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LLOYD CUTLER BIOGRAPHICAL ORAL HISTORY PROJECT

**FINAL EDITED TRANSCRIPT**

**INTERVIEW WITH LLOYD CUTLER**

July 10, 2003  
Washington, D. C.

**Interviewers**

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## FINAL EDITED TRANSCRIPT

### Interview with Lloyd Cutler

July 10, 2003

**Riley:** This is the third of our three planned sessions with Lloyd Cutler. Again, we're grateful for the devotion of time to this project. At the end of the last session we'd gotten up basically to the Carter years, but there were a couple of loose ends that we thought we would tie up. Dan had a question or two about some cases that you were working on at the time. So I'll ask Dan if he'll begin our questioning today.

**Ernst:** Basically, we discussed very briefly last time the *Rainbow Warrior* case. You said that was something we might want to consider. I looked a little bit at the background of it and what I could tell from the newspapers about your role in it, and I wondered if it was something you wanted to discuss today.

**Cutler:** It may be worth putting in because it's at least worthy of note. How many cases and other things you run into in the course of your life are related to terrorism? I may have been less conscious of it at the time, but as I look back, going back to the saboteur case in World War II, this, the seizure of the hostages in Tehran. I'm doing some things related to the whole 9/11 episode too.

**Ernst:** One thing that struck me about it when I heard you use the word "terrorism" to describe the activity—I think it was in an interview when the new *Rainbow Warrior* was launched—was that we tend, in modern usage, to attribute that to non-state agents who are terrorists. When you used it, it looked like you were using it in terms of its original meaning, which is what the French revolutionaries used, that it was the state use of terror as a policy.

**Cutler:** I think that's true, but you could approach it from a standpoint of Greenpeace itself, which believed in peaceful demonstrations, embarrassing governments, embarrassing nuclear power plant operators and so forth. They themselves—while they preached nonviolence—were an active non-governmental group. They carried demonstration almost to the point of, you might say, terrorism. For example, I have some recollection of one time somebody in Greenpeace climbing the Eiffel Tower and just staying up there as a protest over the French nuclear explosions in the Pacific.

The episode itself is interesting. Just to review it for you, the Greenpeace people had been conducting these demonstrations against the nuclear explosions on a French island, which was

just a little atoll. They were explosions for underground testing purposes. There was a real question as to whether this little shell of an atoll could contain the underground explosion the way a site in Nevada or something like that could. The Bikini Atoll, which we had been using but had abandoned, is another example. Everybody else stopped using the atolls in the Pacific for that purpose.

One of the Greenpeace sailboats, the original *Rainbow Warrior*, sailed into the territory of the explosion where the French had issued keep-out orders. They couldn't go ahead with the tests as long as the Greenpeace people were there. It was just one head of Greenpeace plus two women on the boat. They physically boarded the boat, removed them, damaged the eye of the Greenpeace head, and essentially just took them out of action. Greenpeace then went ahead and raised the money to build this second, much larger ship, and used it for demonstrations all over the world. It was a North Sea trawler, maybe 50 years old, which they had actually bought for something in the order of \$50,000. Using sweat labor, they rebuilt it back into a sailing vessel that attracted attention all over the world. They recruited an international crew for that purpose.

When the *Rainbow Warrior* was in Auckland, New Zealand, getting ready to sail up near this atoll, the French Secret Service—so-called “La Piscine” because the building they occupied was an old swimming pool—arranged to send in about 15 agents, two of whom were assigned to attaching a limpet mine to the ship and blowing it up so it would sink in Auckland Harbour. The others were get-away people and observers, all part of the same covert action, as we would call them.

They did pull off the explosion. Most of the Greenpeace people were able to get off the boat. A photographer ran back, after getting off, he ran back onto the boat to get his collection of photographs. While he was in his cabin pretty far down in the ship, there was another explosion and he was drowned. So it became a big episode and accusations were made that this had to be the French. The French said, “Oh no,” or at least they leaked word that it was probably the British who had done it. In the end, we got direct evidence that it was indeed the French.

**Riley:** How did you get called into the case?

**Cutler:** I got called in because Shirley Hufstedler, who is a very distinguished lawyer in Los Angeles who became Secretary of Education under [Jimmy] Carter, recommended me. We went out there. There was an immunity issue vis-à-vis the French government, of course. But what had happened was that two of the agents, a man and a woman, were posing as a Swiss honeymoon couple. They had rented a van and the van was supposed to rendezvous with the frogmen at a beach resort that is just on the outskirts of Auckland, just a little community. There had been a number of robberies and other things in the area, and the residents had created sort of a vigilante committee, which maintained a watch from houses as to what was going on on the street next to the beach. They actually saw the van pull up; they saw the frogmen come out of the water and get into the van. One of them took down the license plate number of the van, which was from a rental agency.

The next day the so-called honeymoon couple were supposed to depart and make their getaway. They actually got to the airport and instead of parking this van in the parking lot and just

deserting it, they went back to the rental agency to return it, to get their deposit, to save the deposit money or whatever. The agent at the rental agency had been alerted about the van and called the police. The police came to the rental agency and they arrested the honeymoon couple.

