was rising to the point of real anger.

Then we came to the fourth incident, one that completely inflamed the situation. This occurred on June 9. Senator [Bill] Scott of Virginia was part of the Allen group filibustering the bill. Cloture had been invoked so each member is supposed to be able to speak for only one hour before the final vote.

Early in the day, Senator Helms had helped his fellow North Carolinian, Senator [Robert] Morgan, one of the managers of the bill and a very strong proponent of it, to secure for Morgan an extra hour to debate the bill. As a manager of the bill, Morgan needed some additional time.⁷³ This was accomplished when Senator Glenn and Senator Bentsen got unanimous consent each to give Morgan a half hour of their allotted hour.

At another point that day, Senator Helms asked unanimous consent that Senator Brock be permitted to transfer thirty extra minutes to Scott so he could extend his speech.⁷⁴ Objection was heard to that, from my boss. Given that Helms had helped Morgan secure some extra time, it was not very kind of my boss to object when Helms tried to secure some extra time for Scott. But tempers were short, Abourezk could be pretty temperamental, and he had objected. Scott then said, “I would like to see more senators to be in the chamber while I am making this talk” so he called for yet another live quorum call.⁷⁵ This offended us, but lots of the actions of the opponents were offending us at this point. After the live quorum call, Abourezk hit Scott with a tabling motion on his pending amendment, which passed 51-35.

When everyone was settling back to hear the rest of Scott’s incredibly dilatory and whining speech—his speeches were always boring, so nobody was listening—he said, “I think there are very important matters that are being brought to the attention of the Senate. I have only 37 minutes remaining. I ask unanimous consent that I have thirty extra minutes under cloture to debate the bill.” None of us heard what he’d said. What he said was lost in the droning. We were tired and busy doing other things. Cloture had been invoked. He had an hour, and he asked for thirty extra minutes. This is at the June 9 *Record* at 17254.

It’s probably no coincidence that Jesse Helms was in the chair. Back then, even when Democrats were in power, both Democrats and Republicans would serve as president pro tempore of the Senate.⁷⁶ Helms quickly mumbled, “Is there any objection? The chair hears none. Without objection, it is so ordered.” All done in a few seconds. Mumbled.

When this occurred, I was sitting there down in the well at the majority leader’s desk.⁷⁷ I hadn’t heard what Scott and Helms had said. Hart wasn’t there. Abourezk wasn’t there. Kennedy wasn’t there. Morgan wasn’t there. No Democratic senator was there at the time—which is not an unusual situation in the Senate. I was distracted. We staff were always busy—figuring out what the next amendment might be, figuring out who we could get to

Speak against the next amendment, and myriad other elements of managing a monstrous debate.

The Scott unanimous consent for thirty extra minutes had been granted before we had any chance to do anything to stop the UC. Staff can't stand up and object! Only members can do that. Our view was that Helms—a Republican sitting as the chair when Democrats controlled the Senate—had gaveled this through only to help Scott and frustrate the majority. Helms had been trying unsuccessfully to give Scott some extra time and here he abused the power of the chair to get it done.

To my knowledge, no member of the minority caucus has sat in the chair since then. I believe that this was the last time a member of the opposition party sat as the presiding officer of the Senate. It was Bill Scott and Jesse Helms who ruined the institution of bipartisanship for the president pro tempore of the Senate. This means that the burdens of presiding fall entirely on the majority and are not shared with the minority. This has helped to make the life of freshmen senators—who are required to preside—even more miserable. It's relieved freshmen senators in the minority from any presiding time.

RITCHIE: That Scott unanimous consent would have set a dangerous precedent for cloture as well, if you could extend the post-cloture debate by unanimous consent.

LUDLAM: Absolutely. The reaction to the Allen-Helms abuse of the power of the presiding officer was swift and dramatic. You can read the *Record* to see the flavor of the response. It jumps right out of the page. It focused on moving to majority cloture, a dramatic break with Senate traditions and precedent.⁷⁸ Scott said that he had made the request in jest. He said, "I fully anticipated that there would be an objection. None having been made, I do want to take the opportunity to complete my remarks." He said, "I thought someone would object" and nobody did.

Mansfield took the floor that day (see the June 9 *Record* of 17254 to 55, and again at 17274 to 75) and he went completely nuts. He said that there had never been an event like this in the history of the Senate. He was truly outraged about what had happened. Scott responded in a very lame sort of way and Mansfield just went on and on about how angry he was.

To this point in the debate, we had suffered fifty-four votes. We had had votes on twelve amendments, eighteen votes on motions to table amendments, eight votes on motions to table motions to reconsider previous votes, two votes on motions to reconsider previous votes, one vote on a motion to table appeal of the ruling of the chair, seven votes on motions to instruct the sergeant at arms [live quorums], four votes on motions to recess and adjourn, and one vote on cloture. This is what it means to suffer a “post-cloture” filibuster. The senators were furious. And then Bill Scott pulled this stunt to get extra time. Basically, it was the last straw for Mansfield, normally a very patient man.⁷⁹

Before I complete the story of the aftermath, let me offer a few observations about Bill Scott. Unlike Mansfield, Scott was not noted to be one of the brightest members who ever served in the body. He’d once called a press conference to denounce—and effectively publicize—a charge that he was the “dumbest” senator. It’s still cited around here as an example of when not to hold a press conference!

During the tortuous debate on the antitrust bill, I was riding in the elevator with Scott and a number of other senators. Some senator—I think it was Bentsen or Bayh—made a comment about the brawl on the bill and said it was like the Senate was “going through male menopause.” Bill Scott pipes up, “Yeah, but it only happens once a month” (confusing menopause with menstruation). Everybody on the elevator was completely dumbfounded and fighting hard not to laugh out loud. [Laughs]

There was another incident right about the same time. I had known a guy named Jim Carty when we were both lawyers at the Federal Trade Commission. During this debate, I ran into him and he introduced himself as “Pat Carty.” I asked him why he changed his name, and he said he was working on Bill Scott’s staff and they had two “Jims” on the staff. Bill Scott couldn’t keep them straight, so Jim Carty changed his name to “Pat Carty.” Anyway, that’s Bill Scott. You can see why we weren’t listening when he pulled his unanimous consent trick.

The Scott and Helms trick had profound ramifications. At that point, Byrd—obviously with Mansfield’s support—threatened to move to suspend the rules of the Senate to use the majority’s power to crush this pesky minority. Cloture requires sixty votes out of one hundred, but Byrd threatened to crush their shenanigans with fifty votes—effectively majority cloture. This was on June 9 at *Record* page 17273. Mansfield

said he'd support majority cloture and he filed the motion to suspend the rules. His motion was printed in the *Record* at 17280 to 82.

Mansfield and Byrd were so angry at what was happening on this bill that they were ready to invoke majority cloture. They threatened Allen and his small team with dire and precedent setting consequences for their obstruction. That is how raw the feelings were about what was happening to Phil Hart's antitrust bill.

Despite this threat to suspend the rules, on June 10 the Allen/Scott shenanigans continued. We had a live quorum, a tabling vote, another live quorum, a tabling vote, a vote on the sense of the Senate about dilatory actions, another tabling vote, a tabling vote about the Helms amendment, another tabling vote, blah, blah, blah. It went on and on and on the next day.

The issue of majority cloture is now front-and-center again as Republicans consider the "nuclear option" of using their control of the Senate to secure a ruling from the presiding officer, presumably Vice President Cheney, that filibusters of judicial confirmations are dilatory or unconstitutional. That ruling might be appealed and the vote on the appeal is a majority vote, not a super majority. This would mean that you don't need sixty votes to stop a filibuster of a judicial nominee; you only need a simple majority. This would end filibusters of judicial nominees and it would radically change the Senate.⁸⁰

Filibusters or the threat of filibusters are a daily fact of life in the Senate. The tradition of "extended debate" goes back 160 years. Columnist George Will argues that filibusters are a conservative mechanism that prevents precipitous and unwise policy making. Others argue that a simple majority should be able to "work its will." The potential risks to minorities from majority mob rule is an issue that goes back to the *Federalist Papers*. So the anger and response we saw from Mansfield and Byrd went right to the heart of the Senate as an institution, nothing less.⁸¹

With the Mansfield and Byrd motion to suspend the rules hanging like a Sword of Damocles over the Senate, and over Allen, he came to us to talk about a compromise. We were angry, but we knew also that the Senate was about to implode, so we entered into negotiations with Allen. They were tense and exceedingly arcane, but eventually we reached an agreement, a compromise.

Finally Senator Byrd offered the compromise to end the debate and get it passed. This was amendment number 274. The negotiations that led to the Byrd compromise amendment resulted directly from the Scott unanimous consent gambit and the Mansfield motion to suspend the rules and invoke majority cloture. This led both sides to talk about how to end this brawl. There were endless meetings, offers, counteroffers, and posturing.

In the end, when we had the best deal we could get, we had our meeting on the couch with Phil Hart. Phil was suffering terribly from radiation and chemotherapy. As I mentioned in our last interview, during that fateful meeting on the couch in the back of the Senate, Phil Hart said, “Just tell me that we are not agreeing to this compromise because I’m dying.” We said it was a reasonable deal and we agreed to it. And that became the Byrd compromise amendment.

Later, on August 31, my boss explained the basis for the compromise. He said, “Due to the illness of Senator Phillip A. Hart, who was no longer physically able to keep up with the pace at that time...[B]ecause this is Senator Hart’s bill, a number of us who are involved in the legislation then agreed to go ahead with the weakening process.”

We were all determined to pass the bill before Phil Hart died. He was not physically able to sit in his chair in the Senate during the debate. He would often sit with staff back on the couches in the rear of the chamber—this was before TV cameras. No senator would do this today.

Eventually, as a result of this vote on the Byrd compromise, we did pass the bill in the Senate. As you can see, it took several trips to the precipice to get the compromise done and pass it. With this compromise, we thought we had an agreement that that would end the filibusters. But, to our shock, when the House version of the bill came over to the Senate, Allen entered into another filibuster. This was in late August.

We were completely livid, having gone through sixty-seven votes on the first debate on this bill. We were not happy at the prospect of another filibuster-by-amendment. This next round of the fights started on August 27 when Byrd attempted to take the Senate bill to conference with the House-passed bill.

To put this second filibuster and the whole fight in context, right in the middle of this second filibuster, on August 30, the Senate voted to name the building in which we are sitting the “Philip A. Hart Building.” Right in the middle of this vicious and bitter debate. It’s in the August 30 *Record* at page 28423.

Two of the members who spoke vehemently in favor of the idea were Jim Allen and Roman Hruska, who were leading the opposition to Phil’s antitrust bill. This was very dramatic, very sentimental. All this just goes to show how much the stature of an individual—Phil Hart—can affect the course of what happens in this institution.

So with Byrd attempting to take the Senate bill to conference with the House, Allen insisted on amending the Senate bill. As is the typical case, Byrd had taken up the House bill and offered the Senate-passed bill as an amendment to it. This is the way you set up a conference. You have a House version of a bill and a Senate version. At the moment Byrd offered the Senate-passed bill as an amendment to the House-passed bill, the Senate amendment was fully amendable. So Allen was moving to kill the conference by offering endless amendments to the Senate amendment to the House bill.⁸² He was offering the same amendments he’d offered to the Senate bill itself. It was maddening.

We then suffered seventeen votes on Allen’s amendments to the Senate amendment to the House bill. At one point Allen asked that the entire House bill be read, and at another that an entire substitute amendment be read. Allen also offered an amendment, got it divided in six parts, and got votes on all six parts. Our blood was boiling.

Some remarkable wit was evidenced in the debate on August 27, 30, and 31. For example, Senator Allen said, “I did not understand the Senator, but I am not going to ask him to repeat it. I believe I will be as well off without hearing it. I doubt that it was a comment that would give a great deal of comfort to the Senator from Alabama (laughter).” Senator Abourezk kept pestering Allen. At one point Abourezk said, “It does not hurt to ask even though I get turned down every time. It does not hurt to ask, does it?”

At another point Senator Allen was warned by the chair against permitting another member to give a speech rather than ask a question. Allen protested this ruling. Then Senator Byrd said he was “touched by the expressions of self-pity by the distinguished Senator from Alabama.”

As the tensions rose during the post-cloture filibuster, Senator Pastore made another of his impassioned 6:00 p.m. speeches. Senator Mansfield gave a series of impassioned speeches. Much of the debate focused on whether there had been an agreement when the bill first passed the Senate that the filibusters would end. We'd compromised to end the first filibuster and we didn't want to compromise again to end the second one.

Senator Mansfield said, "There was no written agreement, there was no oral agreement. But I am quite sure that all of us who were involved at that time thought there was an understanding." He said he feared the Senate might become a "second-rate body subject to emotionalism, degradation, and demeaning."

Senator Byrd took the floor to say that there were seventy-nine amendments and thirty-four motions pending at the desk and he'd be offering a motion to strike all of them as dilatory—this again would be the equivalent of majority cloture. Back to the precipice. Back to World War I.

Again, this caused the opponents of the bill to blink. On August 31 a unanimous consent agreement was reached to schedule a vote on September 8 to finalize action on the bill. Senator Abourezk gave a long explanation of what had happened to the substance of the bill that I wrote for him.⁸³ Pursuant to this agreement the bill passed on September 8 by a vote of 69-18 and it became law.

Actually what happened is that the Senate ended up adopting an amendment to the House bill and sending it back to the House, rather than go to conference. We backed off of going to conference to avoid a third Allen filibuster when we'd take up the conference report! We organized a rump meeting with the House—a substitute for a conference—to resolve the issues so there would be no need for a conference and no third debate in the Senate.

All told there were eighty-four votes on this bill and two major filibusters. The Senate had several times come to a precipice in relationships among the members and the Democratic leaders threatened to use the rules to bring debate to a close on a majority vote. Jim Allen had taken the rights of an individual member to the absolute extreme, which everybody believed was perfectly within his rights, but after a while the Senate was rethinking how many rights it wanted to give to Allen!

I invite you and other historians to go through and to look at this debate, because it was a defining moment in the Senate on a crucial question that has dominated the institution throughout its history. That crucial question weighs the rights of an individual against the rights of a determined majority. This question goes right back to the *Federalist Papers*—about the rights of minorities—and other fundamental values in our democracy. The right of the majority to crush a minority—this is an overriding issue in human history—and we played this issue out on the stage of the U.S. Senate.

It is a testament to the values in our democracy that the Senate would permit one individual, Jim Allen, to tie up the upper body of the national legislature for that long without simply crushing or jailing him. The respect that our society has for individuals, not just in the Senate but in general throughout our society, is the defining characteristic of America. No country has more respect for the rights of individuals to be different, and to be powerful, and to express themselves, than we do. We are nation of immigrants and no country is more tolerant of diversity or less racist.

I have traveled in about sixty-five countries and have gained a good deal of perspective about the issue of tolerance. This debate on Phil Hart's antitrust bill was an incredible lesson in how a determined majority deals with a very stubborn, resourceful, smart, arrogant, and capable dissident. Fundamentally, we respected the dissident and only when incredibly provoked did the Senate majority threaten to crush him by a majority vote. It didn't do it, it just threatened to do it, and that persuaded Allen to compromise. He got something in the compromises. He didn't lose everything.

Would Byrd and Mansfield have suspended the rules to go to majority cloture? Were they bluffing? What would have happened if that precedent had been set? What would the Senate be like today? Was it worth this risk to Allen and his group? Why did they decide to compromise?

I would love to have been an insider to the discussions of Allen and his group. I wonder why they compromised, why they blinked. What was the ultimate fear that led them to blink? Did they fear the precedent of majority cloture as it might be applied to other legislation? Did they think about this much as Richard Russell thought about his dealings with Lyndon Johnson in passing the Civil Rights Act—as is so brilliantly described by

Robert Caro in *Master of the Senate*? If the Senate adopts majority cloture, will it become a less conservative body and is that a good result?

A related issue that dominates this debate is the respect for rules and laws. Here Allen was using the rules to his advantage and even though he was stalling a major bill, the majority had to respect the institution's rules. Rules and laws are a dominate force in our society. We believe strongly in rules and laws, not men. This is why we rely on a constitution rather than an individual. We threw over a monarch in favor of a constitution. When Byrd and Mansfield finally went ballistic, they were moving to *suspend the rules*. Given our nation's preference for rules and laws, suspending them is a major, even a revolutionary idea.

As one who has enormous respect for our political institutions, I care very much about these issues. I am not solely focused on the immediate legislation. I care about process and the integrity of the institution, which may ultimately be much more important than whether you win or lose in a specific legislative fight.

RITCHIE: This fight occurred just following the revision in the cloture rule that reduced the required vote to invoke cloture from two-thirds to three-fifths [67 to 60 votes]. Was Allen thinking in the long-term beyond the bill, in terms of establishing precedent? The Senate had tried to make cloture easier and Allen was trying to make it harder.

LUDLAM: This was the first and second post-cloture filibuster. Allen invented the idea of a post-cloture filibuster. He saw that as long as you file amendments before cloture is invoked, there was no limit on the number of amendments you can file. Then you can simply call them up and run the clock on the votes. Then you can add motions and quorum calls. That happened repeatedly in this thing, with one vote immediately following another. So it's clear that he was, in effect, trying to reverse the cloture vote reform. He was trying to see if he could undermine the impact of the loosened threshold for invoking cloture. He undoubtedly wanted cloture to be less effective in shutting down debate.

In fact, sitting down in the well by the majority leader's desk right in front of the presiding officer, we had so many votes that when members would walk through the door of the chamber, they would look at me and I would give them a thumbs up or a thumbs down, depending on whether it was a tabling motion or an up-or-down vote. They did not care about the substance of the amendment. It became an automatic, machine voting exercise.

We developed a thumbs-up, thumbs-down system. Now that we have TV on the floor, we would never dare be so indiscrete. The cameras might catch it! But back then we didn't have TV, so we were giving them hand signals on how to vote. That's pretty crude by current standards. They'd ask, "Is it a tabling vote or up or down vote?" They didn't ask about the substance. I guess McIntyre didn't look for our thumb!

RITCHIE: I think they do that out by the elevators now [telling senators what the vote is about].

LUDLAM: They can't do this on the floor anymore in front of the cameras. In fact, I've seen a lot of changes arise due to the cameras. Staff sitting on the couches in the back of the chamber have to be very careful now. I am always aware of when I might be on TV. And I often move to another place so that I won't be on camera.

I also find that it's much more tiring under those strong TV lights. It used to be rather pleasant to sit on the floor hour after hour. The lighting was subdued. Now with the cameras, the members do a lot more posturing. The members with bald spots sit in the back row so the camera angles don't show their bald spots. Others get desks in front of marble columns, which provide a better backdrop for the cameras. I like the old Senate before TV cameras. It was more subdued, more respectful. It could be wild, but we didn't see all the posturing to the cameras.