**Riley:** That seems to be a common flaw among terrorists, right? I mean, wasn't there a similar problem with the original World Trade Center?

**Cutler:** Everybody screws up like this, that's right. So the two of them are questioned for a couple of hours, they miss their plane, but they are released and they return to the motel that they'd been staying in. The police had arranged to tap the wires in the motel and the honeymoon couple then proceeded to phone the French Piscine and say, "We were stopped by the police and we are stuck here for another day or two, but we think we're all right, we're going to get out." Of course the New Zealand police had that all taped. We had a question, as I mentioned, as to whether we could bring a suit against the French. Instead, we prepared papers and were ready to bring a suit against the honeymoon couple, who couldn't plead sovereign immunity. With that complaint, we talked the French into conceding liability and arbitrating the issue of what the damages would be.

Of course what was really at stake politically was the New Zealand lamb, butter, and everything else were entering the Common Market, because New Zealand is a member of the British commonwealth. The French threatened to block export to the European Union, or the Common Market in those days. But anyway, we ended up with an arbitration that took place in Geneva and I was the lead counsel. It went on for weeks and months. The arbitrators tried to get us to settle it. We made a settlement offer in the \$5 or \$6 million range, which was turned down by the French. The tribunal came down with a judgment around \$8 or \$10 million, most of which was for what under French law is called *dommage morale*. It's more or less the equivalent of punitive damages. We collected that and that was announced publicly, but unfortunately as in most arbitrations, the proceedings themselves are confidential. We were never able even to publish the actual opinion, other than the award of the money.

**Riley:** And it remains confidential?

**Cutler:** To this day, yes.

**Riley:** Because I'm not trained as a lawyer, when were the original proceedings?

**Cutler:** I think it was around '88, if I remember correctly.

**Riley:** But in which jurisdiction, in New Zealand?

**Cutler:** Well, we threatened the lawsuit. We were physically in New Zealand and we threatened the lawsuit there. We agreed instead on an arbitration with France, in which the only issue was the amount of the damage.

**Riley:** I see.

**Cutler:** And that arbitration took place in Switzerland.

**Riley:** Has this kind of global practice been a fairly standard part of your professional career in subsequent years?

**Cutler:** It was always one of our objectives and partly because of this case. Somewhat earlier than that we started an office in London, which grew out of representing a number of European noteholders of the Pennsylvania Railroad, which went bankrupt. Penn Central had sold several series of notes all over Europe to European banks. We became counsel for the group of banks and that gave us a base to start a law practice in Europe. Now we might have as many as 100 lawyers in Europe, in Brussels, in London, and Berlin.

**Riley:** Are there other prominent cases that you can tell us about that also involve your having a significant presence overseas personally?

**Cutler:** Lots of matters, but they are less likely to be cases than transactions: starting up a new plant, doing a merger or acquisition. I did a lot of that—we did and I did—in South America for the Kaiser companies and India for the Kaiser companies. We became counsel for Lufthansa and a number of European companies. So we had a wide-ranging practice.

**Ernst:** I was struck by a newspaper report from that time that said that the New Zealand government wouldn't turn over the two agents until France had settled with the photographer's family and also reached some sort of an agreement with Greenpeace. It looked like the agreement from France to submit the matter to arbitration came pretty quickly, I think by December of that year. It's in the newspapers.

**Cutler:** You're probably right. My activity over there lasted only 10 days or two weeks or so.

**Ernst:** Were you having conversations with the [David] Lange government about this?

**Cutler:** With the New Zealand government?

**Ernst:** Yes.

**Cutler:** Yes.

**Ernst:** They seemed quite supportive. I understood that they were upset about this whole business of testing.

**Cutler:** Yes, very much so. There were lots of negotiations. All of the sovereign states in the area were very much against the French testing, and New Zealand and Australia in particular.

**Ernst:** Was Greenpeace's selection of Judge Woodhouse as an arbitrator influenced by the desire to cultivate or keep the New Zealand government happy?

**Cutler:** Well, sure. Our counsel in New Zealand had highly recommended him as an arbitrator, but certainly we were trying to get an arbitration panel that would be favorable to us. I think the French named a distinguished Swiss arbitrator; we named Woodhouse. I forget how we arrived at—we picked Claude Reymond as the chairman and he was a mutual pick.

**Riley:** Was there any expressed interest on the part of the American government in your work in this case? Because it has international dimensions, I just wondered if the foreign policy establishment in any way viewed this as problematic.

**Cutler:** Well, there was enormous press interest, but I don't think it ever became a major U.S. government issue.

**Ernst:** The case gets mentioned in a 1980s discussion about the importance of pro bono for law firms. It looks almost like a landmark in the history of pro bono work for American lawyers because it was a new realm, really, for pro bono work as I see it. Is that how you interpreted it and was it a controversial decision?

**Cutler:** Well, it was a major pro bono case. It was pro bono to an extent, because when we got this big judgment, which nobody thought we'd get, we were paid, not our full hours, but a fraction of our full hours. It probably worked out that we got paid about 60 percent of what our normal fees would have been.

But there are many, many good examples of major pro bono litigation, civil rights cases, campaign reform cases. Most of those turn out to be pro bono, or are largely pro bono. You can go all the way back to *Brown v. Board of Education*, and right on to these Michigan cases, which were our cases, which we argued for the university.

**Riley:** I have to ask this question. I see occasional references in some of the biographical material to the fact that you have represented, or you've been involved in a case with the Rolling Stones and their manager?

**Cutler:** I was an arbitrator.

**Riley:** An arbitrator. How did that come about then?

**Cutler:** It was a lot of fun, I must say.

**Riley:** Well good, that's why I threw it out there. I want to hear about some of the fun stuff.

**Cutler:** The Rolling Stones had a business agent named Allen Klein.

**Riley:** And this was at about what time?

**Cutler:** I would say when my children were teenagers or a little bit later than that. It's got to be 30 years back at least.

**Riley:** Okay.

**Cutler:** There was a trial lawyer friend of ours who was counsel for the Rolling Stones. We had known one another in the Cravath firm at the very beginning. Klein had also been the business agent for the Beatles before that; they had fired him. One of the provisions of the agreement with the Rolling Stones was that any tapes which the Rolling Stones did not market themselves could be marketed by Klein, so long as the Rolling Stones had approved them as artistically satisfactory. There was a song called “Brown Sugar,” which had been put on a record. I guess it was a very well-known song at that time. There were other unused tapes of “Brown Sugar.” When Klein, the agent, and the Stones had their fight, Klein tried to make a tape of that and market it, the one that had never been published. The Stones vetoed it as below their artistic standards and that was the issue in the arbitration.

**Riley:** So your role was to determine—

**Cutler:** One of the things that I had to help pass on was whether there was a good-faith argument that this was below their artistic standards. *[laughter]* I played the two discs and I could hardly tell the difference. Then I played it for my children, who of course loved all of this, and they saw a big difference. So my judgment was in part based on my teenage children.

**Riley:** That’s a wonderful story.

**Cutler:** And Mick Jagger testified himself in the course of this. Of course we think of him as a cockney, and he certainly dresses like a cockney, talks like a cockney, but actually his father was a lecturer at the London School of Economics. That sort of lower class East London accent that he affects is all for purposes of his band.

**Riley:** Did you cross-examine him? I guess you would have listened to—

**Cutler:** Well, we certainly asked a lot of questions. He had his own experts of course, including a wonderful fellow named Prince *[Rupert]* Lowenstein, who looked a little like Peter Lorre. In essence, we decided that Klein and his people were bigger liars than Jagger and decided in favor of the Stones.

**Riley:** Is it at this point that you got to know Bianca *[Jagger]*?

**Cutler:** I may have known Bianca before that. Probably it was after that. My main original contact with her was through an American woman in London named Marguerite Littman, whose husband is a major barrister. She was a great friend of Princess Diana. Bianca was her friend and occasionally I would see Bianca there at lunch. Then Bianca came to a couple of Salzburg seminar sessions.

**Riley:** I remember.

**Cutler:** She shows up there now almost every year because she helps sell works of art for some big Salzburg entrepreneur or some gallery.

**Riley:** You said the Stones case was a fun case for you. Can you think about other fun cases that maybe we haven't asked you about, that you can relate some good stories?

**Cutler:** Did we go into the *Synar* case, the one about Gramm-Rudman-Hollings?

**Riley:** We haven't gotten there yet. If you would like to go ahead and talk about that now, we can do that or we can hold off until we get to it later.

**Cutler:** Whatever you want to.

**Riley:** Okay. Any other cases that come to mind immediately as involving you with some interesting personalities or characters?

**Cutler:** I can think of a lot of cases like that. Most of them I would have to keep fairly confidential.

**Riley:** I understand.

**Cutler:** I mean, Queen Noor, we've given legal advice to Queen Noor, whose father was Jeeb Halaby, who is an old friend of mine and occasionally gets mentioned on these tapes. He just died.

**Riley:** Anything else on that?

**Knott:** Did you become a Rolling Stones fan or did it turn you off?

**Cutler:** Actually, we got to know Paul McCartney through a good friend of ours named John Eastman, who is a very good New York entertainment copyright, art gallery lawyer. He's the brother-in-law of McCartney. His sister married McCartney and she was in the band.

**Riley:** This was Linda.

**Cutler:** Linda. And now he's remarried, but he comes to visit in East Hampton and we get to see him there almost every summer.

**Riley:** Oh good. But you haven't gotten him to the seminar? *[laughter]*

**Cutler:** He gives concerts and tours for 20,000 people, or I suppose a 10-city tour, they probably have half a million people altogether.

**Riley:** That's true. Well, let's dial back then to politics if we can. We had left off with Carter, unless I'm cutting something off.

**Cutler:** No.



**Riley:** Okay, we talked a little bit about your early relationship with Jimmy Carter last time. We don't want to go fully into the Carter years because we already have an interview with you on that, but I thought there were some deficiencies in the earlier interview that we would like to go ahead and flesh out.

**Cutler:** Sure.

**Riley:** One was, were you at all involved in the transition effort for the Carter Presidency?

**Cutler:** None officially, but I spent a lot of time with [Cyrus] Vance, Harold Brown, and others who eventually went into the Carter government. I thought about going in myself, but two years went by before a good opportunity actually happened.