Later there was another post-cloture filibuster by Abourezk and [Howard] Metzenbaum against the Natural Gas bill, where Abourezk was filibustering and Allen was on the majority side. Allen had taught Metz and Abourezk how to run a post-cloture filibuster! I was not involved with that fight, but it was another massive post-cloture filibuster.

Eventually these post-cloture filibusters led to reforms of the rules, because obviously if you get cloture with a sixty-vote supermajority, that should be enough to pass a bill. Allen proved that the rules were not tight enough, and that once you get cloture, that's only the beginning of the problem, not the end of the debate.

RITCHIE: Senator Byrd used the Abourezk filibuster as an excuse to stop the post-cloture filibuster. He brought in the vice president to rule all of those amendments out of

order.

LUDLAM: Correct. That was a powerful move in the direction of majority cloture. It's all a very slippery slope. During the antitrust bill debate, there were many debates and motions trying to define which amendments or tactics are "dilatatory." It didn't prove to be easy to define. Dilatory tactics were being used against motions about defining something as dilatatory—round and round. There were fifty different parliamentary debates in the middle of this bill about whether or not a motion to table or a motion to reconsider was or wasn't dilatatory. There were debates about whether filing an amendment that was similar to another amendment was dilatatory. In one case, there were two amendments that had been combined as one amendment and the question was whether or not it was dilatatory given the fact that each half of it had previously been rejected. It's a very slippery concept to define.

During this brawl, Murray Zweben was in the hot seat all of the time. It is amazing how many rulings of the chair there were. There were extended dialogues between members and the chair about the appropriate parliamentary standard. It is a glorious, fascinating record to read.

RITCHIE: Did you spend much time with the parliamentarian between acts trying to figure out what the next step was in the process?

LUDLAM: Oh, absolutely. Every single night when the Senate had adjourned, which was often late, we would sit around for hours trying to figure out the next move. We were cataloguing all of these amendments and analyzing the substance. We were scheming about the parliamentary situation. Murray was in the middle of all of this.

But a lot of the parliamentary rulings were spontaneous. The motions and maneuvers were coming in a machine gun style at the chair. The members were angry. They were peppering the chair with motions. It was a riveting debate. The chair even refused to rule sometimes. It was often bordering on the hysterical or absurd.

On another occasion I remember that Dan Quayle came to the Senate to preside, and the Democrats decided to have some fun with him. They started peppering him with motions, demands for explanation of the chair's rulings, and appeals of his rulings. Quayle wasn't the smartest guy around, so he was making confusing statements that deepened the morass. He

wanted to run away, but that would have been unmanly. So he hung in there. I recall he looked like he was riding a bucking bronco and about to fall off. It was a form of hazing and it was rather mean-spirited.

RITCHIE: Back with Murray [Zweben], that was before the parliamentarian had a computer up there to be able to remind him of the proper precedents.

LUDLAM: Murray was an incredibly smart, capable guy. He didn't really need a computer. He handled it very well. Brilliantly. He was also very sardonic and funny. I thoroughly enjoyed his company.

I think if you look back at the *Record*, there weren't any rulings that he made that were wrong. The recognition of Senator Byrd on May 28 was clearly wrong, but I don't know if Murray was a conspirator on that. There were two or three cases where he submitted a ruling to the body because he said there was no precedent on this subject matter whatsoever and the body would have to decide the matter.

It was always clear to me that Murray was trying to rule correctly and not just help Byrd and the majority. In recent years, there have been increased tensions about the role and status of the parliamentarian, but back then I can say that Murray tried to rule correctly, based on precedent.⁸⁴

RITCHIE: Senator Mansfield had been the one who stood against majority cloture vote back in '75. He convinced them to go to three-fifths, so if he was going to stand up and say maybe we need a majority vote, maybe that was the frightening moment.

LUDLAM: I think it was. I think this debate is a testament to Mansfield's stature as well as Hart's. If you think about it, the most important point here is that it took unbelievable provocation—repeated and tortuous provocations—to stir Mansfield and Byrd finally to threaten to crush the Allen group with majority cloture to shut off their delaying tactics.

This says something very powerful about the Senate and about our society's respect for individuals and dissenters. What other society would put up with the provocation that came from Allen and his small group? One thinks about the current feelings in the Senate about the confirmation of judges and the threat that has been made by the Republicans to

nuke the Senate to confirm them. What would Jim Allen think of that? He'd support the Republicans on the judges, but he would hate the idea of crushing a minority. What would Russell Long feel about this? What would Jim Eastland, or John Stennis, or Richard Russell think about this? How would they weigh the immediate fight vs. the precedent? Ultimately, there are institutional issues here that completely transcend the immediate substantive issue.

In the case of Phil Hart's antitrust bill, ultimately the minority blinked. They saw that consequential precedents were about to be made. They saw how majority cloture would apply in many other contexts. So they blinked. But what if Allen hadn't blinked? What if Byrd and Mansfield had followed through with their threats? What kind of Senate would we have today? If it hadn't been Phil Hart, would we have come this close to these momentous rulings and precedents? I think not. I think this was all about Phil Hart, a man of stature. This shows how much personalities count in the Senate. It shows that the members have very personal and emotional feelings that can dominate what they do. It shows that personal relationships—in this case with a beloved man who was dying—can dominate the institution.

Despite the tension and warfare, during this debate there are some just incredibly funny exchanges. This says to me that the institution can use humor and wit to defuse the terror. There was a time when—I can't remember the exact exchange—but Bill Scott made some comment that sounded negative about Mansfield, and then Scott said he hadn't meant to refer to Mansfield. Mansfield said, "I looked at my shoes and I thought I fitted it." [Laughs]⁸⁵ I mean, there were some very witty comments here. At several points, some member would ask unanimous consent that their statement appear uninterrupted by some colloquia, and people would object to that.

Because of the May 28 incident, members started taking incredible care when they asked for unanimous consent for anything, UC for some staffer to have leave of the floor, anything. They would have to check to make sure the UC wasn't a ruse or a parliamentary maneuver. It was very tense and very tough.

It's unimaginable today that we would spend sixteen days and have eighty-four votes on anything. There may be some bloody times in the backrooms trying to work out a bill like the Medicare drug benefit bill that just passed, but they would never air their dirty linen on the floor like that. But it was a unique time. Carter was the president. He would have signed the bill. And the Democrats were in control, and Phil Hart——

RITCHIE: This was '76 wasn't it? The election was that year, so Gerald Ford was still president.

LUDLAM: Yes. You're right.

RITCHIE: But the Ford administration supported the bill.

LUDLAM: Ford supported it and signed it, but it was a very tough time for him. Ford was very much on the defensive, going into that election, so he was weak.

The key to understanding this whole episode is the stature of Hart, Byrd, Mansfield, and Allen. The personalities had more to do with this bill than the substance. Hart was on the verge of death. It was Byrd showing his mettle, trying to control Jim Allen. Mike Mansfield finally lost his normal equanimity about the process, and Murray Zweben was on the hot seat. Abourezk was his usual, zany self. It was fascinating to watch.

RITCHIE: What was your impression of Senator Byrd as a legislative strategist in those days?

LUDLAM: Well, he was certainly at the height of his powers, and he did become majority leader—partly due to his success in this fight. The liberals didn't trust him much, but in fighting for Phil Hart's bill, Byrd gained a good deal of respect from the liberals. They saw that he'd fight for liberal ideas.

Byrd's tactics on this bill were completely brilliant, totally focused, and utterly ruthless. His knowledge of the rules, his innovative way of thinking about the rules, and the extreme situations that could arise in the rules, Byrd was completely brilliant. Jim Allen was also brilliant, and I can't imagine anybody around here who had as much knowledge and understanding of the rules, of how to use the rules to accomplish a goal, than Allen. Allen and Byrd—the two giants of parliamentary procedure in the history of the Senate.

It was a privilege to participate in all of the endless meetings with Byrd, Kennedy, Abourezk, Phil Hart, Phil Hart's staff, Kennedy's staff, and Murray Zweben. We were struggling hour-by-hour to survive. It was basically World War I. [Laughs] I mean, we were totally exhausted. We were working untold hours and with incredible aggravation. And we

all loved Phil Hart. There was no question that we were all doing this out of our love for Phil Hart.

RITCHIE: Given that you did make that one big compromise, when it was all over with, did you feel that the fight had been worth it?

LUDLAM: Well, the Supreme Court made a terrible ruling in the *Illinois Brick* case, which basically gutted the core concept in the law, the class action antitrust suits by state attorneys general.⁸⁶ The pre-merger notification elements of the bill are still effective, but the attorneys general antitrust lawsuits, the class action suits, they were invalidated by the Supreme Court. I was later involved with the efforts to overturn the Supreme Court. But Phil Hart was gone and that was never possible. So it turned out that the core of the bill never worked.

RITCHIE: Do you think that the Court turned it over because they were dealing with a particularly bad case or that the bill really was flawed?

LUDLAM: *Illinois Brick* was a political decision by the Court. The state attorneys general antitrust class action suits were based on a novel theory. The Court, defending the business community, just wouldn't tolerate it. I wonder if the Supreme Court ruled this way in part due to the tenacious way in which Allen fought. The legislative history of this law, which the court obviously consulted, was wild!

Illinois Brick was a massive victory for the business community, massive. State attorney generals are very ambitious, aggressive people, so they'd have loved to bring these cases—all treble damage cases. The business community dodged a bullet here—a nuclear missile. I've become rather pro-business in my career, but I still think that these suits would be a major deterrent against collusive and other anti-competitive activity. I'm delighted we fought so hard and sad that the Supreme Court invalidated much of our work product.

Fortunately Phil Hart did not live to see his baby eviscerated by the court.

RITCHIE: Tell me about the Airline Noise bill fight.

LUDLAM: The noise bill fight was two years later. In this oral history, that fight appropriately follows this one because it also relates to Murray Zweben. That bill also focuses on the rights of a determined minority, which in this case was Senator Abourezk and me, acting alone. We were the determined minority this time. This just shows that what “goes around, comes around.” The rights Jim Allen asserted as a minority were relevant to our rights as a minority!

The story of what happened to the Airline Noise bill is a story of how the Senate can be a “game of inches.” This is a tale of how you can lose a bill because you do not know physically where a bill goes when it comes over to the Senate from the House. This is where you need to know not just the rules but you also need to know the actual location—the physical location—of a bill as it moves through the legislative process. This is why I won this one—I simply knew more than my opponents about the mechanics of the Senate.

I beat the majority on this one. There wasn’t enough time for Bobby Byrd and Mike Mansfield to gang up on us. We were only up against the entire airline industry and they weren’t as formidable! Here’s the setup. Carter was the president. His administration supported deregulation of airline routes and fares. This was a big initiative of Senator Kennedy out of the Judiciary Committee, out of Administrative Practice and Procedure Subcommittee, where he’d been chairman in the mid ’70s. Lots of deregulation bills became law during this period—for the airlines, trucking, and railroads. Lots of rates and routes were deregulated.

The airlines were not at all happy with the idea of competing over routes and fares. They had their routes and fares set by the Civil Aeronautics Board and it was a cozy relationship. All of us have seen the impact of competition among the airlines since the 1978 deregulation. There has been wild competition in the airline industry, with many airlines going bankrupt and other new entrants. The airlines by and large have become a very unprofitable industry. I think you could probably trace it back to the deregulation when they were forced to compete.

In 1978, the airlines saw this coming. They did not like the Carter/Kennedy deregulation bill, but they didn’t think they could stop it. So they sought to extract a quid pro quo for not opposing it. They were then facing a new regulatory requirement that was forcing them to buy quieter airplanes to lessen the noise around airports. It was going to be expensive

to comply with the rule. So they offered Carter and Kennedy a deal. The airlines said, “We will not oppose airline deregulation if you will bail us out on the cost of buying these quieter planes.” They basically asked Carter and Kennedy to pay them a massive bribe.

The *Wall Street Journal* on July 20, 1978, said, “The airlines and their allies on Capitol Hill insist that unless Congress provides the money for quieter planes they’ll block deregulation, a bill on which the industry has mixed views.” So they said, “We’ll stand back as long as you give us some money, a lot of money.” The way they were going to get the bribe was they wanted a portion of the proceeds of the tax on airline tickets to be funneled directly to them—directly into their corporate coffers—rather than go to the Airport Trust Fund to pay for airport improvements.

A few of us thought it was a terrible precedent. If the cost of a regulation is too great, then maybe it’s useful to give the affected industry some grants or maybe a tax credit to offset some of the cost of compliance. But we hated the precedent of imposing a tax which never touches the hands of the U.S. Treasury and goes directly into the pockets of a private entity. We thought this was an abuse of the government’s tax power.

We’re talking about a large bribe here. In today’s dollars it was a \$10 billion bribe. At the time it was \$4 billion. The inflation adjustment means the bribe would now amount to \$10 billion. United Airlines alone was getting \$600 million in 1978 dollars. More than \$1 billion today. Eastern Airlines was getting \$200 or \$300 million, which is at least twice that today. Pan Am was getting \$350 million, at least twice that today.

Despite the massive size of the bribe and the unprecedented way in which it’d be paid to the airlines, Carter and Kennedy agreed to it. For them, it was a small price to pay. The House passed the airline deregulation and noise/bribe bills on September 14. The bribe noise bill was HR 8729 and it passed the House by a margin of 270 to 123. Everybody who was anybody had been bought off in favor of this bribe. The liberals—led by Kennedy—supported deregulation because they thought this would be good for consumers. The conservatives liked deregulation, plus it had this bailout for the airline industry to comply with a government regulatory requirement. This broad group all supported the noise bill bribe as a necessary quid pro quo to secure passage of the airline deregulation bill.

So the House passed both bills—deregulation and the bribe—by margins of more

than two to one. In the Senate, there was no question but that both bills would pass by even greater margins. It was a done deal, or so the airlines thought. I recall that in the House they debated the deregulation and bribe bills under an unusual rule that provided that if only one of the bills passed, the vote on the other would be vitiated! They had umbilically tied the two bills together. The airlines were paranoid about the possibility of passing one bill and not the other. They wanted both or neither.

This is when it got interesting and intricate. The Senate noise/bribe bill, S.3279, was reported out of the Senate Commerce Committee on July 11. When the Commerce Committee reported the noise bill on July 11, the bill was re-referred to the Finance Committee because it included the ticket tax provision. When the House bill came over on September 19, Finance had not yet reported the Senate version of the noise bill to the Senate. Finance did eventually report the noise/bribe bill to the Senate on October 5.

I saw all this coming in slow motion. And I had a plan. Murray and I had bonded during the antitrust bill brawl. In early September, I went to Murray and I said, “Senator Abourezk hereby puts in an objection to any unanimous consent agreement⁸⁷ or request to hold the House Airline Noise bill at the desk.” I pointed out, “The Senate bill is not on the calendar yet.” What I said was precisely accurate. The bill had been reported from the Senate Commerce Committee, but it had been re-referred to the Senate Finance Committee. So it wasn’t on the Senate Calendar on September 19 when the House bill came over. The Senate bill was still “in committee.”

To be clear, Jim had no idea that I’d put in the objection with Murray on holding the noise/bribe bill at the desk. Jim wanted to kill the bill and left the details to me. It is not uncommon for staff to invoke a member’s name as authority for something without actually checking with the member. Of course, staff take a risk when they do this, but it’s the only efficient way to run the institution. If we kept checking with members every time we did something, the members would be bogged down and never get to be senators. The better members hire great staff and delegate, delegate, and delegate.

The objection I filed with Murray was based on the fact that when bills are finally reported from committees, they go on the Senate Calendar. Then and only then can they be called up on the floor of the Senate. The only other way is by unanimous consent.

So on September 19, when the House-passed noise bill arrived in the Senate, Murray referred it to Senate Commerce Committee. This is noted in the September 19, 1978, *Record* at page 30087. There is a little sentence in here, in very small type, saying HR8729 followed by “is referred to the Committee on Commerce and Transportation.” That referral—accomplished quietly by me behind the scenes and off the record—cost the airline industry *\$10 billion*. Let me explain how.

The clerk of the Commerce Committee and the staff of the Commerce Committee did not notice that the House-passed “HR” bill had been referred to their committee. They weren’t looking for it. They weren’t watching. They hadn’t taken care to make sure that it was held at the desk and put directly on the Senate Calendar. They’d missed that crucial issue. I was sitting in my office knowing that the “HR” bill had been referred to the Commerce Committee. I was not saying anything to anybody. Silence was golden.

A few weeks later the Senate bill, the “S” bill, was reported by the Finance and went onto the Senate Calendar on October 5. The Finance Committee didn’t notice that the “HR” bill had been sent to the Commerce Committee. So the Senate “S” bill was on the calendar and the House “HR” bill was in committee—precisely the opposite of what the proponents needed. When one wants to get a bill to the president, both houses have to pass one bill. It’s either an “HR” bill or an “S” bill. If it’s an appropriations or tax bill, it has to be an “HR” bill under the Constitution, which requires that the House originate all “revenue” measures. If the House has passed a bill, the easiest thing is for the Senate to take up the “HR” bill and pass it. Then it goes directly to the president. Or if the Senate has passed a bill, the easier route to enactment is for the House to pass the “S” bill and then it goes directly to the president.

In this case, if the Senate passed the “S” bill, it would be ignoring the House bill that had already passed the House. Then the House would have to act again as if it’d never acted before. And maybe the Senate would have to act a second time also when the bill came back from the House. At any rate, the proponents of this bill wanted the “HR” bill on the calendar—not stuck in committee—so that they could just pass it and send it to the president.

Ralph Nader was a violent opponent of the noise bribe bill. He hated the airline industry bailout. He started screaming at me—his only supporter—saying that I had no strategy for killing the bribe. He wanted me to line up allies, line up speakers, start a

filibuster, something. He was vile and abusive. I was his only friend on this issue and he was vilifying me. I told him that I had a strategy I thought would work but I refused to tell him what it was. This enraged him. He didn't trust me. Of course, I didn't trust him either. I figured if I told him what my strategy was, he might leak it. I knew he wouldn't understand it.

I knew that the only way my strategy would work was for the Commerce Committee not to notice that the "HR" bill had been referred to the committee. Time passed. The proponents didn't see the mess they were in. Their inattention to this was utter incompetence. I was incredulous and excited. I saw the noose tightening.

Finally, in the closing days of the Congress—this was the second session right before final adjournment—the Senate got around to taking up the deregulation and noise bills. Then suddenly they discovered that the bill they wanted to work off, the House "HR" bill, was stuck in the Commerce Committee, not on the Senate Calendar. They asked unanimous consent to discharge the committee from consideration of the "HR" bill. We objected. They asked unanimous consent for the committee to meet while the Senate was in session so it could report out the "HR" bill. We objected.

RITCHIE: Senator Abourezk?

LUDLAM: Yes. Again and again we objected to discharging the committee or permitting it to meet during the Senate sessions. Committees can't meet when the Senate is in session except with permission. This is an arcane rule that gives the Senate debate priority over committee debates. I don't know when this rule was adopted, and now it's mostly obsolete. In fact, the priority should probably be given to committees over the Senate floor debates! The rule is rarely used. Permission for committees is normally granted automatically. But in this case, we objected again and again to the committee meeting.

Not having permission to meet when the Senate was in session—and we were putting in long hours on the Senate floor given the impending adjournment—meant that the committee would have to meet and secure a quorum very early in the morning or very late at night. Not surprisingly, this proved to be impossible for it to do. Given the heavy schedules of senators, it's hard in the middle of the day for committees to secure a quorum, but getting a quorum early in the morning or late at night is utterly impossible.

We had them. They had the wrong bill on the Senate Calendar. They needed the “HR” bill and all they had was the “S” bill. Once it’d been referred to a committee, it had to be reported or the committee had to be discharged—those were the only two options. And neither option was possible given our objections. Eventually, on October 12, Bobby Byrd filed a cloture petition on the Senate version of the bill, but, of course, that wasn’t going to accomplish anything because they needed cloture on the “HR” bill.

I continued to get calls from Ralph Nader attacking me. I was also getting calls from Ted Kennedy’s staff. Kennedy had formally endorsed the noise bailout because he was trying to pass the deregulation bill. Kennedy’s people are telling me, “You’re doing a great job. Keep it up. Don’t stop.” It was complete duplicity. Kennedy hated the bailout and had only agreed to it so he could pass his deregulation bill.

The Senate was in the closing days of the second session, just prior to final adjournment. At the end, the Senate was in session for thirty-six hours straight. I sat on the Senate floor for thirty-six hours straight, enjoying the quiet drama that was unfolding. This was October 14, 1978. I was getting repeated calls from the Commerce Committee chief counsel telling me that he was going to murder me. I was getting hysterical calls from the airline lobbyists.

It was surreal. They were putting every type of pressure on me, one anonymous, thirty-three-year-old staffer working for a first-term senator who had announced his retirement. Of course, I was enjoying this immensely. I never wavered. I knew my rights. Even if I was a minority of one, I had rights. Jim Allen taught me that! To get unanimous consent, you need unanimous consent. In this case, they needed Abourezk to consent and we were never going to consent.

The irony of this situation was quite apparent to me. Two years before, I’d seen how Byrd and Mansfield had eventually forced the Allen group to blink and buckle. But in this case, the pressure had only begun to be applied. Byrd and the others had no time to play out their pressure tactics. They had no time left to apply the thumb screws to me. Then the Senate passed the airline deregulation bill. When that happened, Abourezk forced the Commerce Committee chair to explicitly state that it was no longer tied to the noise bill. Abourezk explained that he’d asked this because the two bills had been “tied together” in the House.⁸⁸

When the deregulation bill passed, no longer could anyone blame me for killing it. At that point they had zero leverage on me. None. If I'd been holding up both bills, and we were being blamed for killing the deregulation bill, it would have gotten tense! But I was only killing the noise bill, the tail of the dog. We had no objection to the deregulation bill.

I kept reviewing the situation—me and myself—and kept concluding that there was nothing they could do to me, and no way to get around me. Abourezk was solid. I felt invulnerable. I just sat there hour after hour on the Senate floor waiting for the other side to offer me a deal. Eventually, they came to me on the floor and asked, “What do you want to let us bring the ‘HR’ bill out of committee.” I said, “You have to agree to delete section 305, 306, 307, and 308—the tax provisions.” All the ticket tax stuff had to go. Ten billion dollars.

They were furious and they pissed and moaned, but they had no choice. We went in the back room and with some scissors we cut out \$10 billion for the airline industry. We taped the remaining bill together and renumbered the sections. With this agreement, we let them discharge the committee and take up the amended “HR” bill. That is the bill—finally the “HR” bill—that the Senate passed.

Senator [Howard] Cannon, chairman of the Commerce Committee, said we still needed to pass the noise bill, even without the bailout. He acknowledged that “it is a far different bill than had been reported” by the committee! Not knowing how I'd eviscerated the bill, several senators put in statements praising the bailout. Senator Javits was obviously confused about this. Senator Abourezk didn't say a thing during this debate. He didn't need to gloat. Cannon didn't want the bill to die in the Senate and get blamed for killing it. He certainly didn't want to admit that they'd royally messed this up and had shown themselves to be utterly incompetent. They were furious, but more important, they were embarrassed by how I'd hung them out to dry.

The House was so outraged by all of this that they tried twice to take up the returned House bill and failed each time.⁸⁹ Strangely, one of the players on the House side was Congressman John Rousellot, who was the John Bircher who represented me in San Marino, California, my home district. Rousellot had succeeded Congressman Glen Lipscomb, with whom I'd been an intern in the summer of 1967. I'd actually registered as a Republican to vote against Rousellot in the primary; I knew whoever won the Republican primary would win the seat forever.

So in 1978, in the closing day, I killed the ticket tax diversion, the bribe. It never came back. Deregulation passed, the noise/bailout died. Forever. Dead. Ten billion dollars. We'd defeated the proposal to divert tax revenues directly into the pockets of a private entity—what we believed to be a dangerous precedent. Our maneuverings weren't sport; they were necessary to prevail on an issue of principle about federal tax revenue.

Legislation is truly a game of inches. The key here was knowing at all times precisely where a bill must go and where it must be, and knowing how the parliamentarian makes a decision on whether a bill is held at the desk or put on the calendar or referred to committee. The committee staffers didn't ask the right questions, they made assumptions that did not prove to be true and then they failed to notice my trap in time.

There's one "small town" postscript to this story. Much later I learned that one of the key administration officials in this fight was Bill Bonvillian, who was then in the congressional liaison office in the Transportation Department. Bill is a dear friend and serves as the brilliant legislative director for Joe Lieberman. Bill is now my boss and I love him dearly and respect him enormously. At any rate, when I'd finished killing the noise bill, Bill got reamed by his boss downtown! Little did he know then that later we'd be friends and he'd hire me to work for Joe and become my boss.

The objection I put in to hold the House bill at the desk was registered with Murray, person to person. I was not required to reveal my conversation with Murray to anyone. It is the practice in the Senate that holds—pre-filed objections to unanimous consent agreements—are secret. I knew that the other side would not know what I'd said to Murray, and that Murray would not tell them. The point is that a knowledgeable minority of one can kill a bill. I had successfully run out the clock and killed a bad idea.

RITCHIE: When Murray made that decision do you think he knew what the impact was going to be?

LUDLAM: No.

RITCHIE: He just did it because the "S" bill wasn't on the calendar and you had a legitimate argument?

LUDLAM: Yes. The companion Senate bill was not on the Senate Calendar. The general rule was that you don't hold the House bill at the desk unless the companion Senate bill is on the Senate Calendar.

Now in this case, the other side could have argued that the "S" bill had been reported by the Commerce Committee and was simply waylaid in another committee. They might have tried to override my objection. I don't really know what would have happened if they'd seen this coming. But they weren't looking. They weren't thinking. They were asleep. They never went to Murray to check out what would happen to the House bill when it arrived in the Senate.

They probably had an argument to make with Murray in favor of putting the House bill on the calendar. But they never showed up to make that argument. They failed to pay attention to the details. You can lose everything here if you don't pay attention to the details.

RITCHIE: So when you went to the parliamentarian, who has the responsibility to refer bills to committees, you had this whole strategy in mind?

LUDLAM: Yes, from the first day.

RITCHIE: That was your goal from the start?

LUDLAM: That's right. I knew it was the only way to kill the bill. I knew we would never win if this came to a vote on the Senate floor. Abourezk would have voted against it, and maybe a few other members might have voted against it, but Kennedy would have voted for it and so would ninety or more of the rest of the body.

You can make an argument that what Abourezk and I did was completely undemocratic. If you believe that majorities should govern and that minorities should lose, especially minorities of one of one hundred senators, then what we did was a complete violation of democratic ideals.

As a matter of parliamentary procedure, what we did was totally legitimate. But in this case, we were a caucus of one intent on killing this bill. Allen had many more supporters in the Hart-Scott-Rodino fight than we had! The committee had full written notice of the

situation. There was that statement in the *Record* on September 19 that the bill had been referred to the Commerce Committee. The committee clerk was given notice of this in writing. My “trick” was totally visible, in black and white. But, to them, my gambit was totally invisible until it was too late.

Our right to object to the committee meeting during the Senate session was totally legitimate. Our right to object to discharging the committee was totally legitimate. Everything that we did was totally compliant with the rules of the Senate, but our exercising those rights meant that a major political deal between the airlines and the administration regarding airline deregulation and the Airline Noise bill was nuked.

I am able to say that my strategy was 100 percent of the cause of the demise of the bailout. Not 99 percent of the cause, 100 percent. And I’m proud of it, because I think the bribe was absolutely the wrong policy in terms of the diversion of tax revenues directly to a private entity and bribing a firm to comply with government health and safety regulations. I didn’t just do this to have fun. This was a deadly serious policy fight.

RITCHIE: What you had going for you was that the Senate does so much of its business by unanimous consent. Unanimous consent puts an enormous amount of power into the hands of every single one of the one hundred senators. But you have to have a senator who is willing to buck the other ninety-nine and say “I object,” and to do it repeatedly.

LUDLAM: We raised many objections at various times to unanimous consent to discharging the committee or its meeting during the Senate sessions. One objection means that there’s no unanimity and no consent.

RITCHIE: Part of that is you had a senator, James Abourezk, who didn’t mind that people really hated him.

LUDLAM: Abourezk had announced his retirement. He was leaving after one term in the Senate, and he was a rather unusual individual. He was well liked, but he didn’t care about public pressure, especially from the business community. He rather liked being controversial. Let me recount some wonderful stories about what happened during those crazy thirty-six hours on the Senate floor.

In the midst of this, Abourezk looked up at the gallery and saw Dick Tuck, the famous prankster during the Nixon era.⁹⁰ Abourezk asked unanimous consent that “Richard Tuck” have leave of the Senate floor during the closing debate.⁹¹ This was back at a time when to get staff permission to work on the Senate floor you had to make an oral request for unanimous consent. Nobody on the floor knew who “Richard Tuck” was. They assumed he was a Senate staffer, and so the unanimous consent went through without any objection. So Dick Tuck came down to Jim Abourezk’s desk on the Senate floor as a private citizen, not as a Senate staffer. I’ve never seen this done, before or since. It was clearly a disrespectful stunt.

Then for five or ten hours, Abourezk and Dick Tuck held court, cracking jokes and having fun, and mocking the institution, just going completely wild. [Laughs] They had this huge crowd around Abourezk’s desk in the back row of the Senate. Everyone was exhausted and ready to go home, so we were getting punchy. All this was quite outrageous by the standards of an institution like the Senate.

[Daniel Patrick] Moynihan saw this situation and he was just completely outraged. He stood up on the floor and he said, “No legislative body has been ever been so disgraced since Caligula rode his horse in the Roman Senate.” I don’t think this appears in the *Record*, but that’s what he said. So Moynihan went wild about this situation. He was appalled.

At another point, Senator [Thomas] Eagleton got up and was going to give a tribute to Abourezk because Jim was retiring. Tom had written a six or seven page statement, and he showed it to Jim. He leafed through it and nodded his head with appreciation. Then Eagleton stood up and asked unanimous consent that the tribute appear in the *Record* as if he had actually presented it out loud. There’s a different typeset in the *Record* for spoken verses submitted statements. Abourezk objected to this UC request and forced Eagleton to read the whole statement aloud! [Laughs]

I mean, this went on for thirty-six hours. We were sneaking food on the floor of the Senate. All night. Physically, we were hanging by a thread. As the pressure mounted on the noise bill, the other side tried to put pressure on Abourezk by holding up funding for the Senate Indian Committee of which he was chairman. They were taking hostages. We didn’t blink and eventually they did. It was very dramatic, but also it was very quiet. Much of what happens in the Senate is never visible. You see the end result, but you may have no idea how

it happened, why compromises were reached, and why one side blinked before the other one did.

RITCHIE: One of the things that made Senator Abourezk so different was that he was coming from the left. Those who ran up against the institution tended to be the likes of Jesse Helms or Jim Allen, who were coming from the right. Except for Metzenbaum, there really weren't many other Democratic senators who were willing to take on the institution and offend their own president and majority party. Abourezk was quite remarkable in his one term in being such an independent.

LUDLAM: Yes, Abourezk was very independent, and also very funny and sweet. He had almost no pomposity about him at all. Let me tell some other stories about Abourezk.

Jim had been raised on the Rosebud Indian Reservation. His parents, I think, were traders on the reservation. So he was very close to the Indians in South Dakota. At one point, he brought in an Indian shaman to give the opening prayer of the Senate. It's too bad this was before television. The shaman came in wearing a war bonnet. He gave the opening prayer in his native tongue. You could see the poor debate reporters trying to transcribe this phonetically. As I recall, it was given in the Sioux language and was quite a show. Typical Abourezk.

There was another time when Jim introduced a bill to compensate the survivors of the Wounded Knee massacre, which had occurred in South Dakota. This is right about the time that Dee Brown's book came out, *Bury My Heart at Wounded Knee*. So Jim organized a hearing in the Judiciary Committee. We actually found a survivor of the massacre, a woman who had been a child at the time. The issue at the hearing was whether the survivors deserved compensation. Dee Brown was a witness. And in the most poignant turn, the army testified that it had acted reasonably in killing all the women and children! This was the kind of show that Abourezk loved to produce.

There was another time—and I'm actually not going to mention the name of the member here—when Jim was on the floor holding forth as the only opponent of the legislation to implement the Sinai agreement between Israel and Egypt. The bill provided funding for the U.S. troops who were going to be stationed in the Mitla Pass in the Sinai to enforce the cease-fire, the pullback, and the agreement. Jim had discovered his Arab roots

at that point and was opposed to the Sinai agreement. He was holding a big fight trying to stop the bill.

At one point, this senator stood up and said publicly, "I would like to note that the three staffers who were working for Jim against this Israeli-Egyptian agreement are all Jewish." And he named them. They were, in fact, all Jewish, and they were staffing Jim because they were Jim's staff. They were not especially happy with Jim's position, but they were staffing him in his effort to stop the implementation of the Sinai agreement.

We were appalled, absolutely appalled at the insensitivity of this "outing" of Senate staffers. This member, who I have always thought was a jerk, was basically making a joke out of the fact that these staffers were in a very uncomfortable personal position. One of the Jewish staffers went over to this member and physically grabbed him by the collar and said, "You ----- . You're going to go in and take that comment out of the *Record*." And the member did strike it from the *Record*. Of course, if this had happened post C-SPAN, it'd be much harder to strike it.

Jim was an exceptional guy. Very independent and irreverent. We loved working for him. I hesitate to tell one final story about Jim, but it fits in here and says a lot about him. We had staff holiday parties and invited Jim. We all pitched in to give him a small present. It was a pornographic calendar of an obese couple fornicating, each month in a different sexual position. Jim was rather obese himself and so was his wife Mary. He opened the calendar, held it up, and without missing a beat he said, "That looks like Mary and me." He loved the porno calendar and we gave it to him twice more at subsequent holiday gatherings. Now, in the history of the Senate, which other senator would think that this calendar was a thoughtful gift from his staff?

Also during this time I worked for Jim, we established the right of women to wear pantsuits on the floor of the Senate. Something really important! My chief counsel was a woman and one of the first women chief counsels of a Senate subcommittee. Another woman, who was the chief counsel of the subcommittee chaired by [Senator] John Tunney, was Jane Frank. She later won a seat in the House under her new married name, Jane Harman. They were breaking barriers and the pantsuit issue was another barrier. The '70s was a big time for breaking barriers and our group decided that this was a barrier that had to be broken.

So we had quite a few meetings planning how this would happen, going to such questions as: Which woman would do it? What would she wear? Which doorkeeper would we prefer to be sitting at the desk admitting the staff? And what bill did we want pending when the barrier breaking would occur?

Basically, we put together a whole battle plan. We knew if we asked in advance whether a woman could wear a pantsuit in the Senate, the answer would be absolutely never, no. It was a male chauvinist institution, deeply so. Of course, now women, including senators, wear pantsuits on the floor of the Senate, but back then it was a big deal.

As I recall, our chosen woman was a Birch Bayh staffer and the pending matter was abortion rights. This was before *Roe v. Wade*, as I recall, or about that time. Our designated staffer wore white. We had picked the right doorkeeper, and the doorkeeper didn't say anything. I don't know if he even saw that she was wearing a pantsuit. Now they have women doorkeepers, but not back then. Lots of us were waiting on the Senate floor to see whether she got through.

We didn't say anything about it at the time, so obviously it never appeared in the *Record*. There were no speeches, but a few weeks later we made it widely known that it was now perfectly legitimate for women staffers to wear pantsuits on the floor of the Senate. We'd established a precedent and in the Senate precedents are important! It was a funny plot, and it typified the era.

RITCHIE: What else were you covering for Senator Abourezk?

LUDLAM: Let me mention a few other projects. During my last two years with Senator Abourezk, I wrote and enacted the first law on the subject of organizational conflict of interest (OCI). OCI is different from individual or personal conflict of interest. It arises when a firm has a conflict of interest in the subject matter of something it's been asked to study for the government. For example, a study might recommend a certain policy which, if implemented, would financially benefit the firm. So in the interest of receiving objective advice, the government looks to the possible bias of the firm in preparing the study. It's a both ends against the middle problem. It's a very interesting issue and I'm proud to have written the first law on the subject.

As I got involved with this issue, somehow I found and recruited Gil Cuneo, a legendary government contract lawyer, to help me. Gil was then disabled and wheelchair bound. He had strong personal feelings that organizational conflict of interest was a problem and he wanted it fixed, even if that wasn't in the interest of some of his clients. Gil was one of the giants I've had the privilege to work with during my public service career.

We eventually passed the organizational conflict of interest law as part of Public Law 95-70, an energy bill. It had first been part of the Reauthorization Act for the Energy Research and Development Agency, but we couldn't get that passed in 1976, so we inserted it into another energy bill six months later.⁹² The law says that the government must look for OCI and then take actions to minimize the potential bias that might appear in the study.

The bill and law arose from a major investigation I led of Bechtel Corporation and its ERDA-sponsored study of a coal slurry pipeline, a South Dakota interest. Back then the only department that checked for organizational conflict of interest was the Defense Department. Since 1990 there's been a government-wide regulation on OCI and it is based on the same principles that I enacted thirteen years before.⁹³ I believe I had something to do with the fact that the whole government is now concerned about organizational conflict of interest issues. Incidentally, my history with Gil back in 1976-1977 has proved to be absolutely critical for my work on bioterrorism preparedness. I'll tell that story in my next interview.