**Riley:** That was going to be my next question. If you had been approached about a position, would it have been in a foreign policy capacity?

**Cutler:** It would probably have been in the foreign policy community, but it never materialized into anything important and we were very busy building the law firm at that point. The firm started in '62, and Carter is '76.

**Riley:** One of the problem areas that Carter had in the transition period and in the early years that kind of set the tone for the entire Presidency was a kind of disconnect between him and the permanent Washington establishment. I am wondering if you were called on or if you volunteered your efforts to try to bridge that in any way. Were you in any way involved in an effort to make the permanent Washington more closely associated with the administration?

**Cutler:** I think the answer is no, largely because although I had known Carter and had first met him on the Trilateral Commission, as we mentioned earlier, I didn't really get involved in the administration except for commissions, committees, and things like that, until '78, you might even say '79. I was offered the job of Undersecretary for Defense for International Policy, I think it was called, which included SALT II [Strategic Arms Limitation Treaty] among the issues for which I would be responsible.

**Riley:** But you didn't take that position?

**Cutler:** I didn't take that position. I said I would work out of the law firm to present SALT II to the Senate committee, and I did that. When that was in mid-course during the summer of '79, I guess, I got one of these White House operator calls on a French canal from Hamilton Jordan, "How soon can you get back here? There's something we want you to do." And it was to be counsel for the President.

**Riley:** Was there a particular reason why that other job was not appealing to you at the time?

**Cutler:** You mean the Defense Department job?

**Riley:** Yes.

**Cutler:** Yes. It was a field I know a lot about, the arms control field. But we're now a year or a year and a half into the Carter administration. The job is a sort of layered job between the Secretary himself and the Assistant Secretary for Arms Control, for aid to foreign governments, et cetera. The Defense Department had functioned for two years without anybody in this position. The assistant secretaries were accustomed to dealing directly with the Secretary. For a while before the job was offered to me, Stanley Resor had it. He had been the MBFR [Mutual and Balanced Force Reduction] negotiator for limitation of military forces, which was a 10-year negotiation with the Soviets. He found that he was sort of a fifth wheel in the Pentagon. Really based on his advice, I didn't take it.

**Knott:** Russell mentioned the permanent Washington establishment. You had been a long-time both observer and participant in the Washington scene. How important is it for a new President to come into town and to make these links with this?

**Cutler:** Oh, it's terribly important, I think. Many Presidents proceed from the opposite point of view. That is, they ran against Washington to get elected in the first place. They don't want to meet the holdover Washingtonians who never went back to Pocatello or wherever. Each new administration stays out of the Georgetown dinner parties.

There is no such thing as a permanent establishment, except former government officials and journalists, lawyers to a degree. But it's very much a revolving door thing.

**Knott:** You saw Jimmy Carter making this mistake?

**Cutler:** Yes. Carter was a very admirable man in very many ways, with a lot of bad luck. He did tend to run against the establishment. I think I told you about inviting all of the congressional leaders to breakfast in the White House—this was an effort to close this gap as much as possible. They served orange juice, a danish, and coffee. They charged every member who came a dollar and a half, as I remember. This was all done by Carter's cousin, named Cousin Hugh, I think.

**Riley:** Called "Cousin Cheap."

**Cutler:** He was the fellow who turned out the lights, the way LBJ [Lyndon Baines Johnson] turned on the lights. "Cousin Cheap."

**Knott:** Did Carter's position change over time on this? Did he come to appreciate the necessity of reaching out? You were there near the end.

**Cutler:** Yes, and he made several efforts to reach out. There were people in Congress with whom he got along very well. But he was very stubborn about his authority by virtue of the President's powers. He didn't work at it in the sense that Bill Clinton would and LBJ would.

**Riley:** Was that true also of the so-called permanent Washington? Did he ever get a sense that he needed to make peace with permanent Washington in order for—?

**Cutler:** When he ran, of course, and when he ran for re-election, he wanted money from permanent Washington, among others. Made speech after speech, went to dinner after dinner, fundraisers, but that's normal.

**Riley:** Were you involved in helping to organize some of those things, or were you preoccupied?

**Cutler:** In 1980, yes.

**Riley:** The SALT negotiations. When you came in, how did the situation look to you when you inherited it? Did you think it was a doable job, that it was difficult? Did it look impossible to you?

**Cutler:** No, it looked doable with a lot of hard work. I think the public at large wanted to have an arms control agreement with the Russians. We were finishing off an agreement that had really been negotiated by [Richard] Nixon and Henry Kissinger. There were ideological issues left over. There were arms controllers, or generals, the Richard Perles even of those days, who didn't want any agreement with the Russians.

I think I told you about this wonderful remark of Paul Warnke's. One of the big issues was we had failed to put any limitation on throw weight. We had limitation on the size of missiles, or warheads, but not on the throw weight of the multi-warhead MIRV [Multiple Independently Targeted Reentry Vehicles] missile. That was pointed out as a hole that we should have tried to re-negotiate with the Russians, and we knew we couldn't do that. In the testimony, when we were presenting the treaty to the Senate, Paul was attacked on this. He said, "The only difference that throw weight makes is how big a hole you have where the high school used to be." We had trouble in the committee even though we had a good Democratic majority. We had trouble with the Senator from Florida. Anybody remember his name?