Let me relate one last story about those four years with Abourezk. I led the charge to defeat the confirmation of Earl Silbert, who was up for confirmation as the U.S. attorney for the District of Columbia. Silbert had been the Justice Department attorney who handled the investigation of the Watergate break-in. Some thought he'd been less than aggressive in pursuing all the leads—most people give Judge John Sirica and the *Washington Post* the credit for cracking the case. There'd been nine days of hearings in 1974 on the nomination—as the Democrats used it as an excuse to relitigate the entire Watergate scandal. Why President Ford wanted to give Democrats that opportunity is beyond me, but he did.

At any rate, as I was pursuing our campaign against Silbert's confirmation, I had many meetings with Daniel Ellsberg, the famous leaker of the Pentagon Papers. Early on, Silbert had possession of Howard Hunt's casing photos of the office of Ellsberg's psychiatrist, but Silbert didn't follow up on that. Hunt and Gordon Liddy and the other

“plumbers” had broken into the office to try to find dirt on Ellsberg. In fact, I think the “plumbers” unit was set up initially because of the Pentagon Papers and only later focused on McGovern and the Democratic National Committee. Had Silbert pursued the casing photos, he might have uncovered the “plumbers” unit and the full range of its activities much earlier. At least that was our charge against Silbert.

Ellsberg was totally paranoid—justifiably so—and it was fascinating trying to work with him. He hated Silbert. In the end, I couldn’t stop Silbert’s confirmation, but I had fun trying! You never know in public service when some nutty issue like this will fall in your lap. Dealing with Phil Hart and Daniel Ellsberg—now that’s a pretty interesting mix.

RITCHIE: What did you work on at the White House?

LUDLAM: After Senator Abourezk retired in 1978, I went to work in the Carter White House with Si Lazarus on regulatory policy. I’d done quite a bit of work on that issue on the Senate Judiciary Committee, which had jurisdiction over amendments to the Administrative Procedure Act.

My biggest accomplishment with the White House was eviscerating the Regulatory Flexibility Act, which was enacted as Public Law 96-354. The original version of the bill would have amended the substantive mandate of every regulatory agency—including EPA and OSHA—requiring that they grant exemptions to small businesses. This would have had a devastating impact on the government’s ability to protect health and safety and other priority concerns. My goal and accomplishment was to turn the statute into a procedural mandate, like the drafting of an environment impact statement, and delete the substantive requirement that these agencies grant exemptions to small businesses.

My team at the White House all agreed we needed to eviscerate this legislation before it was enacted. Unfortunately, John Culver, a powerful Democrat, wanted the bill to become law; it was an important part of his re-election effort in 1980 in conservative Iowa. So we couldn’t just kill the bill. We had to gut it and let it become law so Culver could have a White House signing ceremony. This is not as strange as it may sound. It’s common that we pass bills as gestures that don’t mean very much.

I was tasked to go up to the House Judiciary Committee, which was marking up

legislation. I had some friends there from my days working on the Senate Legal Counsel and Hart-Scott-Rodino Act. I arranged for them to attach some amendments to the bill that basically gutted it, turned it into a purely procedural statute that did nothing to amend the underlying substantive regulatory priorities. The amendment I drafted said that the agencies would only have to grant small business exemptions if the agency found it was in the public interest to do so. A minor amendment! My amendment gave the agencies an open ended opportunity to refuse to grant these exemptions after they'd done their impact analysis.

This procedure vs. substance distinction was the same one I'd faced ten years earlier when working on the Alaska pipeline case where we were asking whether NEPA was procedural or substantive. These issues keep recycling in different guises. In the middle of the markup, where I had just successfully accomplished my legislative surgery, a conservative Democrat on the committee, Andy Ireland [who later changed party affiliations and became a Republican], called Frank Moore at the Carter White House. He was the legislative liaison. Ireland complained to Frank that "your boy is screwing up a Carter administration priority." Frank Moore didn't know a thing about the Regulatory Flexibility Act and the threat it posed. But Frank immediately took a White House limousine up to the Hill to pull me out of the markup and fire me on the spot.

Si just happened to be there—he had just dropped by from some other appointment on the Hill—when Frank Moore arrived. Moore was all in a huff. He yanked me out of the markup. Then Frank and Si, with me literally in the middle, started screaming at each other about whether or not I was going to be fired on the spot. This happened over in the Rayburn Building. During the shouting match, I was having an out of body reaction, like it was interesting and didn't apply to me! Si protected me, unequivocally. I wasn't on Frank's staff, so he didn't have authority to fire me.

I'll never forget Si's loyalty and toughness. He's a prince. I have the greatest affection and respect for him. He's a truly great human being. I think this not just because he saved my ass on this one, but because he's a totally dedicated public servant, he's sweet and funny, and he's incredibly effective in fighting for progressive causes. It's one of the great privileges of my career to have worked on so many projects with Si. It was a very dramatic incident in my career. I remember it vividly, the setting, the voices, the tone, and the threats. I had just accomplished a great victory, engineered with considerable political skill, and I was about to get fired for it! As I will explain later in regard to the stem cell fight, this was not the last

time I was almost fired right after achieving a major legislative victory.

The ultimate victory for me came when the original sponsor of the bill that became the act, Congressman Tom Kindness, took the floor of the House to denounce the final bill as “meaningless” and voted against it. That gave me the definitive legislative history I needed regarding the meaningless of the legislation! This is as close to perfection as it gets in politics.

So we enacted the Regulatory Flexibility Act, with my eviscerating amendment included. We organized a big White House signing ceremony for Culver. He lost his re-election anyway in the 1980 Reagan landslide, but he was happy with the signing ceremony. He didn’t care that the act was meaningless. It was a win-win situation for us and him.

Although I didn’t get fired, Frank Moore pursued me with a vengeance for another six months. He found out that I was actually on the OMB [Office of Management and Budget] payroll, not on Si’s payroll, so Moore got OMB Director Jim McIntyre to jump on me. McIntyre tried to reassign me to handle non-regulatory issues, so they set up an office in the New Executive Office Building and gave me some projects focusing on the Carter energy plan. I kept this second office for awhile until the coast was clear and continued my work for Si on the Regulatory Flexibility Act and other regulatory projects. For six months I had to take a circuitous path around the New Executive Office Building so that my enemies at OMB didn’t see that I was still working for Si. OMB’s lobbyist, Herky Harris, was constantly on the lookout for me and I had to dodge him dozens of times.

I must say I am proud of what I accomplished in gutting the Regulatory Flexibility Act. I pushed the envelope, accomplished my goal surgically, and survived to fight another day. I think it’s not too far fetched to say that I saved the regulatory system from an onslaught of the far right anti-regulatory small business community.

RITCHIE: I have a question at this point: you worked for Senator Abourezk and then you went to the Carter administration. Now Abourezk was not President Carter’s favorite senator. He had come up against him on a number of occasions, in particular the deregulation bill. How did you make the leap from him to the Carter White House?

LUDLAM: Well, this goes back to the Senate Legal Counsel bill. Si Lazarus had

been a witness at a hearing on the Senate Legal Counsel bill. He had written an article in the *Washington Post* about the conflict of interest the Justice Department was experiencing in representing members of Congress. It was exactly on point with the gist of the bill. I called Si as a witness and I got to know him.

Then Si was the one who brought me down to the Carter White House. And he's the one who saved my job in this fight with Frank Moore. Si was a wonderful boss, zany, brilliant, funny, principled. A fabulous guy. And recently we've been able to work together again on the bioterrorism legislation. I'll get to that in a subsequent interview.

RITCHIE: What exactly was your position at the Carter White House with Si?

LUDLAM: I staffed the regulatory reform effort of the Carter administration, which was to amend the Administrative Procedure Act (APA) to provide for greater balance in terms of costs and benefits.⁹⁴ This focus of mine explains how I got involved with the Regulatory Flexibility Act. It was one of the many pending regulatory reform proposals. In fact, this act is the only one of these regulatory reform proposals that became law. The administration's regulatory reform bill died.⁹⁵

In addition to the threat posed by the Regulatory Flexibility Act, other anti-regulatory forces were pushing to convert rule-making proceedings to a sort of mini trial, where the industry could call witnesses to testify against a rule and they could, in effect, cross examine the regulatory agency. This was called "hybrid rule-making" and basically it would have ossified the rule-making process. I managed to kill that idea completely.

I also managed to kill the proposal of Senator Dale Bumpers to mandate de novo court review of agency rules.⁹⁶ This would have eliminated the presumption of regularity [legality] that applied to agency rules when they were challenged in court. Later I went to work for Dale Bumpers, and during our interview for the job I told him that I had been in charge of killing the Bumpers' amendment. He thought that was interesting, and he said, "You did a rather good job of killing my proposal. Maybe it wasn't the best idea I ever had." So I still got the job.

I consider killing hybrid rule-making and the Bumpers amendment to be major accomplishments during my White House stint, but the most important victory was

eviscerating the Regulatory Flexibility Act. I did that surgically and took out its heart, kidney, and liver. And I'd risked my job to get it done. So I was strongly in favor of certain types of regulatory reform and strongly opposed to others. It was quite a balancing act to sort out the one from the other.

RITCHIE: Did you work with Alfred Kahn?

LUDLAM: No. Fred worked on the deregulation side and I worked on the regulatory reform side. He was certainly the leader behind the airline deregulation bill. It was his concept. He's still around I think. He still talks about it as one of the greatest accomplishments of his career.

RITCHIE: I think if you ask 99 percent of the people on Capitol Hill, they would think that the deregulation was a Reagan administration initiative but it actually was a major thrust of the Carter administration.

LUDLAM: It was a Ted Kennedy initiative as much as anybody's. It was more Kennedy than it was Carter. Kennedy did some surprising things. He viewed the deregulation movement as a pro-consumer effort. Kennedy should get most of the credit.

RITCHIE: Regulation in a huge way came out of a Democratic administration, Woodrow Wilson's administration, Franklin Roosevelt's administration, but there was a sense by the 1970s that corporations had developed an enormous influence over the regulatory commissions.

LUDLAM: I think that happened really around 1980 with Reagan. He really clamped down on the regulatory process. He didn't press for legislative changes in the Administrative Procedure Act; he just used his power as chief executive to crush the regulatory agencies.

Carter was a conservative on regulatory issues and he supported many types of regulatory reform. The reason why I was hired by Si Lazarus to work on the regulatory reform effort was that the White House didn't trust OMB to staff the effort. OMB was pro-agency, defending all the excesses of the regulatory process. So Si brought me in as an independent expert on the regulatory process to keep the agencies honest, to keep OMB honest, and to pass a responsible regulatory reform bill. The agencies hated all of this: the

Regulatory Flexibility Act, hybrid rule-making, the Bumper's proposal, and the administration's own proposal.

In the end, the administration's proposal died—mostly due to the opposition led by my old friend Dick Wegman. Hybrid rule-making died. The Bumpers amendment died. And I gutted the Regulatory Flexibility Act. The big fight over the administration's own bill focused on its requirement that agencies perform cost-benefit analyses of their proposed regulations. Dick Wegman hated our bill for another reason: he wanted to stop White House intervention in the rule-making process. Dick hated OMB's meddling with the agencies.

Dick had been our leader in enacting the Ethics in Government Act and he was a close friend. Yet, I was pitted against him on the administration's regulatory reform bill. Dick was trying to kill the administration's bill or amend it to block White House intervention in the regulatory proceedings. I was trying to pass the administration's bill. I was also trying to make sure that the Carter White House didn't go too far to the right on these issues and destroy the regulatory process. So my two years on this beat had me involved in a very complicated dance with Dick. Basically, on many of these issues, I was halfway between the White House and Dick.

The Regulatory Flexibility Act was also a complicated dance between me and John Podesta [later Clinton White House chief of staff]. John had taken my desk and job with the Administrative Practice Subcommittee. He came in with [Senator John] Culver after Abourezk had retired. He was responsible for enacting the Regulatory Flexibility Act just as I was engaged in trying to gut it. John knew there were major problems with this act, and I think it's clear that he tolerated my successful effort to gut it. He just wanted a signing ceremony, which I gave to him. All of this was done with a lot of winks and nods.

I was also engaged in a complicated dance with Jim Davidson.⁹⁷ When Abourezk retired and John Culver took over the subcommittee, I was a holdover staff. Jim became the new chief counsel and was John's boss. Jim said to me, "I'll keep you on as long as it takes for you to land another position." Within a few months I'd landed my position in the White House. I'll never forget that and am forever indebted to Jim—who is still a good friend—for giving me that leeway to avoid unemployment. So with me working for Si, fighting with Dick, John, and Jim, fighting Dale Bumpers and gutting the Regulatory Flexibility Act, it was a fascinating two years. There were lots of back channels and some very awkward

moments!

RITCHIE: It's an interesting testimony to the Carter administration that you have very different tensions going on inside the administration. No consensus essentially as to what they wanted in terms of regulation.

LUDLAM: There were a lot of fights in the administration, and obviously that was part of the problem. I was working in Stu Eizenstat's domestic policy shop. Stu and Si were the best guys in the Carter administration. Both are kind and smart, an unusual combination in this town. Frank Moore's legislative liaison shop was notoriously arrogant. Ham Jordan was completely disrespectful to all kinds of important people. There was a very bad relationship between the Carter White House and the Democratically-controlled Congress. And then, of course, Ted Kennedy ran against Carter in one of the great acts of suicide for the Democratic Party. Finally, Carter had all the bad luck with the hostage crisis, and the oil embargo, and the inflation, and his own personal limitations. It was a fascinating and sad opportunity for me to have a front row seat to witness the demise of the administration.

There was actually another relationship that reemerged here. Although I worked for Si and Stu on the domestic policy staff, as I said, I was actually on the OMB payroll. Harrison Wellford was my nominal boss. He ran the Carter White House reorganization projects.⁹⁸ Harrison had been one of Phil Hart's staffers on the Antitrust Improvements Act, so we had already bonded in the Senate trenches. Harrison was a first class guy to work with.

After the 1980 election, Harrison managed the transition process between Carter and Reagan. He did such an effective job that the Reagan folks said, "We will protect all of your people for six months." I was one of the people on Harrison's staff, so I actually worked in the Reagan White House for six months! Personal relationships constantly can yield benefits and opportunities in this town.

RITCHIE: To go back to the tensions of the Carter administration, wasn't it essentially a conservative administration leading a liberal party?

LUDLAM: That's absolutely right. That's where the split occurred with Kennedy, when he ran for president against Carter. Running against an incumbent president of your own party? This was just insane. No Republican is going to run against George Bush to cause

him trouble when he seeks reelection. Kennedy's run was an act of betrayal in the face of the enemy. Everybody knew that Reagan was going to be a tough opponent, but to split the Democratic Party at that point in time was incredibly damaging.

Carter, as part of his strategy against Kennedy, retreated to the Rose Garden. He used the hostage crisis as an excuse. I think if Kennedy had not run, Carter would have handled the hostage crisis quite differently, and handled the campaign quite differently. He wouldn't have dissipated his resources in beating Kennedy in the primaries. Kennedy is not sufficiently castigated for the damage that he caused to the Democratic party, and the responsibility that he bears for Reagan's victory. In the same vein, Ralph Nader is not blamed enough for putting George Bush in office in 2000.

I could see that Carter would lose the election, so I lined up a job back in the Senate with another friend from the Ethics in Government Act fight, Ira Shapiro. But then Democrats lost the Senate—Culver lost and so did Nelson, Bayh, Church and others—so that Senate job evaporated. Fortunately, I was on the payroll at the Reagan White House for six months, making good use of my phantom New Executive Office Building office, and then I was unemployed for six months. I remember standing in line for eight hours to file for unemployment; that was not a happy day. I was out of work, and so were twenty thousand other Democrats. There weren't a lot of jobs available for Democrats. It was a bleak time in my career.

Eventually, I landed a job as a consultant with the Alliance for Justice writing a major report on how the White House was subverting the regulatory process. This was the third time I'd worked on this issue. First I worked on it with Senator Abourezk, from the congressional point of view, and then I worked on it with the Carter White House, from the executive branch point of view. I knew all sides of the issue! You have to be flexible in this town. I wrote several reports for the Alliance focusing on the White House intervention in the regulatory process, criticizing my old friend Jim Tozzi. Now I was taking Dick Wegman's point of view, opposed to White House intervention.⁹⁹

During that work I became involved with an oversight hearing in the House Commerce Committee. [Congressman John] Dingell and Al Gore hauled OMB regulatory Czar Jim Miller up to explain what the White House was doing behind the scenes to

eviscerate the government regulatory process. Miller testified for an hour and passed a note up to Dingell asking for a bathroom break. Dingell kept him going for another two hours. Typical Dingell. I was blown away by Gore's brilliance. I had the pleasure of working with Pat McLean, one of the key committee top professionals, and he's remained a friend for nearly twenty-five years.

RITCHIE: How did you make it back to the Hill?

LUDLAM: I finished the consultant job and then I landed another short-term project working on the 1982 tax bill.

The issue was the tax exemption for bonds to fund non-profit hospitals and universities. The tax exemption for these bonds was in jeopardy. The Reagan administration proposed some drastic curtailment of these bonds, trying to reduce the revenue drain on the Federal treasury.¹⁰⁰ The non-profit community didn't see this challenge coming; I did and, as a result, I led the coalition to beat back the administration.

In another strange turn, I teamed up with Jim Davidson—my old friend and opponent on the Regulatory Flexibility fight—who represented the “small issue Industrial Development Bond (IDB)” users of tax-exempt financing, the commercial users. Reagan had attacked the tax exemption for all of these bonds, including commercial entities and non-profit users. I won a total victory for the non-profit institution bonds and Jim won a partial reprieve for the industrial bonds.¹⁰¹

The fact that Jim and I trusted each other helped to reduce the natural tensions between his clients and mine so we didn't get caught in a zero sum game. I never attacked IDBs and he never attacked the bonds of the non-profits. In the end, I won and he mostly did, but we both did better because we kept our lines of communication fair and open at all times. Once again, my respect for Jim was total and it was a pleasure to work with him.

During this fight I also met Steve Lawton. It turned out that he was an admirer of my father. Steve and my dad were both leading health care lawyers. Later Steve was hired by BIO [Biotechnology Industry Organization] and I was finally able to work with him on my bioterrorism initiative. I've always enjoyed Steve immensely. He's a first rate professional with a wicked sense of humor.¹⁰²

The value of this bond tax exemption I saved for universities and hospitals, which could continue to issue bonds to finance their activities at a lower interest rate cost because the investors received the bond income tax free, runs to about \$2.5-3.5 billion per year.¹⁰³ So since 1982, my victory has saved this community something like \$55-80 billion and continues to accumulate. That's not a bad return on my nine months worth of work. I should count this victory as one of my greatest accomplishments, but I tend to overlook it because it was a crash, short-term project.

My base for this fight was my Dad's Los Angeles law firm, Musick, Peeler, and Garrett. Our clients were non-profit hospitals and schools, including my alma mater, Stanford. At the end of the fight, the firm, which had a pro-nepotism policy, invited me to stay on, but I headed back to the Hill, my natural home. The firm managers were somewhat incredulous and dismayed at my decision, but I had no interest in working for any law firm. This was the only stint in my career in a law firm. I never worked for a firm during my summers in law school. I always knew I'd hate working for a law firm and with this one exception at my father's firm I never was tempted to do so. This was one of the better choices I've made in my career.

After the tax-exempt bond fight, I left my Dad's firm and I finally made it back to the Hill to work with Congressman Gillis Long as his designee on the staff of the Joint Economic Committee. It'd taken me from November 1980 to early 1982. It'd been a tough two years, but I'd gotten a tremendous amount accomplished. And I'm proud of my determination to continue my career in government despite the Reagan landslide. For Gillis, I handled a lot of issues at the House Rules Committee, where he was the ranking Democrat, and on the House Democratic caucus, where he was the chairman.

RITCHIE: What did you work on for Gillis Long?

LUDLAM: I came very close in 1984 to changing the whole trade law dealing with the question of the natural resource subsidies that many foreign governments grant to their companies. The issue is pretty complicated. Typically the governments own a natural resource, like timber or natural gas or petroleum, and they sell it to their domestic companies at a subsidized price. This gives the companies an incredible advantage when they use this resource or feedstock to develop a product they can sell at a vast discount.

The issue in the legislation Gillis proposed¹⁰⁴ was whether the sale of these natural resources at a subsidized price constituted an illegal subsidy that could be offset by the United States by a countervailing duty. In recent years, natural resource subsidies have been at the heart of the United States' messy trade fight with Canada, focusing on Canadian government subsidies to its softwood lumber industry.

I got my natural resource subsidy language through the House in fine shape, but then I lost it in the conference when the Senate conferees voted three to two against me.¹⁰⁵ Again, this is a game of inches and this time I lost. Two years of hard work down the drain. If I'd enacted this amendment, it'd rank up there among my greatest accomplishments and would have had a massive impact on world trade.¹⁰⁶ But I lost, mostly because Bill Brock, Reagan's trade representative, opposed it.

The story on this fight is interesting. After I got the amendment included in the House bill, my friend Charlene Barshefsky surfaced as the leader of the opposition. She was representing Armand Hammer, the famous industrialists who headed Occidental Petroleum. Charlene fought hard and won fair and square. I don't think she'd ever done legislative work before and her victory on this became one of the qualifications that led to her being appointed as the U.S. trade representative.¹⁰⁷

Charlene had been an intern of mine when I'd been a lawyer at the Federal Trade Commission, so it was strange finding myself at war with her! I think Char got rich beating my amendment. I don't know whether she changed her position on natural resource subsidies when she became U.S. trade representative, but she was a hundred times more effective than Bill Brock had been. I believe Charlene is acknowledged as the best trade representative the United States has ever had.

The natural resource subsidy fight brought me together with Phil Potter, a lobbyist representing some of the U.S. industries suffering from the subsidized imports. Phil was a world class expert on trade issues and a classy, incredibly funny guy. I've kept in touch with him over the years. A delightful person. Unfortunately, I've had some political fights with the D.C. council representative for Northwest D.C., whose chief of staff is Phil's wife, Penny. The issue again was tax exempt bonds. This is another of those "small village" stories.

While working with Gillis from 1982 to 1985, the most interesting work was over at the House Democratic caucus. We were working on a plan to reestablish the credibility of the Democratic Party on economic and national security issues. The 1980 election demonstrated that the country loved the Democrats except that it didn't trust us with the reins of economic or national defense power, the two most important concerns. So we were working to bring the party back to the middle.

Eventually this effort led to the establishment by Al From, the caucus staff director under Gillis, of the Democratic Leadership Council (DLC). Our goal and the DLC's goal was to bring the party back from the 1980 election debacle, to show that the party was controlled by "New Democrats," which eventually led to the election of two of the New Democrats, Clinton and Gore.

Before his movement got us back into the White House, Gillis died suddenly in 1985, right about the time Reagan was inaugurated. Gillis had a history of heart trouble, and he died of a heart attack. In 1984 I'd taken Gillis on a salmon fishing trip in Puget Sound, on our way to the Democratic convention in San Francisco. Gillis was from Louisiana and loved fishing. He had a huge marlin on his office wall. There were about twenty-five of us fishing for salmon and the only person who caught one was Gillis! Now that's a staff triumph. But in trying to land this fish—it was probably twenty-five pounds—Gillis had almost died!

At any rate, Gillis' death meant that I faced another job crisis. Within the space of seven years, I'd had one boss retire, Jim Abourezk (1978), one get beat, Jimmy Carter (1980), and one die, Gillis Long (1985). I was beginning to think I was a jinx. At the Joint Economic Committee, where I was based, Congressman [David] Obey took over and his staff director—in contrast to how Jim Davidson had handled a similar situation in 1978—gave me a few days notice to leave. They treated me like dirt.

I scrambled and landed a position with Senator Dale Bumpers over on the Senate Small Business Committee—despite my record of having killed the Bumpers regulatory amendment! There I handled all the economic issues and continued to try to build a record on which Democrats—I hoped Bumpers would run for president in '84 or '88—could run and convince the public that we could be trusted with the reins of economic power.¹⁰⁸

In 1985 when Gillis died, I had come close to landing a job with Cray Computer, the

supercomputer company, and I'd talked with lots of other high-tech firms. So I was getting heavily focused on policy issues of relevance to the high-tech sector, which became my specialty with Senator Bumpers.

One of my most influential mentors then was Kent Hughes, who served with me on the staff of the Joint Economics Committee. Kent was probably the first congressional staffer to focus on the high-tech sector. He organized a hearing on venture capital back in about 1982.¹⁰⁹ Kent and I worked closely together with the House Democratic Caucus, which Gillis chaired, to define a pro-growth, pro-free trade, pro-entrepreneur strategy for the Democrats.

As part of this I crafted a special capital gains incentive, focused on offerings of stock by entrepreneurial firms. I'd been involved in the debate on the 1986 Tax Reform Act when the capital gains incentive had been repealed. So I crafted a targeted capital gains incentive for entrepreneurs. It only provided a special capital gains tax break for new, direct, long-term investments in the stock of small entrepreneurial firms.¹¹⁰ This approach contrasted starkly with the proposals for a capital gains tax break for any investment in anything, an approach that provides massive windfalls on wealthy investors. My focus on entrepreneurs was typical of everything I did with Bumpers.

During the 1992 campaign, I persuaded Clinton and Gore to endorse my targeted capital gains incentive. They endorsed it and we enacted it as part of the 1993 Budget Reconciliation bill. Unfortunately, they insisted on enacting some amendments that gutted it. We got it enacted, but it was gutted.¹¹¹ Another close call.

If they'd enacted the incentive as I designed it, it might have had a dramatic impact on the entire high-tech sector in the 1990s, but the Clinton folks screwed me. The targeted incentive might have given Democrats an argument to use against the Republicans, who wanted to restore an across-the-board retroactive capital gains tax incentive. They enacted that and it provided a massive windfall for all types of investments, many of which have nothing to do with economic growth.

My approach was focused on the one sector of the economy that is starved for capital and has the greatest potential to generate economic growth. I believe we should husband federal tax incentives and use them where they can provide the greatest benefit for the revenue cost. But Republicans just want to gut federal revenues to "drain the swamp" of

revenues that could be spent on programs.

So on the natural resource subsidy and capital gains issues, I put in years of work and got nothing for it. In both cases, I'd crafted constructive proposals and I fought tenaciously for them, but Charlene beat me on the first one and the Clinton/Gore folks screwed me on the other one. You have to take your lumps in this game. This period from the Reagan triumph through my work with Dale Bumpers was the least productive period of my career. Democrats were on the defensive. The Republican ascendancy was changing everything.

RITCHIE: So how did you break out of this slump?

LUDLAM: If you keep plugging away at public policy, breaks may come your way and a huge break came my way in 1993 after I'd worked for eight years with Bumpers. As a result of all my high-tech work with Senator Bumpers, I was recruited by the Biotechnology Industry Organization (BIO) to serve as its principal lobbyist, as vice president for government relations. Their lobbyist, Lisa Raines, who died tragically on 9/11 in the Pentagon plane, had seen me in action on the capital gains and other high-tech issues and she invited me to apply. I served as BIO's VP for seven and a half years.

So strangely, the least productive period in my career was followed immediately by the most productive period. If you persevere in this game, and you work as an entrepreneur, good things may well happen. In this case, I had a vision of how the government should work with the high-tech sector and others were impressed with it. I came to this vision quite early. I worked on venture capital issues in 1982 and had become a leader on them by 1986.

Most people didn't get into these issues until the high-tech boom in the mid to late 1990s. I had a sense that the whole economy was changing radically and that high technology would change our world. Eventually these changes became obvious to everyone and they had a massive impact on the political system. It took fifteen years for that to happen and I made good use of those years to position myself to become one of the leaders on these issues.

When I left the Senate in 1993 for BIO, I was eighteen months short of drawing a government pension. Hill employees with twenty years of government service can retire at age fifty, but I was only forty-eight and a half. But the opportunity at BIO was so interesting, I left anyway.

During my tenure at BIO, I was intensively involved with the House and Senate. Eventually, I managed a staff of sixteen lobbyists and assistants, retained outside lobbyists to open doors, organized fly-ins of executives, hired Michael Losow to reach out to the patient groups, launched a Political Action Committee, and oversaw twenty-five state biotech associations. Michael was a dream to work with. He was a lawyer, but he had an emotional side that you rarely find in lawyers.

In terms of outside lobbyists, the two we retained, Chuck Brain and Linda Tarplin, are among the finest people I've ever worked with in this town. They're incredibly effective and kind individuals. The biotech industry was a fun and incredibly interesting client that was just then emerging in the public consciousness of the public and as a political entity.

RITCHIE: What sort of issues did you work on?

LUDLAM: One of my major projects at BIO was the enactment of fundamental reforms to the U.S. patent system. It's a long and fascinating story. This project took five years and from the first day I had a vision of where we needed to end up. And, in the end, I won everything I'd sought.

In the big trade bill in 1993, the Congress changed the term of a patent from a flat seventeen years from the date the patent is *granted or issued* to a term of twenty years from the date the patent application is *filed*. This change in the patent term put tremendous pressure on applicants to rush their patent applications through the patent office. Any and all delays in the processing of the application would erode the applicant's twenty-year patent term.

The change made sense. Many applicants were intentionally delaying the issuance of their patent to secure, in effect, a much longer term. They'd delay the issuance of the patent for ten or fifteen years and then they'd get the full seventeen year term on top of that. The system was being abused, so they set the term at twenty years from the *filing* date of the patent application, meaning that the applicant would lose patent term if he delayed the issuance of the patent.

Related to this change in the term of the patent, the Patent Office then was routinely rejecting patent applications for most biotech inventions. It was setting a high "utility"

standard requiring that applicants show that biotech inventions provided clinical benefits for patients.¹¹² This was devastating because the financial markets were waiting for the companies to secure patents before they would fund clinical trials that could prove, one way or the other, whether the inventions provide clinical benefits, e.g. had a “utility.” This was a classic Catch-22 or cart-and-horse problem.

This situation was yielding tremendous delays in the issuance of biotech patents and damage in the capital markets. So it was clear under the twenty year term that the biotech industry faced a crisis. Patents are the lifeblood of the industry; the industry doesn’t exist without patents.

First, I publicly threatened that we’d fight the new twenty-year term and kill the trade bill if they didn’t help us, which was pure bluff. But it got the attention of the Patent Office. That led Bruce Lehman, the PTO [Patent and Trademark Office] commissioner, to remove the supervisors of the patent examiners who were rejecting all the biotech patent applications. He then led the Patent Office to issue new and much more lenient "utility" standards for patents. During consideration of these new standards, I organized the drafting of a massive commentary from our companies—all organized in chapters and then presented twenty-five witnesses at a hearing—each presenting one element of our argument.¹¹³

What made the crucial difference is that Bruce believed that if he helped us with a new utility standard—so that our companies didn’t have to prove clinical efficacy to secure a patent—we’d support the new twenty year patent term. It was a classic political trade, our supporting the new twenty-year term in exchange for Bruce firing the obstructionists and changing the utility standard. For the biotech industry and patients, this was a fabulous bargain and a massive victory. It eliminated the Catch-22 problem. And the new utility standard applied to all patents, so it had ramifications at the Patent Office across the board. I had to change the whole patent system to deal with the Catch-22 problem.

Having achieved one objective, I focused on another one. If we were going to be stuck with the new twenty year term, I wanted to make sure that any delays in the process of securing a patent from the PTO would not cut into the term of the patent. The old term was a flat seventeen years starting when the patent was issued. The new term was twenty years from the application date. So it’s easy to see that if it took more than three years to secure a patent from the PTO, the applicant would end up with less than a seventeen year patent.

This was one of the reasons we had to change the utility standard; the biotech companies were all getting massive delays in the issuance of patents, all of which was going to erode the term of their patent. But changing the utility standard was only half of what we needed. We also needed to enact protections against any erosion of the patent term, any erosion that was not the fault of the applicant.

One of the reasons why the Congress changed the term to twenty years from application was that applicants had no incentive to move their applications quickly through the PTO. They sometimes delayed the applications for years, even decades. This was abusive and it had to stop. Running the clock from the day the applicant filed an application put the onus on the applicant; every day of delay came out of the term of the patent he'd finally get.

I was focusing, however, on the delays that might occur in this process that were *not intentionally caused* by the applicant and I wanted to enact a law to restore any and all erosion in the term of a patent that was *not the applicant's fault*. This legislative project proved to be much more complicated than the new utility guidelines.

Congressman [Dana] Rohrabacher introduced legislation to go back to the old fixed seventeen-year patent term.¹¹⁴ Bruce, and the entire patent and business community, violently opposed the Rohrabacher bill. They wanted to stop the intentional delays that we'd seen under the old system. So what did I do?

I threatened to endorse the Rohrabacher bill—another bluff—unless Bruce, and the patent and business community, endorsed amendments to the new twenty-year term to ensure that delays at the Patent Office would not erode the term of the applicant's patent. Given that the term started running when the patent applicant filed the application, all delays in processing the application eroded the term. I wanted full restoration of any lost patent term as long as the delays were not caused by the patent applicant himself.

Initially Bruce felt I'd betrayed him. He'd fired the obstructionists and issued the new utility guidelines and here I was threatening to endorse a bill that went back to the old seventeen year fixed term. He was furious, but eventually he calmed down and found that what I was proposing wasn't so awful and that I could—again—be useful to him. Bruce came from the Hill, so he could deal with my machinations.

I persuaded Bruce, and the patent and business community, that I would be a useful ally in killing Rohrabacher's bill. For me to join them, however, I demanded that they pay my price. I forced or persuaded Bruce and the anti-Rohrabacher coalition to endorse all of my amendments to protect the patent term of applicants.

The deal I struck with Bruce and the coalition was that if the PTO took more than two years to examine and grant the patent, the patent applicant would be held to two years of lost term. My proposal was that we'd set up a sort of chess clock; in fact, that's the analogy I always used to explain the system. The PTO had two years, when the ball was in its court, to examine and issue the patent. Whatever time the patent applicant took, when the ball was in its court, would be its problem and its lost term. The chess clock analogy proved to be a powerful one. I kept distributing pictures of chess clocks to illustrate my proposal.¹¹⁵

When I got this agreement, I became the most active member of the coalition seeking to enact our amendments and beat Rohrabacher. The agreement with Bruce and the coalition to restore the term lost during the PTO patent examining process meant nothing until we enacted the reforms into law! I led the effort to persuade Rohrabacher that he should take credit for the amendments I had secured to protect the patent term of applicants. I told him in testimony that he should endorse these amendments and declare victory. One of the hardest things for politicians to do is to declare victory! I had some impact on Rohrabacher and I think I deserve a good deal of credit for enacting the Patent Reform Act.

Senator Bond led the opposition, apparently at the behest of Phyllis Schlafly, also from Missouri. She's legendary for killing the equal rights amendment. Somehow she got fascinated with patent issues, about which she knew absolutely nothing. Just the year before, I'd run up against Bond on the stem cell issue and beaten him, so I set out to beat him again.

In the end, Senator [Orrin] Hatch managed to attach the Patent Reform Act to H.R. 3194, the omnibus appropriations act enacted in November 1999 (Public Law 106-113). This included the substance of the Patent Reform Act, S. 1948. To be clear, the new PTO "utility" guidelines and the patent term restoration in the act both apply to all patents, not just life sciences patents. We had to reform the entire patent system in order to save the life science patents. In 2003 there were 342,441 patent applications and 169,028 patents granted in the U.S. and our reforms protect the applicants for all of these patents.

I must give tremendous credit for the amendments to Dave Schmickel, my patent counsel at BIO. Dave is a brilliant patent lawyer who did most of the substantive work on this issue. He's one of the most competent and thoroughly enjoyable human beings I know. He was a joy to work with. We were a powerful team—with me being the manipulator and Dave writing the bill and smoothing over the feathers I'd roughed up. We often played "good cop, bad cop" with the coalition, PTO, and the Hill.¹¹⁶

This whole project took five years: from the debate on replacing the seventeen year with the twenty year patent term, through the reform of the biotech section of the PTO and the issuance of the utility guidelines, through the fight to join the coalition, through the fight with Rohrabacher, through the fight with Bond and Schlafly, and through to the Hatch victory. Essentially every day of this five year period Dave and I worked to implement our strategy. In the end, we won a total and complete victory.

At one point in this fight the *Lehrer News Hour* was thinking to run a segment on the fight. Our coalition selected me to go on the show. I had some TV experience, but this was a daunting prospect. I knew I'd be put up against some nut who would speak in slogans and my response would all be in paragraphs. I brought together a group and we moot courted me for days. Just when it was looking like the show would air, I got laryngitis! I've never had laryngitis in my life. I wasn't in a panic about the show, but getting laryngitis seemed psychosomatic. In the end, the *News Hour* didn't air the show. I think they found the topic too complicated to explain.

The Patent Reform Act saves tens of thousands of years of patents for biotech inventions. Tens of thousands of years! Given that some biotech patents are sometimes worth \$2 or more billion per year in sales revenue, this victory to protect patent term was fundamentally important. They could be worth tens or even hundreds of billions of dollars to the biopharma industry. These reforms should provide substantially greater incentives for investors to back this life giving research. Without strong and long patents, the investors won't risk a single dollar on this research. I consider this to be one of the greatest victories of my career.

The reforms have changed the way the PTO manages the patent applications. Because the PTO is measuring its delay so precisely—so that it can restore lost patent term to applications—the examiners are pressured to process the applications on time, with no

delays. The PTO now has a yardstick that measures its performance. And this is making a world of difference to the applicants. When the PTO causes delay, applicants are held harmless, but the result is that the PTO is going out of its way to avoid these delays.