**Riley:** [Richard] Stone?

**Knott:** Stone, I think.

**Cutler:** Senator Stone, that's right. Who was also, for his own political purposes, a big critic of the Russians. He voted against us. John Glenn, who was very concerned about the loss of the observation stations and listening posts we had in northeastern Iran—at the time we got into all of these fights with Iran—and he was reluctant. Finally we got out of the committee by a vote of 10-6, which was not quite the two-thirds that we needed, but we had gained the support of Senator [Robert] Byrd, who was the majority leader then. He had told us he would put it through in the January 1980 session of Congress. But at around Christmas of 1979, the Russians attacked Afghanistan. So in effect we had to just take it off the table.

**Knott:** Maybe I'm getting my dates mixed up here, but I believe at one point there were these reports of this Soviet brigade in Cuba that also made life difficult for you.

**Cutler:** Yes, this was Senator Stone.

**Knott:** Senator Stone's big issue.

**Cutler:** And it was Frank Church. Some of this, I'm just repeating myself. The Soviet brigade had been there since the Cuban missile crisis. In the original Cuban missile negotiations, we had demanded its removal, along with removal of the missiles and the missile launching sites. At some point in the negotiations, although we kept insisting on the removal of the launching sites, we just dropped any demand relating to the brigade.

Then when SALT II came along and we had to increase surveillance of Cuba at Senator Stone's request, the reconnaissance planes rediscovered this brigade. It turned out the intelligence community had forgotten that it was there. So it was presented to the country as a new brigade, which is not too different from what's going on right now about buying yellow cake uranium in Niger. Church, who had a big election fight going on at the moment himself, joined the group demanding the removal of the brigade.

**Riley:** Two other names that occur a lot in these discussions about arms limitations, one was Scoop [Henry] Jackson. Tell us about Scoop Jackson. What was it like working with or against him?

**Cutler:** Scoop Jackson was thought of as almost the ideal Democratic Senator capable of winning the Presidency. That was because he was tough on the Russians, he was liberal on most domestic issues, and a very astute politician in every way. It turned out that he was everything but a good speaker. He just bombed as a candidate and really that's how Jimmy Carter and others got their lease on life.

Jackson was a critic of SALT II as it reached the Senate. I think he had Richard Perle working for him even then, but did go along with it. We had hearings, I think, before Armed Services, but the report actually came out of the Foreign Relations Committee.

**Riley:** So Jackson was somebody that you never would have expected to have won over?

**Cutler:** I think we would have expected to win him over. Certainly once we had Senator Byrd, we had a good shot with Jackson. If there had been no invasion of Afghanistan and simply an up-or-down vote in the Senate, it would have been close, but we would have had a good chance to win him. It might have been like the Panama Canal treaty.

**Riley:** Let me ask you about that too. Were you at all involved in the Panama Canal?

**Cutler:** Mostly just watching it. Every now and then I'd get a request, "Could you talk to Senator So-and-so about it," but I was in private life at that time.

**Riley:** Exactly.

**Cutler:** It turned out, of course, to have very significant consequences. It's one of the really good things that Carter did, but it was very costly. For one thing, it cost Howard Baker his

chance to be President, because he went along with it. For another, it meant that we were able to keep Panama as an ally for a considerable period of time.

**Riley:** I was also going to ask you about Sam Nunn, working with Sam Nunn at this point. He and Carter had a history, obviously, that predated your coming into the position.

**Cutler:** Right, right.

**Riley:** Was Nunn somebody that was easy to work with on this?

**Cutler:** Yes. Nunn and Carter did not have the best personal interrelationship and many people thought that Nunn was more deserving of being a Democratic President than Carter was. I have worked with Nunn on all arms control and end of Cold War issues for years. We both sit on the board of the Concord Coalition. We do a number of things together.

**Riley:** When you came into this position, your primary mission was to get the treaty through the Senate, but there was an existing legislative affairs shop in the White House. Did you work in tandem with that shop?

**Cutler:** Oh, yes. I just joined the team and in effect became lead counsel in organizing the hearings, who our witnesses would be, what position we would take on various reservations or sense of the Senate understandings that you had to negotiate in order to get through what the Russians would accept if we did that. I would go visit with [Anatoly] Dobrynin on that issue, but this was an overall administration issue. It wasn't just one—everybody took part, all of the Secretaries took part, Carter himself took part. [Zbigniew] Brzezinski took part.

**Riley:** I'm sorry?

**Cutler:** Brzezinski always played a major role.

**Riley:** That particular legislative affairs operation has taken a lot of hits as not being a terribly competent shop. Did you find that to be the case when you came in, that there were problems in the existing shop?

**Cutler:** Well, they were mainly people who had come with Carter from Georgia. While personally they were all very nice, and some of them were very highly competent, none of them had the sort of stature you would want. I would say this administration and the Clinton administration had better legislative people. And of lot the job is, you know, is when you are working with a legislator and there is something that he needs for some constituent, and you've got to make bargains. Carter was very difficult to persuade to make a bargain. If LBJ had been the President, he could have gotten it through, I'm sure, with no trouble.