The reforms we enacted are most useful when there's an "interference" proceeding. Under our U.S. patent system, the "first person to file" a patent application for an invention is not necessarily the one who gets the patent. If another can prove that they were the "first to invent," they can win. The determination of which inventor was the first to invent—an "interference" proceeding among competing claimants to the patent—can be tortuous and take years, even a decade. Under my amendments, all of this time is restored to the applicant. This is crucial because the inventions that are caught in interference proceedings are often the most valuable inventions, the inventions where there was a massive race among researchers to discover some scientific Holy Grail. Dave and I fought to the death to win this concession—to compensate for time lost in interference proceedings in the chess clock system. It took every threat and argument we had to win it from the coalition.

Strangely, just as we were fighting to provide protections against erosion in the event of delays from interference proceedings, the president of the Pharmaceutical Research and Manufacturers Association (PhRMA), Jerry Mossinghoff, got involved only to fight us every step of the way. It was quite incredible. He'd been the U.S. patent commissioner and was an expert on patent policy issues. It seems he had no clue on how important it was to include interferences in the patent term protections. He was a total idiot, and had no idea about the interests of his client. We beat him, but he should have been helpful, not an obstructionist. It's amazing sometimes how much trouble your friends can make in this town!

In general, I kept my distance from PhRMA. It's an arrogant and intensely risk averse organization. It is totally dominated by the Washington offices of its members. Its staff is always running for cover. I made a point of never going to its offices. In fact, for my first five years at BIO, I didn't even know where they were located. I wanted nothing to do with PhRMA or its political baggage.

I had my own problems with the Washington offices of BIO's members. There were three and later four companies with Washington offices. They fought to dominate BIO and I fought to keep BIO independent of their influence. Some of their representatives could be condescending and rough and I was constantly defending my staff from their attempts at

intimidation. On four or five occasions, I had to talk one of my key people out of quitting in response to the attacks from the Washington representatives. At one point, one of these representatives said to me, “You know when PhRMA took a certain position on such and such, their entire staff was fired.”

None of them ever helped me on the patent reform bill. Strangely, they just didn’t understand how important it was to protect the patent term of applicants. This whole manipulatory effort on the patent term issues took five years. Dave and I played the system with bluff-after-bluff.

RITCHIE: What was the key to this victory?

LUDLAM: The key was that we set our strategy the first day and then we worked to implement it for five years. We never changed our strategy. We saw that we needed to change the personnel and utility standard and we needed to enact the protections against lost term. Two forums, two complicated projects, all interrelated. We saw that we had to whipsaw the PTO, endorsing the twenty year term and then threatening to support Rohrabacher’s repealing the twenty year term. We had to whipsaw Bruce, whipsaw the coalition, and then whipsaw Rohrabacher.

Interestingly, I’m now working on the corollary to the Patent Reform Act. That bill focused on restoration of patent term for delays that occur *at the PTO*. I’m focused now on restoration of patent term for delays that occur *at the FDA*. In the bioterror countermeasure research legislation I’ve drafted for Senator Lieberman,¹¹⁷ I’ve included full restoration of patent term for FDA delays—for medicines for bioterror pathogens and other infectious diseases and for all patents held by NIH or its grantees. I’ve teamed up again with Dave Schmickel.¹¹⁸ I’ll get into this initiative in another interview. The point is that I’ve been working on this issue now for more than ten years. I’m halfway to my goal of protecting patent applicants. And I’ve never given up my focus on the goal line. Dave won’t either.

One of the fallouts of the new, more relaxed patent utility standard was the issuance by the Patent Office of patents on genes. This proved to be very controversial. The patents are actually issued for knowledge of the function of the genes—their utility—not the gene itself. But this distinction was completely lost in the public debate over gene patents.

One of my happiest accomplishments at BIO was making sure that a bill restricting the patenting of genes was never even introduced. One of the best ways to win in this game is to make sure that a bill you don't like is never introduced. It's always good to beat a bill, but it's even better if the bill is never introduced in the first place. I prevented the introduction of any bill on the whole question of gene patents.

RITCHIE: How do you prevent the introduction of a bill?

LUDLAM: We tied up the proponents of the bill and negotiations for about two years. [Laughs] We had meetings upon meetings. We exchanged documents. We discussed issues. We discussed facts. We consulted and we consulted. Ad nauseam.

Over this protracted period, their political moment came and went. They could never find a sponsor for legislation on the Hill. We were trying to cut them off from every sponsor we thought they could go to. It took two years of effort, but they never actually got the bill introduced. If they had, it would have been a tough fight.

This effort to block a gene patent bill came on top of a massive fight I led to derail the [Congressman Greg] Ganske proposal to ban the issuance of certain types of patents. Ganske was a plastic surgeon and he hated the fact that some surgeons had secured patents on some surgical techniques. His legislation was poorly drafted and would inadvertently have banned the issuance of many biotech patents. Ganske was intransigent on amending his bill, so it turned into a public brawl on the floor of the House and Senate.

This was precisely what I'd feared the gene patent groups would do, try to bar the issuance of patents on genes. Beating Ganske had been frightfully difficult and I had no interest in a fight against a ban on gene patents.¹¹⁹ With Ganske's proposal, I'd fought alone against it for months and got so bruised and battered, I had to be relieved in the ninth inning to bring in a new team to negotiate the final compromise with Ganske. That was fine with me. I was spent.

Unfortunately, I was not able to prevent the White House from making some vague and threatening statements about gene patents on March 14, 2000. The result was a panic on Wall Street with the market capitalization for the biotech industry dropping by \$40 billion in one day. This was the beginning of the collapse not just of the biotech capital markets; it

was the beginning of the collapse of both the NASDAQ and New York markets. This collapse—due to investor fears about the status of industry patents—shows the importance of the Patent Reform Act and how important it was that I prevented introduction of a bill on the subject of gene patents.

Also while I was at BIO, in 1996 I secured the enactment of the first—and I think still the only—law on the subject of genetic discrimination. It was included in the Kassebaum-Kennedy Health Insurance Portability and Accountability Act, Public Law 104-191. That law bans group health insurance plans from refusing to include an individual based on a preexisting condition which has been diagnosed and treated. Plans were denying coverage of these individuals to reduce their costs.

What we got included in this law was an amendment which also bars discrimination based on “genetic information” that indicates that a patient might later become diseased.¹²⁰ This is information that may exist *before* there is a diagnosed and treated condition, the threshold in the pending draft of the bill. So we had to change the threshold and include predictive genetic tests. We didn’t want genetic tests to be used as a basis for denial of coverage, which would discourage patients from taking these tests.

Our victory on this issue is one of the only cases I know of Congress acting to anticipate a problem and address it before it becomes a major problem. We don’t yet have many genetic tests, but over time the biotech industry will develop thousands of them. Many diseases have a genetic component or basis and we’re just now discovering which genes are responsible.¹²¹

I also managed to make the Orphan Drug Tax Credit permanent. The credit provides incentives for research on rare diseases, most of them genetic.¹²² The small markets for drugs to treat these rare diseases make them very unattractive to the drug companies. The credit and some other incentives try to offset this and make it worthwhile for the companies to develop these products.¹²³

The credit had been extended year to year, like the Research and Development Tax Credit, and had lapsed a few times. It had never become a permanent feature of the tax code. This made the orphan credit incentive rather ineffective as an incentive—no one could rely on the credit existing over the course of a five- to ten-year R&D effort on a new drug to treat

one of these diseases. It was a royal pain to keep getting these extensions every time the credit was about to expire and I hated the R&D Tax Credit Coalition, which I found to be the most dysfunctional coalition I'd ever tried to work with. So to make the orphan credit work, to reduce our year-to-year political workload, and to get away from the damned R&D credit coalition, I urgently wanted to make the orphan credit permanent.

An additional problem was that many small biotech research companies couldn't use the credit in the year in which they earned it. This was true of most of the small biotech companies that had no product, no sales revenue, no taxable income, and, therefore, no tax liability with respect to which to claim the tax credit. To make matters much worse, they weren't permitted to carry the credit forward, the orphan credit, to use it in a tax year in which they did have products, sales revenue, taxable income, and tax liability. All other business credits could be carried forward, but not the orphan credit. Why this one credit was singled out as the only one with no carry forwards is a mystery. But it meant that the credit was useless to nearly all of the companies that might develop drugs for these diseases, in a current or future tax year.

I developed a two-part strategy to remedy this mess. In the 1996 tax bill I secured an amendment that permitted companies to carry forward the orphan credit.¹²⁴ Then in the 1997 tax bill I secured an amendment making the orphan credit permanent.¹²⁵ I knew if I couldn't secure carry forwards, I couldn't justify the work to make the credit permanent. So I had to pass the carry forwards amendment first.

Chuck Brain, later the chief Clinton lobbyist, was my partner in this elaborate strategy.¹²⁶ He had worked on the House Ways and Means Committee and he and I established a powerful personal relationship with one of the staffers over there who cared deeply about research on orphan diseases. Chuck is one of the most effective lobbyists I know and a dear person. I absolutely loved working with him. He and I both viewed this project in very emotional and personal terms.

One of my dearest friends, Jen Belton, has a son, Noah, who is slowly dying of a rare orphan genetic disease—it's a rare form of Leukodystrophy that is known to have afflicted thirty-two people in the U.S. Jen is the most devoted mother and the most deeply spiritual and loving person I've ever met. She and her husband, Hugh, have kept Noah alive hour by hour for many extra years. Noah is a delightful person. He's totally disabled, yet he has a

wicked sense of humor. He's kind and spiritual and very courageous. We're all blessed to know Jen, Hugh, Noah, and their other children, Sarah, and Julia. They're all wonderful friends and delightful human beings.

So my work on the orphan credit was emotional and very personal. I was fighting for Noah, Jen, Hugh, and their family. The political and the personal sometimes merge up here; it's never better than when this happens. When we'd won the permanent credit, I recruited the entire orphan disease community to write personal thank you notes to the key staffer on the Ways and Means Committee who had helped us. I ran into her a few days later and she said she'd cried when she'd received all these notes. She'd never been thanked for her work before—the business lobbyists are rapacious and just come back for more goodies—and she'd never worked on a tax issue laden with so much emotion or been so appreciated by the beneficiaries.

The orphan credit is a powerful incentive for industry to conduct research on rare diseases. The orphan credit is worth about \$40 million in tax savings per year, perhaps forever.¹²⁷ So this was a very sweet and personal victory for me, one that is paying dividends each year. I doubt it'll help Noah, but it gives me comfort to know I've done all I can do to help him and millions of others like him.

Early in service at BIO, I led a huge fight with NIH, which was seeking to regulate the prices of products of companies that had licensed technologies from NIH. I got NIH to repeal the whole scheme. It took me two years to do that and I had to run roughshod over NIH Director Harold Varmus. The prospect of price reviews was killing the NIH technology transfer program. Companies would not begin a discussion with NIH about its technology until the price review threat was withdrawn. Without any technology transfer partners, the NIH research was going to waste and not being developed into products for patients.

Actually, my old work on the capital gains issue proved to be crucial in winning this repeal of the price review scheme. I'd made friends with a venture capitalist in New York who was a close personal friend of HHS Director Donna Shalala, a sorority sister. When it looked like HHS would simply change its "reasonable pricing" rule, I got this friend to call Donna and tell her to just euthanize the rule. That's what Donna did. My opponent at HHS was Bill Corr, a friend who had worked for Senator Metzenbaum. You keep running into friends—on your side or the opposite side—in this political game! It's a very small town.

We got the price review scheme repealed, but the technology transfer function at NIH is so miserably managed that it is still a mess there. With the price review threat it was 100 percent broken, but now it's still 95 percent broken. So in the same bioterror bill I just mentioned, I've included a sixty-page NIH reform section, focused on technology transfer. So here I am, twelve years later, working on the same issue!

At BIO I had the sense that our message would be amplified if we organized the high-tech companies into an Entrepreneurs Coalition. The high-tech sector is surprisingly disorganized in Washington, and no such coalition existed. High-tech companies are just too individualistic and entrepreneurial to get themselves organized. Getting organized is the only way to succeed in Washington.

So I went to friends at the American Electronics Association (AEA), Council of Growing Companies (CGC), The Nasdaq Stock Market, National Venture Capital Association (NVCA), and Software Publishers Association (SPA), and we organized the coalition. Together we represented fourteen thousand companies. In 1996 and 1998 we published a comprehensive and detailed agenda of issues of concern to the entrepreneurial, high-technology sector and we distributed it to all incumbent candidates. It didn't have much impact, but it's an approach that I hope someone in the high-tech sector will pursue.

At BIO I organized the first fly-ins of company executives to lobby the Hill and organized the first political action committee. The industry was very naïve when I got to BIO and I was constantly urging them to get more active and practical. This is a problem for the entire high-tech sector.

RITCHIE: How did you get back up here again?

LUDLAM: Following my seven years at BIO—a life sentence at a trade association—I took nine months off to recuperate. While I was looking for a new job on the Hill, I led a political fight in my neighborhood. In 2000, after I'd left BIO, I organized the Garden and History Tour for the Cleveland Park Historic Society (CPHS), a neighborhood group. The tour featured a local 1847 springhouse. A springhouse is a structure placed over a spring in which food is cooled by the spring water. Our neighborhood is part of the old Springland Farm founded by John Adlum around 1800. The springhouse served his manor, which is located on Tilden Street right behind my house.

I received confidential information from an inside source that the land on which the springhouse was located was going to be sold and that it might well be developed, destroying the springhouse. So I persuaded a wealthy neighbor to hire the top historic preservation lawyer on the East Coast. In a blitz, we recruited CPHS to sponsor our petition, intervened in a pending historic landmark proceeding to prevent the withdrawal of the pending application, testified at a public hearing on the petition, and secured the landmark designation. The owners of the property never knew what hit them!

We saved the springhouse for posterity. It probably deprived the owners of the land of about \$1-2 million in profits they'd have enjoyed if they could have subdivided the property and developed it. My political skills came in handy at home.

During this time, I hankered to return to my home on the Hill and lined up my current position with Senator Lieberman. I'd worked closely with him and his brilliant legislative director, Bill Bonvillian,¹²⁸ when I was with Bumpers and BIO. Lieberman is probably the single most active senator on high-tech issues, and Bill is a genius on these issues, so it's been a perfect home for me. I think it's best to talk about my Lieberman work in another interview. It's mostly focused on bioterrorism, fiscal responsibility, and international competitiveness issues.

Let me just say that Bill is an absolutely superb boss. Irene and Si were also, so I've been blessed in my career to work under truly brilliant and kind individuals as my mentors. That is an unusual combination in this town. I've been blessed. I'm still having fun up here, but I'm feeling quite free to retire after these efforts and these accomplishments. It's certainly been fun in a lot of ways.

RITCHIE: Well, you compared it to World War I at one point. There certainly was a lot of trench warfare that you've been engaged in over that time.

LUDLAM: Yes, I love the trench warfare up here. It's combat, no question about that. It engages all your faculties. It's a high energy game. Some of these fights take years, but if you keep plugging away, inch by inch, you can have a huge impact. The key is setting the strategy on the first day and never losing sight of the goal line. That's what I'm doing now on bioterrorism and fiscal responsibility. That's what I did for five years on the patent

reform fight.

To end today's discussion on a lighter note, let me tell you the story of the Senate buffalo. We need to move from deadly serious issues to the story of a plastic buffalo! Right across from the door clerk on the Senate side off the Reception Room, on the desk where phones are for staff, there resides a plastic buffalo. People have wondered where it came from. It weighs about one ounce. It's a fixture of the U.S. Senate on a par with the statues of the vice presidents and the glorious chandeliers.

For the full story on that, you really need to talk to Myron Fleming, who is one of the Senate doorkeepers. He and I have spent many hours sitting in the Senate chamber and we both love the institution. This is what Myron told me about the buffalo. Don Larson was his boss, and Don was a fairly aggressive, difficult individual. At some point Don started screaming at Myron about something and Myron said, "You buffalo-ass son of a bitch, don't point your finger at me." Myron is a pretty forceful guy as well. And he's a classy guy.

Bob Russell, who was also a doorkeeper, overheard this exchange. That weekend, he was at a yard sale and somebody was selling this plastic buffalo. He bargained them down from twenty-five cents to five cents and bought the buffalo. He brought it in and, ever since, it's been sitting there at the staff entrance to the Senate floor. There are some heavy moments around here, and there are some light moments around here. [Laughs]

Some of this work is very serious, and some of it is just absurd and silly. It's a very human institution that can be dominated by senators like Hart, Mansfield, Byrd, Kennedy, Abourezk, and Lieberman. The fights can be very dramatic. But the institution still finds a place for a plastic buffalo.

RITCHIE: Being there on the floor and dealing with all the strategies that are involved in passing and blocking legislation, how did you prep yourself? Did you read through *Riddick's Procedures*? How do you cope with the arcane nature of Senate rules and precedents?

LUDLAM: Well, I love learning the rules of procedure. I guess I'm an antiquarian. I believe you have to know the rules to prosper here. That's why I won the aircraft noise fight. I knew the rules better than the Commerce Committee staff. I learned a lot about the

rules during the epic Hart-Scott-Rodino fight. Then, over time, I began to understand more and more about the rules. If you are around here long enough, you learn things. I learned some funny and helpful things like: What is a star print? What is an original bill? Lots of things like that are useful to know.

You may never use that knowledge a second time or a third time, but it's useful to know things like that. I think it's basically longevity that leads to knowledge, but I have gone far out of my way to study the rules. I also love to deal with the Budget Act and the Administrative Procedure Act, two other key statutes. If you want to do well in this game, you have to know the rules, the BA, and the APA. I consider myself to be an expert on all three. One of my mentors on these issues is Bill Dauster, now with the Finance Committee, who is the Senate's institutional memory regarding procedures.

I love the Senate. I love the institution. I admire it. I love its foibles. Its history. Its traditions. Its drama and humor. I love to give tours of the Capitol and the history of the Capitol. I just gave a big tour to congressional fellows in our office the other day. I love to tell the story of this place. I certainly know the limitations of this institution. I know its problems. I know when it's operating at its best and when it's operating at its worse. But I fundamentally believe that the rules, the procedures, the traditions, the subject matter that we debate, are really important. Tradition and the rules are critical to trying to bring some civility to the process.

I believe that if you know more about the rules, and know more about the subject matter, and know more about the process, you will probably win. So my battle plan is always to try to know more than anybody else knows about the issue so we'll never be surprised or outflanked. If there is some process or procedure or approach or argument that I can make that will advance my cause, I want to know what it is, and I want to be able to use it.

A lot of what I see now around here is slipshod. There is much less respect for the institution, much less respect for the individuals, much less civility, much less maturity on the part of the staff. Poor-quality work product, less respect for the institution as an institution. We need people who love the institution and protect it.

RITCHIE: Did you make much use of the legislative counsel's office in any of these projects? You've mentioned the parliamentarian, but I wonder how you use the Senate

legislative counsel?

LUDLAM: Yes, I have the greatest respect for the SLC. We just introduced a bill to fundamentally overhaul the entire budget process—my fiscal responsibility initiative. I'll talk about it in our next interview. I went through forty or forty-five drafts of this bill with the legislative counsel before we introduced it. It's been introduced as S.1915. I love working with the legislative counsel's office. I love crafting legislation, trying to find the right words.

I've developed something of a legislative drafting style. This budget process bill has almost twenty pages of findings. The reason for this is that I'm using the findings to educate people about some very arcane subject matters in the bill. I figure if I put the findings in the bill, they are more likely to read them than if they are in a separate document as a floor statement.

Sometimes I try to make something more transparent in the bill by including some findings to explain the subject matter. Sometimes I write out the new law in long hand instead of simply amending the current law. It's very hard to understand what's happening when you put "on line xx, strike the word 'not.'" I often try to write a bill so people can read it and understand what it does. In other cases, I find it more useful to hide what I'm doing. But I think, every time, you ought to be making a choice on whether you make some point more obvious or less obvious. So I have very strong feelings and values about how to draft legislation or how to draft an amendment.¹²⁹ I also love dealing with the questions of the amendment tree: the seven amendments that can be pending at any given time. I know all about how to play the amendment tree.

I have copies of the rules. I study them from time to time, and love asking questions of the parliamentarian, trying to find out where a bill will be referred, redrafting so that it will go to one committee rather than another, discussing what motions or points regarding a bill are available. I love combat, and I think that is certainly a useful system of values around here because it is combat.

It's often a game of inches, as we saw on the noise/bribe bill. The more you know about physically how things happen, the better you can maneuver. You need to know exactly who refers a bill to a committee, when, and on what basis. Where does a bill actually go when it goes on the calendar versus going to a committee? How does a bill get a number?

How can you select a number in advance that is a better sounding number than another number? Little things like that. It's all a question of craftsmanship. It's pride in one's work.

RITCHIE: Well we really covered a lot of territory. Maybe this would be a good break. This has been terrific, especially the discussion about the Hart-Scott-Rodino.

LUDLAM: People should go back and read the transcripts. They read like a soap opera.

RITCHIE: Well I'm going to, I'm going to read some of the things you mentioned!

LUDLAM: They were dramatic, incredible speeches.

RITCHIE: That was the summer that I started here in '76, and I remember that filibuster going on at the time. Of course, I was really on the periphery of it all, but it brings back some memories.

LUDLAM: Somebody could write a whole article about what does this say about the institution and its values.

RITCHIE: Well your interview will be a good starting point for that.

LUDLAM: Good.

RITCHIE: Well, thank you. We will get you a copy of the first transcript and this one as soon as we can, and then whenever you get some time in the next week or so we can arrange another interview.

LUDLAM: Well, actually the good news is I'm flying to Egypt on Tuesday for a vacation, so it will be in the New Year.

RITCHIE: Have you ever been to Egypt before?

LUDLAM: No. It should be fun. It's a camping trip, so a perfect way to see the country.

RITCHIE: I don't know if you've noticed I have a picture on the wall here of James Landis, who was instrumental in creating the federal regulatory system. He was the fellow I wrote my doctoral dissertation about. I published that in 1980 just as all the whole deregulation movement was breaking.

LUDLAM: Well, the story of regulatory process and the creation of EPA and OSHA, the early cost-benefit analysis, and then the Reagan intervention in the rule-making proceedings—this is where the rubber hits the road in this town. I was in the middle of all of that for about ten years. It's pretty well settled down now. It's a lot less contentious than it was in the '70s and '80s, but regulatory policy was and remains one of the biggest arenas for fights in government. Initially, we saw agencies writing rules by fiat, without sufficient substantive input, and without any cost-benefit analysis. The liberals, of course, thought that was fine, but everybody including Carter and many others thought that we had to professionalize the rule-making process in order to save it.

RITCHIE: And that was the turning point, just about that time period. Well thanks, I appreciate this enormously.

End of the Second Interview

Endnotes

⁶⁶ Once cloture is invoked—which requires sixty of the one hundred senators—there was allotted only one more hour per senator for debate before a final vote on the bill. Once cloture was invoked on a bill, final passage was supposed to come quickly. In this case, Senator Allen continued to filibuster the bill even after cloture was invoked—the first post-cloture filibuster. He did this by filing endless amendments to the bill and insisting on a vote on each of them, together with endless motions, appeals of rulings of the chair, etc.

⁶⁷ Jim Allen was born in Alabama in 1912. He attended the University of Alabama and University of Alabama Law School. He practiced law 1935 to 1968; was elected as a member of the Alabama state legislature from 1938-1942; served in the United States Naval Reserve from 1943-1946; was elected as a member of the Alabama state senate 1946-1950; served as lieutenant governor of Alabama from 1951-1955 and 1963-1967; and was elected to the U.S. Senate in 1968 and reelected in 1974. He died suddenly in 1979 and his wife was appointed to serve out his term.

⁶⁸ Robert C. Byrd was born in North Carolina. He attended Beckley College, Concord College, Morris Harvey College, and Marshall College, all in West Virginia, and George Washington University Law School, Washington, D.C. He graduated from American University Law School 1963. He received a bachelor's degree in political science from Marshall University 1994. He was elected as a member of the West Virginia house of delegates 1947-1950; and served in the West Virginia senate from 1951-1952. He was elected to the U.S. House for the Eighty-third, Eighty-fourth, and Eighty-fifth Congresses (1953-1959) and elected as a U.S. senator in 1958. He was reelected in 1964, 1970, 1976, 1982, 1988, 1994, and 2000. He stands for reelection in 2006. He's served as the secretary, Senate Democratic Conference from 1967-1971; Democratic whip from 1971-1977; majority leader from 1977-1980 and 1987-1988; minority leader from 1981-1986; and president pro tempore 1989-1995. He has chaired the Senate Appropriations Committee. He's authored a massive history of the Senate, four volumes.

⁶⁹ If you don't get recognized by the chair, you can't speak.

⁷⁰ The precipice the Senate faced in the Hart-Scott-Rodino debate is remarkably similar to the precipice the Senate faced regarding the filibusters of Senate Democrats of the Bush administration judges. On May 23, 2005, the Senate blinked and did not invoke the “nuclear option” of crushing the Democrats by ending debate on the judges by a majority, rather than a super majority, vote.

⁷¹ Quentin Burdick was born in North Dakota in 1908. He graduated from the University of Minnesota in 1931. He was elected to the House for the Eighty-sixth Congress (1959-60) and Senate in 1960, to fill the vacancy caused by the death of William Langer. He was reelected in 1964, 1970, 1976, 1982, and again in 1988. He died in 1992. He was chairman of the Committee on Environment and Public Works (100th-102nd Congresses).

⁷² Tomas McIntyre was a senator from New Hampshire. He was born in 1915, attended Dartmouth College and the Boston (Mass.) University Law School. He served in the United States Army 1942-1946, became the major of a small town and city solicitor. He was elected to the Senate in 1962. He was reelected several times, eventually being defeated in 1978. He died in 1992.

⁷³ June 9 *Congressional Record* at 17247.

⁷⁴ June 9 *Congressional Record* at 17251.

⁷⁵ A live quorum call is different than a regular quorum call. In a regular quorum call, there's no vote. They use these as space holders, "time outs," without adjourning. They slowly read the names of the senators and then invariably they dispense with the quorum call. In a "live quorum" they vote to instruct the sergeant at arms to round up the members to make a quorum. The vote on this instruction finds that there's a quorum, so the sergeant at arms never runs off to arrest the members.

⁷⁶ The president pro tempore is a constitutionally recognized officer of the Senate who presides over the chamber in the absence of the vice president. The president pro tempore (or, "president for a time") is elected by the Senate and is, by custom, the senator of the majority party with the longest record of continuous service. The president pro tempore often presides when the session opens, but then other senators take over and serve as the presiding officer of the Senate.

⁷⁷ The "well" of the Senate is the area between the senators' desks and the dais. The desks are arranged in a semi-circle that bounds the well on one side. The dais includes the desk for the presiding officer, the table for the journal clerk, parliamentarian, and two reading clerks. Between the dais and the senators' desks are tables for the majority and minority floor staff.

⁷⁸ A fascinating review of the "constitutional" option to change the Senate cloture rule—the so called "nuclear option" now under discussion in the Senate regarding the filibusters by the Democrats of the Bush judicial nomination—is presented in Marty Gold's piece in the

Harvard Journal of Law and Public Policy, “The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster” (Volume 28, Issue 1). Marty doesn’t delve into the Hart-Scott-Rodino debate, but he could have done so with great impact because in this case it was Senator Byrd who threatened majority cloture. It is now Senator Byrd who is the leading opponent of the nuclear option, but back with H-S-R he was the one who was outraged by a determined and militant minority.

⁷⁹ Mike Mansfield was born in New York City in 1903. In 1906 his family moved to Great Falls, Montana. He served as a seaman when only fourteen years old in the United States Navy during the First World War, as a private in the United States Army in 1919-1920, and as a private first class in the United States Marine Corps 1920-1922. He worked as a miner and mining engineer in Butte, Montana, 1922-1930; attended the Montana School of Mines at Butte in 1927 and 1928; graduated from Montana State University at Missoula in 1933; and received a masters degree from that institution in 1934. He also attended the University of California at Los Angeles in 1936 and 1937; was a professor of history and political science at the Montana State University 1933-1942; and was elected as a Democrat to the Seventy-eighth Congress in 1943. He served in the House for ten years and was elected to the United States Senate in 1952 and re-elected in 1958, 1964, and 1970. He was elected as Democratic whip from 1957-1961; and Senate majority leader from 1961-1977. He was chairman, Committee on Rules and Administration. He was appointed as Ambassador Extraordinary and Plenipotentiary to Japan 1977-1988. Upon his retirement from public service he served as East Asian advisor, Goldman, Sachs. He was awarded the Presidential Medal of Freedom on January 19, 1989. He died in 2001.

⁸⁰ The Op. Ed. by E. J. Dionne in the *Washington Post*, March 22, 2005, “Will Republicans Go Nuclear?”

⁸¹ Using the filibuster to delay debate or block legislation has a long history. In the United States, the term filibuster—from a Dutch word meaning “pirate”—became popular in the 1850s when it was applied to efforts to hold the Senate floor in order to prevent action on a bill. In the early years of Congress, representatives as well as senators could use the filibuster technique. As the House grew in numbers, however, it was necessary to revise House rules to limit debate. In the smaller Senate, unlimited debate continued since senators believed any member should have the right to speak as long as necessary. In 1841, when the Democratic minority hoped to block a bank bill promoted by Henry Clay, Clay threatened to change Senate rules to allow the majority to close debate. Thomas Hart Benton angrily rebuked his colleague, accusing Clay of trying to stifle the Senate’s right to unlimited debate. Unlimited debate remained in place in the Senate until 1917. At that time, at the suggestion of President Woodrow Wilson, the Senate adopted a rule (Rule 22) that allowed the Senate to end a debate with a two-thirds majority vote—a tactic known as “cloture.” The new Senate rule was put to the test in 1919, when the Senate invoked cloture to end a filibuster against the

Treaty of Versailles. Despite the new cloture rule, however, filibusters continued to be an effective means to block legislation, due in part to the fact that a two-thirds majority vote is difficult to obtain. Over the next several decades, the Senate tried numerous times to evoke cloture, but failed to gain the necessary two-thirds vote. Filibusters were particularly useful to southern senators blocking civil rights legislation in the 1950s and 1960s. In 1975, the Senate reduced the number of votes required for cloture from two-thirds (67) to three-fifths (60) of the one-hundred-member Senate. Many Americans are familiar with the hours-long filibuster of Senator Jefferson Smith in Frank Capra's film *Mr. Smith Goes to Washington*, but there have been some famous filibusters in the real-life Senate as well. During the 1930s, Senator Huey P. Long effectively used the filibuster against bills that he thought favored the rich over the poor. The Louisiana senator frustrated his colleagues while entertaining spectators with his recitations of Shakespeare and his reading of recipes for "pot-likkers." Long once held the Senate floor for fifteen hours. The record for the longest individual speech goes to South Carolina's J. Strom Thurmond who filibustered for twenty-four hours and eighteen minutes against the Civil Rights Act of 1957.

⁸² Recently I'd thought that this would happen on the Senate FSC-ETI bill, dealing with outsourcing. The Democrats had offered many amendments to the bill the first time and could have done the same when it came to take the bill to conference—amending the Senate amendment to the House bill—but the Democrats ran out of steam and there were only a few amendments the second time around.

⁸³ See September 7 *Congressional Record* at 29145-29153, especially 29147.

⁸⁴ See following tribute from Senator Daschle upon Murray's death in 2000. "Mr. President, over the weekend we were saddened to learn of the death of Murray Zweben. Murray was chosen by the late Floyd Riddick to be his assistant in the parliamentarian's office in 1965. He followed "Doc" Riddick in that post and became the Senate Parliamentarian in 1975. He served in that capacity for six years and left in 1981. The Senate recognized his exemplary service in 1983 by elevating him to parliamentarian emeritus. After he left the Senate, Murray worked in private law practice and played as much tennis as his schedule would permit. Those of us who knew Murray and his extraordinary ability to fly through the New York Times crossword puzzle, in ink no less, will miss him. Our thoughts and prayers go out to his wife Anne, and his children Suzanne, Lisa, Marc, John, and Harry."

⁸⁵ See August 31 *Congressional Record* at 28603.

⁸⁶ See 431 U.S. 720 (1977) and Donald Baker, "Hitting the Potholes on the Illinois Brick Road," *Antitrust*, Fall 2002 at 15.

⁸⁷ Unanimous consent permits the Senate to structure its business in any way that all senators—without any one objecting—accept. Any one senator can object and that defeats unanimous consent. The consent requests are routinely “hot lined” to all senators—on a special phone—and if no senators object, the unanimous consent agreement—commonly referred to as “UC”—is adopted. Many UCs are proposed without any use of the hot line—and they are normally cleared in advance with both parties before they are proposed. Unanimous consent gives total power to individual senators.

⁸⁸ See October 14, 1978 *Congressional Record* at 37416.

⁸⁹ See October 14, 1978, *Congressional Record* at 38629-32 and 38689-92.

⁹⁰ Dick Tuck was a famous Democratic Party political prankster, best known for his practical jokes committed against former President Richard M. Nixon. Tuck is best known for dressing up as a railroad conductor, and waving a train out of the station while Nixon was still speaking from the train’s rear platform. In another gag, as Nixon spoke to a crowd of Chinese-Americans, Tuck caused a sign to be displayed behind Nixon reading (in Chinese) “What about the Howard Hughes secret loan?” (The reclusive billionaire had loaned money to Nixon’s brother.) When Nixon ran for president in 1968, it is said that his aides threw away thousands of foreign-language campaign buttons for fear Tuck had gotten to them. Tuck began as a campaign aide to Helen Gahagan Douglas, whom Nixon defeated in the election for senator from California in 1950. Nixon, who had already made a name for himself as a member of the House Un-American Activities Committee, ran a mud-slinging campaign, falsely portraying Douglas as a Communist sympathizer. Tuck vowed revenge and was hired as a Nixon campaign aide (while secretly working for Douglas). Tuck organized a Nixon rally, booking the largest auditorium possible. However, he barely publicized it; therefore, Nixon showed up to speak before a crowd of forty in a four-thousand-seat auditorium. In 1956, Nixon was running for reelection as vice president during the Eisenhower administration. Tuck learned that the route taken by San Francisco garbage trucks going to the dump led them right past the Republican National Convention. Tuck paid to have the garbage trucks bear signs that read “Dump Nixon.” The 1960 Democratic convention was one of the first to be covered by television cameras. Tuck, then an aide to California Governor Pat Brown, somehow persuaded the cameras to focus on eight thousand seats full of John F. Kennedy supporters while ignoring seventy-six thousand empty seats. In 1964, Tuck unsuccessfully ran for the California state senate, promising to rehabilitate the Los Angeles River by either filling it with water or painting it blue. “The job needs Tuck,” read a Tuck billboard, “and Tuck needs the job.” In 1968, Tuck was a key adviser in Robert F. Kennedy’s presidential campaign and rode in Kennedy’s ambulance as the mortally wounded candidate was rushed to the hospital. When he became president, Nixon emulated

Tuck's pranks by hiring dirty tricks specialists such as Donald Segretti. Strangely enough, Segretti was a graduate of the high school I attended in San Marino. But the Segretti tricks tended to be mean-spirited rather than humorous. For example, Segretti's dirty tricks included forging letters to newspapers imputing sexual misconduct to Hubert H. Humphrey and forging letters on the stationery of Sen. Edmund S. Muskie that included language denigrating blacks. Apparently Nixon realized that Segretti's efforts were not comparable to the standard set by Tuck. In a White House conversation taped on March 13, 1973, Nixon commented, "Shows what a master Dick Tuck is . . . Segretti's hasn't been a bit similar." The Segretti operation eventually evolved into the Howard Hunt/Gordon Liddy "plumbers" operation and the Watergate and Ellsberg break ins.

⁹¹ See October 14, 1978, *Congressional Record* at 37385.

⁹² See H.R. 13350, 94th Congress; June 25, 1976, *Congressional Record*; S.1458, 95th Congress; May 11, 1977, *Congressional Record*; and Public Law 95-70.

⁹³ Subpart 9.5, Federal Acquisition Regulations (FAR).

⁹⁴ The Administrative Procedure Act (APA) is the law under which some fifty-five U.S. government federal regulatory agencies like the FDA and EPA create the rules and regulations necessary to implement and enforce major legislative acts such as the Food Drug and Cosmetic Act, Clean Air Act, or Occupational Health and Safety Act. See Title 5, United States Code, Chapter 5, sections 511-599.

⁹⁵ See S. 262, 96th Congress. Reported to Senate from the Committee on Governmental Affairs, S. Rept. 96-1018 (October 30, 1980). Never considered by full Senate or House.

⁹⁶ See S. 111, introduced by Senator Bumpers on January 23, 1979. The bill provides that in any court reviewing federal agency actions, the courts shall decide de novo all relevant questions of law. The bill states that there shall be no presumption in any such proceeding that any rule of any agency is valid and it requires that such validity be provided by clear and convincing evidence except when such a rule is set forth as a defense in a criminal trial or action for a civil penalty.