**Knott:** Let me just ask a question, following up. You mentioned the Soviet invasion of Afghanistan and what a terribly destructive effect that finished off the SALT II treaty. Can you recall the reaction in the White House at the time of the invasion?

**Cutler:** Shock. We had been deceived; they were lying to us. You can't trust [Andrei] Gromyko. We had done a lot of our communication through Dobrynin, which always used to annoy the hell out of the American ambassador in Moscow, as you can well imagine. We thought Dobrynin had double-crossed—that he had to know that that invasion was going to happen and he never told us and did nothing to stop it. Dobrynin maintains to this day that Gromyko and the others never told him. That when he was recalled to Moscow and it was meant to be a Christmas return, it was a return because the whole Cabinet were getting ready to plan for the invasion.

**Knott:** Did you see a change in President Carter at this time?

**Cutler:** Yes.

**Knott:** Could you tell us a bit?

**Cutler:** Yes, he really felt he had been betrayed. I think there is a lot of that in his book.

**Riley:** People play Monday-morning quarterback on this. There were reports that the President at one point was considering presenting SALT as an executive agreement rather than through the treaty route. Is that something that, to your memory, was actively discussed? In retrospect, should that have been—?

**Cutler:** At some point it was discussed at low levels, but it never could have been serious, especially when you had a history of existing treaties that had all been done as treaties. It's very difficult to put through an executive agreement on a highly controversial issue and get away with it. We did it in settling the Iran hostage cases and that got upheld because we had no time to go through treaty solutions anyway.

**Riley:** I don't know that I've got any more questions on SALT.

**Cutler:** By the way, there's a brand new Supreme Court decision upholding executive agreements.

**Riley:** Can we head into your counsel years? We've got some questions about your role as counsel. Darby has a number of them and I thought maybe I would just turn this over to her and let her pose some of them, since she's doing some work on this.

**Morrisroe:** When you came into the counsel's post, you came in with an understanding that you would adopt the [Clark] Clifford model of a counsel.

**Cutler:** We're now in Carter, we're doing Carter?

**Morrisroe:** I'm sorry. Yes, under Carter. Was that something Carter had suggested or something you thought important for your role as counsel?

**Cutler:** I think I have been over this to some extent, but when I had my interview with the President, I said to him, "Taking this kind of a job depends on the relationship with the President.

What kind of role do you want me to play? Is it just getting out executive orders, doing the routine vetting, and so forth? Or do you want sort of mixed legal-policy advice?" And he said, "I want you to play pretty much a Clark Clifford role."

People who were in the [Harry] Truman administration disagree widely on just what Clark Clifford's role was, but Clark certainly represented it, and I think the public came to accept, that he was a major policy advisor. I think I had an exchange of letters with the President, or at least I wrote a memo for him saying I understood that he wanted me to play a Clark Clifford role. And Hamilton Jordan was in that discussion. Then every time I thought I had been bypassed, or that I had something to contribute but Zbig had screened me out or somebody else had, I would go to the President or I would go to Hamilton and say, "I think that Harry Truman would have had Clark Clifford at this meeting." Since nobody really remembered and I was the only one who at least knew what was going on in the Truman days, nobody could challenge that. In the end, I really had no trouble.

**Riley:** I think Darby may have some questions about the more traditional aspect. During the earlier Carter interview, we talked a great deal about the policy-political advice, but I don't think there was much attention given to the kind of core role of the counsel.

**Morrisroe:** Yes, actually I have a follow-up question also about the Clifford model. The reason I presented the question, given that you had had some comments on that before, was that it wasn't clear to me whether Carter and you thought that the Clifford model would be the appropriate one for you, because it clearly wasn't the model used for your predecessor. So was it felt as a necessity for what the administration was going to be facing in the coming years, or just that it would be a better use of your expertise to play that role? What do you think accounted for the somewhat changed role in function for the counsel for Carter?

**Cutler:** He had a counsel who was not really well suited for such a critical job. He was a bankruptcy lawyer in Atlanta who had been a big supporter of Carter. He was very active in Jewish-American affairs, mostly in the White House, apart from the gaffe relating to Bert Lance—when he read the report of the comptroller, which was really highly critical of Lance and he came in and told the President that the report had cleared Lance—and they decided to make the change. Of course, when they were making a whole series of changes. When he went up to Camp David, remember? He took out [Joe] Califano, took out Secretary of the Treasury [W. Michael] Blumenthal, and he took out the counsel.

**Morrisroe:** When you took on the position, there were as I understand it five lawyers in the counsel's office.

**Cutler:** That's right.

**Morrisroe:** Were the lawyers under [Robert] Lipshutz retained, or did you have free hand to select new deputies?

**Cutler:** I kept the two deputies who were there then, who were Michael Cardozo and Joe Onek, and we had a very good relationship. The only people I added to the staff were Phil Bobbitt, who

had been a student of mine when I took a sabbatical and taught at Yale, and who happens to be LBJ's nephew. He is a professor now at the University of Texas. And Zoë Baird, who was in the Office of Legal Counsel at Justice.