⁹⁷ Jim graduated from the University of Missouri Schools of Journalism and Law. He studied under the late Dean Earl F. English and Professor Paul Fisher, two pioneers on Freedom of Information Act policy issues. Davidson served as special assistant/press secretary to Senator

Stuart Symington and subsequently as chief counsel to the Senate Governmental Affairs Subcommittee on Intergovernmental Relations (IGR), and as chief counsel/staff director of the Senate Judiciary Subcommittee on Administrative Practice and Procedure. As counsel to the IGR Subcommittee, chaired by Senator Edmund S. Muskie, he helped write and enact the 1974 amendments to the Freedom of Information Act. Senator Muskie's principal amendment, which was so opposed by the White House that the bill was vetoed by President Ford, would have established a new standard for the disclosure of national defense and foreign policy information. The Senate and House were successful in overriding the president's veto. He also assisted Senator Sam J. Ervin in writing the Privacy Act of 1974. This was the first effort by the Congress also aimed at government openness—this for the citizens of the United States about whom the government had collected information and was using it to make decisions about their lives. Among other activities with the IGR Subcommittee, he conducted the first public oversight hearing of Central Intelligence Agency surveillance of U.S. citizens, helped coordinate a congressional and public campaign to oppose the Nixon administration's Official Secrets Act (S. 1), and helped write and pass the Government in the Sunshine Act, the Federal Advisory Committee Act, and many other open government initiatives. Subsequently he moved to the Judiciary Subcommittee, chaired by Iowa Senator John C. Culver, where he worked on the Regulatory Flexibility Act. He now leads Davidson & Company, a consulting company focused on media and freedom of information and intelligence classification issues.

⁹⁸ Between 1969-1972, Harrison was a public interest advocate, serving as executive director of the Center for Study of Responsive Law (popularly known as "Nader's Raiders"), and advocating environmental and consumer causes before the Congress and executive agencies. In the U.S. Senate between 1972-76, Harrison served as chief legislative assistant to the late Senator Philip A. Hart, chairman of the Antitrust and Environment Subcommittees in the Senate. From 1977-1981, he was executive associate director of the Office of Management and Budget in the Executive Office of the President. He was in charge of management, reorganization, and regulatory policy for OMB. He served for four years as executive director of the president's Reorganization Project which prepared and advocated before Congress executive agency reorganization plans for the Executive Office of the President, the Dept. of Energy, the Dept. of Education, the Federal Emergency Preparedness Agency ("FEMA"), the Nuclear Regulatory Commission, and several other agencies. Harrison is now a partner in the Washington, D.C., office of the law firm of Latham & Watkins, where he is co-chairman of the firm's energy practice. In the 1980s, he was a leading advocate for the creation of the competitive power industry and was a founder of the largest trade association for the independent power companies. He served as outside counsel, strategic advisor, and investor in two of the leading independent cogeneration power companies created during that time, Intercontinental Energy Corporation and Sithe Energies. From 1995-1998, he was chairman of the firm's International Practice, directing Latham's expansion in Asia and other parts of the world. From 1998 to 2000, Mr. Wellford was vice chairman of Sithe Energies, Inc., one of the world's largest merchant power generation companies. Since 2000, in addition to ongoing work in mergers and acquisitions and energy project finance, Mr.

Wellford has assisted a number of renewable energy, energy efficiency, resource recovery, and environmental technology companies with private equity financing, project financing, and mergers and acquisitions. He holds a Ph.D. in government from Harvard University, where he was a Danforth Fellow and Teaching Fellow and a Juris Doctor degree from Georgetown University Law School. He was a Marshall Scholar at Cambridge University and valedictorian of his graduating class at Davidson College.

⁹⁹ See Chuck Ludlam, “Undermining Public Protections: The Reagan Administration Regulatory Program,” *Alliance for Justice*, 1981.

¹⁰⁰ See “Administration’s Fiscal Year 1983 Budget Proposal,” Senate Finance Committee hearings, part 3 at pages 70-72.

¹⁰¹ See the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA)(HR 4961, 97th Congress, Public. Law 97-248). The Act placed restrictions on the issuance of small issues of industrial development bonds used for private activities for purposes of the tax exclusion of interest on such bonds but did not touch the bonds issued by non-profits.

¹⁰² Steve served as vice president and general counsel at the Biotechnology Industry Organization (BIO) from 2001-2005 and now represents Nabi Biopharmaceuticals, a Florida company focusing on the immune system and infections. From 1989 to 2001, Steve was a partner at Hogan & Hartson, representing clients like Amgen, Genentech, the American Academy of Pediatrics, the American Cancer Society, the Fred Hutchinson Cancer Research Center, and the Infectious Diseases Society of America. He held a similar position from 1979 to 1989 and 1969-1971 with Reed, Smith, Shaw & McClay. He was chief counsel of the House Health and Environment Subcommittee, working with Chairman Paul Rogers, from 1971 to 1979.

¹⁰³ See “Analytical Perspectives on the U.S. Government,” Fiscal Year 2005 at table 18-1 (estimates of total income tax expenditures). The tax exemption for student loan bonds is worth \$260-380 million per year; for private nonprofit educational facilities it’s worth \$780 million to \$1.13 billion; and for hospital construction it’s worth \$1.62 to \$2.29 billion. About 80 percent of this revenue loss to the government accrues to the benefit of the bond issuer. On this calculation see “Tax Credit Bonds,” report of the Congressional Budget Office (July 2004).

¹⁰⁴ See H.R. 3801 as introduced on August 4, 1983.

¹⁰⁵ See H.R. 3398, House Report 98-267 and Public Law 98-573.

¹⁰⁶ When a foreign country subsidizes a particular industry, the United States may, under certain circumstances, impose import duties to compensate for the favored treatment. International law recognizes the legitimacy of countervailing duties. Under the General Agreement on Tariffs and Trade (GATT), countries may impose countervailing duties on goods produced with the aid of a “bounty or subsidy.” The GATT, however, does not clearly define subsidy. This vagueness resulted in the development of domestic law that attempts to define what subsidies the United States may countervail. Unfortunately, the United States law allows the countervailing of domestic subsidies only if the subsidy benefits a particular industry or group of industries. This is known as the specificity requirement. Under this test, the foreign government must provide aid “to a specific enterprise or industry or group of enterprises or industries.” Back in 1984 the U.S. took a very narrow view of the specificity rule and was extremely reluctant to find that natural resource subsidies were subject to countervailing duties. The Gillis Long proposal, if it had been enacted, would have ensured that countervailing duties were available as a remedy. In coming so close to enacting his proposal, we put pressure on the countries that were targets of the bill—Russia, Eastern Europe, China, Mexico, Brazil, and Canada where energy and other natural resources were owned by the governments—to reform their practices. They could see that their natural resource subsidies might be vulnerable, and over time U.S. negotiators took a broader view of the specificity rule and found many more cases where countervailing duties were appropriate. This trend was strengthened by the enactment of the 1988 trade bill that included strengthening of dumping law against a non-market economy. Had this trend begun in 1984 and accelerated in response to a specific statutory mandate, the pressure against unfair subsidies would have had a much greater impact. Today, environmentalists are discovering that these natural resource subsidies can lead to unsound agriculture practices, excessive exploitation of scarce natural resources, and excessive dependence on fossil fuels.

¹⁰⁷ Charlene and her husband, Ed Cohen, became dear friends of mine in the 1970s. Charlene attended Catholic Law School with my ex-wife and I knew Ed on the Hill. He’s a distinguished public servant in his own right, having served many years on the Hill for Warren Magnuson on the Senate Commerce Committee staff (where he was one of the leaders in the consumers right movement), in the Carter White House (where we worked together on the regulatory reform issues), and Clinton Interior Department with Bruce Babbitt. Ed is now the Washington representative for Honda Motors. Before becoming U.S. trade representative, Charlene had worked at a law firm and been deputy trade representative. She was the administration’s leader in opening of foreign markets and the elimination of regulatory and investment barriers around the world, and as the architect of U.S. trade policy, she was a central figure for international business. She’s best known for negotiating the historic market opening agreement with China on its entry into the World Trade Organization, which has deepened China’s stake in a stable, rules-based global economy and helped lead to a doubling of American exports to China since the year 2000. Beyond this,

Charlene formulated an aggressive agenda to open foreign markets at the WTO and across the globe, negotiating hundreds of complex trade and commercial agreements with virtually every major market, from Japan and the European Union to the smallest states of Latin America, Africa, and the Middle East. In addition to agreements covering traditional sectors of the economy, Charlene also developed and negotiated trade rules for the information age, concluding global agreements covering the world's telecommunications markets, global financial services, information technology products, intellectual property rights, and cyberspace, which account for well over half of all global commerce. The breadth of Charlene's accomplishments and her international reach have been widely recognized: Harvard Law School has honored her with its "Great Negotiator" award and the Harvard Business School has chronicled her deft negotiating skills in a series of case studies. She was the recipient of Yale Law School's Prieskel-Silverman Fellowship for distinguished public service, and her savvy and skills are detailed at length in *Leading Up*, a book published under the auspices of the Wharton School and the Wharton Center for Leadership and Change. She's now a lawyer with Wilmer, Cutler and Pickering.

¹⁰⁸ With Senator Bumpers I had the great privilege of working with Scott Hibbard, Deborah Estes, Christie Dawson, and Tracy Crowley, all dear friends to this day.

¹⁰⁹ Kent is currently director of the Science, Technology, America, and Global Economy program at the Woodrow Wilson International Center. He's just published the definitive account of the "competitiveness" issue: *Building the Next American Century: The Past and Future of Economic Competitiveness* (Woodrow Wilson Center Press, 2005). Prior to joining the Center, Kent served as the associate deputy secretary at the U.S. Department of Commerce. Before joining the Clinton administration, he served as president of the Council on Competitiveness; chief economist to U.S. Senate Majority Leader Robert Byrd; senior economist at the Joint Economic Committee; and legislative and policy director in the office of U.S. Senator Gary Hart during the senator's first presidential campaign. Prior to his congressional service, Kent served as a staff attorney for the Urban Law Institute and an International Legal Center Fellow and Latin American Teaching Fellow in Brazil. He holds a Ph.D. in economics from Washington University, an LL.B. from Harvard Law School, and a B.A. in political and economic institutions from Yale University.

¹¹⁰ See S. 931 introduced by Senator Bumpers on April 7, 1987. See also S. 348 introduced on February 7, 1989; S. 1932 introduced on November 11, 1991 (47 cosponsors); and S. 368 introduced on February 16, 1993 (37 cosponsors).

¹¹¹ See 26 United States Code 1202, Pub. L. 103-66, title XIII, Sec. 13113(a), Aug. 10, 1993. Proposals have been made to amend my venture capital gains incentive to make it work as intended. There was a Senate Small Business Committee roundtable on May 22, 2002, on

“Unleashing the Power of Entrepreneurship: Stimulating Investment in America’s Small Businesses,” chaired by John Kerry. An old friend of mine, Mark Heesen, president of the National Venture Capital Association, testified in favor of amendments to my incentive. Senator Kerry introduced a bill to this end, S. 1676. I doubt if anything will be done to make this incentive work as I’d intended it to work.

¹¹² In order to be eligible for patent protection, United States patent law requires that an invention be, 1) New or Novel: The invention must be demonstrably different from publicly available ideas, inventions, or products (so-called "prior art"). This does not mean that every aspect of an invention must be novel. For example, new uses of known processes, machines, compositions of matter, and materials are patentable. Incremental improvements on known processes also may be patentable; 2) Useful: The invention must have *some application or utility* or be an improvement over existing products and/or techniques; 3) Non-obvious: The invention cannot be obvious to a person of "ordinary skill" in the field. Non-obviousness usually is demonstrated by showing that practicing the invention yields surprising, unexpected results.

¹¹³ The original proposed Utility Examination Guidelines were issued in December 1994, in response to a groundswell of complaints I orchestrated that Examining Group 1800 (biotechnology) was imposing a nearly impossible burden on biotech and pharmaceutical applicants to establish section 101 utility. These guidelines were formally published for comment on January 3, 1995. The proposed guidelines were incorporated nearly verbatim as section 608.01(p)A of the revised MPEP circulated in March, and were assumed to be final. The “final version” of these guidelines, published in the July 14, 1995, volume of the Federal Register (60 FR 36263-265). See (<http://www.uspto.gov/web/offices/com/sol/notices/utilexmguide.pdf>).

¹¹⁴ Currently serving his eighth term in Congress, Dana Rohrabacher represents California’s wealthy Orange County coastal community, including Palos Verdes. He’s chairman of the Space and Aeronautics Subcommittee and a senior member of the International Relations Committee. He’s known for his late-hours speeches on C-SPAN. He is one of that body’s most forceful spokesmen for human rights and democracy around the world. Rohrabacher led the effort to deny Most Favored Nation trading status to Communist China, citing the rogue nation’s dismal human rights record and opposition to democracy. Prior to his first term in Congress in 1988, Dana served as special assistant to President Reagan. For seven years he was one of the president’s senior speechwriters. During his tenure at the White House, Rohrabacher played a pivotal role in the formulation of the Reagan Doctrine and in championing the cause of a strong national defense. He also helped formulate President Reagan’s Economic Bill of Rights, a package of economic reforms that the president introduced in a historic speech before the Jefferson Memorial. Prior to joining Ronald Reagan’s White House staff, he was an editorial writer for the *Orange County Register*, and

graduated from Long Beach State College in 1969 and received a masters degree from the University of Southern California. He's famous as a surfer and gadfly. See H.R. 811 introduced by Congressman Rohrabacher on March 15, 1997.

¹¹⁵ In chess matches, players are each given a fixed amount of time to make all of their moves—called “time control.” A time control of 40/2 means that each player has two hours to make the first forty moves. A “sudden death” time control means that both players must make all their moves for the game before time expires; “game/30” means that each player must make all their moves in thirty minutes or less. When one player has moved, he or she stops the countdown on his clock—often called an “allegro” clock—and this automatically starts the countdown on the other player’s clock. The two clocks are part of one mechanism in the center of the table. Time pressures on one or both players can become a major issue as the match proceeds. In the patent context, the examination process moves back and forth between the PTO and the applicant, with inquiries and responses, rulings and appeals, etc., so it’s possible to determine how much time each “player” has consumed.

¹¹⁶ Dave Schmickel is a detailee from NIH at the Senate Health, Education, Labor, and Pensions (HELP) Committee. At NIH he served in the Office of Technology Transfer. Previously, Dave was a principle at the investment firm Meridian Venture Management, Ltd., in New York City, which invested in mature biotechnology companies. He also has served as patent and legal counsel for the Biotechnology Industry Organization (BIO) in Washington, D.C., as a patent examiner at the Patent and Trademark Office, and as an associate with a large Washington, D.C., based law firm. Dave received his doctoral degree from the Department of Biology at the Johns Hopkins University in Baltimore and his Jurist Doctorate from the University of Baltimore.

¹¹⁷ See S. 975 introduced on April 28, 2005. The predecessor bill is S.666, introduced in March 2003.

¹¹⁸ Dave was detailed to the Senate HELP Committee in 2005 to work on this legislation.

¹¹⁹ The original version of the Ganske bill (H.R. 1127), introduced in March 1995, would have banned the issuance of patents claiming "pure" medical procedures, such as methods of making incisions for cataract or open heart surgery. However, the bill’s language was so broad that it would also have banned patents on new uses for known compounds and many diagnostic assays. The Ganske bill thus faced strong opposition from groups such as the Biotechnology Industry Organization, the American Bar Association, and the American Intellectual Property Law Association, and the bill did not become law. The Ganske bill was revived, in very different form, as Section 616 of the 1996 omnibus appropriation bill, P.L.

104-208, and it became law in late 1996. The new Ganske compromise law no longer attempts to curtail patentable subject matter. Instead, the compromise legislation amends 35 U.S.C. Section 287 by adding a subsection (c) that exempts from the definition of patent "infringement" a medical practitioner's performance of a "medical activity" on a human or a laboratory animal. Rather than banning patent protection for medical procedures, the Ganske compromise legislation establishes that any such patents are not infringed when the patented procedures are performed under certain situations by certain classes of individuals.

¹²⁰ The language reads as follows: "an employee health benefit plan or a health plan issuer offering a group health plan may establish, under the terms of such plan, eligibility, enrollment, or premium contribution requirements for individual participants or beneficiaries, *except that such requirements shall not be based on* health status, medical condition, claims experience, receipt of health care, medical history, evidence of insurability (including conditions arising out of acts of domestic violence), *genetic information*, or disability." Section 101.

¹²¹ There exists a database of four thousand human genes and seven hundred genetic disorders called the OMIM(TM), Online Mendelian Inheritance in Man. This database is authored and edited by Dr. Victor A. McKusick and his colleagues at Johns Hopkins and elsewhere, and developed for the World Wide Web by the National Center for Biotechnology Information. The database contains textual information, pictures, and reference information.

¹²² An orphan disease is defined as a condition that affects fewer than 200,000 people nationwide. This includes nearly six thousand diseases as familiar as cystic fibrosis, Lou Gehrig's disease, and Tourette's syndrome, and as unfamiliar as Hamburger disease, Job syndrome, and acromegaly, or "gigantism." Some diseases have patient populations of fewer than a hundred. Collectively, however, they affect as many as 25 million Americans, with one in every ten individuals in this country having received a diagnosis of a rare disease. That makes the diseases—and finding treatments for them—a major public health concern. See the Web site of the National Organization for Rare Diseases for a description of the symptoms for eleven hundred of these diseases.

¹²³ Since 1983, the Orphan Drug Act has resulted in the development of nearly 250 orphan drugs, which now are available to treat a potential patient population of more than 12 million Americans. In contrast, the decade prior to 1983 saw fewer than ten such products developed without government assistance. As a result, treatments are available to people with rare diseases who once had no hope for survival. Many consider the ODA the most successful tax incentive in the history of the tax code. It's an incentive for economic activity that would not otherwise occur—whereas many tax incentives are windfalls for what taxpayers would do anyway without a tax incentive.

¹²⁴ See H.R. 3448 (104th Congress) and Public Law 104-188 (August 20, 1996; Section 1205).

¹²⁵ See H.R. 2014 (105th Congress) and Public Law 105-34 (August 5, 1997).

¹²⁶ Chuck was head of legislative affairs for the Clinton White House and a top aide to the Ways and Means Committee. He founded his own firm after the breakup of Bergner Bockorny Castagnetti Hawkins & Brain. He's regularly voted one of the city's top "hired guns."

¹²⁷ See Joint Tax Committee "Comparison of The Estimated Budget Effects," JCS-37-07 (July 10, 1997).

¹²⁸ Bill has been legislative director and chief counsel for Senator Lieberman since Joe took office in 1989. From 1974 to 1975 Bill was a law clerk to Judge Jack B. Weinstein, U.S. District Court for the Eastern District of NY; from 1975 to 1977 he was an attorney with Steptoe and Johnson; from 1977 to 1981 he was deputy assistant secretary, director of congressional affairs, and liaison officer, Department of Transportation; from 1981 to 1985 he was a partner at Brown and Roady; and from 1985 to 1989 he was a partner at Jenner and Block. He has degrees from Columbia and Yale Universities and Columbia Law School.

¹²⁹ I worked closely with Stacy Kern of the Senate Legislative Counsel in drafting the BioShield II legislation. She was utterly brilliant in this effort. We went through four main drafts, but I gave her fifty to seventy documents worth of amendments to each draft. Some of them were overlapping or even inconsistent. She sorted through these amendments and often spotted errors in proposals from some of the top D.C. law firms. We ended up with a 360-page bill and she gets much of the credit for how well it reads and how few mistakes it contains.