We had a big argument about—I guess a forgotten issue today—and that was at the time the census came along. Could the President appoint census officials for the count who were really just recommended by Congressmen, or did it have to be handled on a regular civil service, non-political basis? Zoë had written an opinion saying that under the current law, it has to be on a non-political basis. We talked about that and she persuaded me that she was right, so I figured I would get her on my side.

**Morrisroe:** That brings up a question I have about your relationships with other legal actors, like the Office of Legal Counsel, the Attorney General, Solicitor General. Who were the other legal actors you worked with most closely during your tenure?

**Cutler:** Griffin Bell I think had left or was about to leave at that time. Charlie Renfrew became the deputy. He and I worked together very closely. I'm trying to remember where [Benjamin] Civiletti fits into the picture. Civiletti, I did not have the best relations with. By that time we're in the middle of what was then called "Cartergate," Billy Carter.

**Morrisroe:** What was the working relationship like between the counsel's office and the Office of Legal Counsel?

**Cutler:** Very good.

**Morrisroe:** Was it? You had regular contact between the attorneys?

**Cutler:** Regular contacts. One of the things we did was to hold meetings of the general counsels of all of the departments and agencies with the White House counsel, to have some common policy on various issues, including what information we would furnish to Congress, what we wouldn't. Some committee wanted copies of a draft legal opinion for the President, which the agency wanted to hand over for whatever reason, including making Congress feel better. It could conceivably violate the whole notion of executive privilege. So we were trying to organize all of those things.

The heads of the Office of Legal Counsel at that time were really quite good and we worked very closely together. I had written a lot about this subject, which I think you have, but in many ways the White House counsel performs a real function for the lawyers in the rest of the government and for all of the Cabinet members, because he's sitting there in the White House meetings and he's the one who has to recognize whether there is a legal issue or a legal policy issue. He will normally say, "There's a problem here, let me go talk to the Justice people," and that would be the Office of Legal Counsel.

**Morrisroe:** Do you have any recollections of any issues in which the legal conclusions of the counsel's office and the Office of Legal Counsel were in dispute?



**Cutler:** Yes. One is at the time of the Iranian hostage crisis. There were demonstrations and counter-demonstrations that were scheduled to be in front of the White House. The Justice people said to us, "Under existing case law, you have to allow demonstration and it's your duty to preserve order." We said, "We have a bigger problem than that, because if we have police there preserving order, there is going to be some photograph of a policeman swinging his club down on somebody on the ground." The hostage-takers in Iran would use that to whip up sentiment against America, our assistance to Savak, the Iranian intelligence agency, all of the terrible things we had allegedly done in Iran. So that's the position we took and we maintained that position in court and it was upheld by the court.

**Morrisroe:** Were there any other disagreements that come to mind?

**Cutler:** Not major.

**Morrisroe:** And when there were minor disagreements over legal interpretation, how were those resolved?

**Cutler:** Further conversation, usually. In the end, unless the Cabinet member is ready to go to bat, the White House counsel can always say, "The President wants you to do this or that."

**Morrisroe:** One area where there's usually a lot of collaboration between the Department of Justice's Office of Legal Counsel and the White House counsel is in judicial selection.

**Cutler:** Yes.

**Morrisroe:** How was that handled in the Carter administration?

**Cutler:** In the Carter administration, it was handled by regular meetings. First off, there was a lawyer on the counsel staff who did police the operation, kept count of who did the talking with Senators and everything else you had to do. That was Vicky [Rollins]—she's a partner now in Williams & Connolly. Then the White House general personnel people took part and I took part. Usually there was a Justice Department vetter who was part of the Congressional Liaison Office at Justice. We would meet regularly. We would make our recommendations. Carter would pick them and I would pick them. Of course, in our time, he never had the chance to make a Supreme Court appointment.

**Riley:** Were you keeping an active file of likely candidates for the Supreme Court?

**Cutler:** Yes. I'm pretty sure he would have picked Shirley Hufstedler, who by then was his Secretary of Education.

**Riley:** Can you tell us who else might have been in the "A" category of consideration?

**Cutler:** If we had been able to find the right Hispanic. Even in those days everyone was looking for a good Hispanic.

**Riley:** In the case of the Hispanic, might that have hinged on who left the Court? Is there that kind of calculus, even in—?

**Cutler:** It's such a complicated calculation. It's who you can get through, whether you think that person will have—I mean, you're not likely to pick a 78-year-old, because you want to cast a shadow for many years ahead on the Court. You've got Senators to deal with, you've got people who are confirmable or not confirmable. It's very complex. The only ones that I took any real part in were later in the Clinton days.

**Morrisroe:** For the lower federal appointments, what were the political concerns or philosophies that guided Carter's selection of judges?

**Cutler:** He was very much a meritocracy judge. He wanted to create, and he did create that for the Courts of Appeals—you know for the district court, it's really pretty much that the Senator proposes and nominates and the President confirms, more or less. Carter wanted to establish commissions in every circuit to vet out people and make recommendations. Then he would say he had picked somebody from the recommended group. However, when you got to issues like *Roe v. Wade*, would you appoint somebody to the Supreme Court if you were in doubt as to what his or her position would be about *Roe v. Wade*? He was very up front on that: "I'd certainly want to know how she felt about it."

We had a couple of these Fred Friendly panel discussions that you see on television every now and then. I remember in one, Carter is asked that direct question, because the issue was, "Is this a proper thing to ask?" And he said, "Of course I would."

**Morrisroe:** And did that come up for the lower court appointments as well, when your office and the Congressional Affairs Office at Justice were doing the vetting, in addition to the merit-based considerations?

**Cutler:** Well, he would have to deal with the fact that a particular Senator might be pushing a particular candidate, who we thought was either not up to snuff. Or, especially in states where there are split Senate delegations, there might be a perfectly good candidate proposed by one of the Senators, but that would offend the other Senator, because he had somebody to propose too. Then you would have to take political considerations into account.

**Morrisroe:** At some point during the Reagan administration they had adopted a policy where they would require Senators to forward three names from which they would pick. Did that happen during the Carter administration or did you not put restrictions on suggestions?

**Cutler:** It wasn't that formalistic in the Carter administration. Of course, some Senators delay the decision as long as they can. They appoint their own committees to advise them. I've written a lot on this that I have given you, I think.

**Ernst:** I understood it was a common preference in some points in the history of judicial selection of Court of Appeals justices for Senators to want to elevate district court judges, see

those judges be elevated so that they would then have control over the district court selection. Was that still sort of a strategy of Senators during the Carter administration?

**Cutler:** I'm not aware of it as a strategy really, because normally somebody would be importuning them for the Court of Appeals job as well. Many Senators have made deals among themselves, as you know, I think. In New York, if you have a Democratic administration, a Democratic president, and a split Senate delegation, they take turns. I think for a while Moynihan's arrangement was that he had three out of four appointments or some such thing.

**Morrisroe:** You mentioned that one of your staff members was specifically responsible for helping in the judicial selection. Was there any kind of functional division for your staff and the tasks that they would undertake?

**Cutler:** Well, there was one that existed when I got there, which I didn't change. We had two deputies who were more or less roving the way I was. We had people who did vetting, and primarily vetting people who could turn out executive orders, and people who primarily did executive orders.

**Morrisroe:** You said that one of your observations about the role that you played was that perhaps only 10 to 15 percent of your time was occupied by more routine matters, like review of executive orders, et cetera. How do you think that compared with the amount of time spent on those matters for your predecessor? Do you think that was a typical amount of time that a counsel spends on those functions? Or given your involvement in some of the kind of larger issues in the administration, that those took on an increased role for your tenure versus your predecessor?

**Cutler:** Are you asking whether there is a difference between what you do for one President rather than another? I'm not sure I get what you're asking.

**Morrisroe:** Whether or not you were familiar with the kinds of activities that Lipshutz undertook, whether or not you think that for the Carter administration that 10 or 15 percent time is spent on routine matters, whether that is consistent through Carter or through later administrations.

**Cutler:** Certainly the basic routine work continues, but more and more as we went through Watergates, Cartergates, this, that, and the other thing, playing what I call defense—or *de-fense* in the football term—takes more and more and more of your time, because there are more and more attacks.

**Morrisroe:** Did you already see, even in the Carter period when you were in the counsel post, the kind of prominent role that ethics management started playing in the counsel's office?

**Cutler:** Yes.

**Morrisroe:** When it came to ethics management, what types of activities most occupied your time? Was it advising on ethics matters members of the White House staff, or issuing regulations for the White House staff?

**Cutler:** Well, it's partly that. Partly it's dealing with various legislative initiatives about financial disclosures, locking barn doors after the horse is stolen. A lot of it is dealing with the legislation and a lot of our troubles are the result of legislation. I was later on the [George H. W.] Bush I task force about federal ethics law reform, if I haven't given that to you. You have it, I guess?

**Riley:** Yes, we do.

**Cutler:** But that's pretty much what I think.

**Morrisroe:** Okay. Jumping ahead just slightly to the Clinton years, did you notice an increase in the amount of time you spent on these ethics considerations during your Clinton period versus Carter?

**Cutler:** Defense?

**Morrisroe:** Yes.

**Cutler:** Much more in the Clinton period. Much more. In fact, almost entirely.

**Riley:** Do you think that's true of the current counsel or not true of the current counsel?

**Cutler:** I think he's got a special relationship with [George W.] Bush that comes out of their prior experience. Bush in effect brought his own lawyer to the party.

**Riley:** But there doesn't seem to be quite the degree of scandal management in this administration as before. I wondered if that might be attributable to the fact that you don't have an independent counsel statute.

**Cutler:** Well, I'm glad we don't. With all of the criticisms many of us would make of the Bush administration, they have been reasonably clean on what you'd call corruption issues. You have favoritism issues to deal with, Enron, [Kenneth] Lay, Halliburton, those things. But honest-to-God corruption, we haven't seen much. We haven't even seen many allegations.

**Riley:** Why don't we take a five-minute break now and we'll come back and pick up. Do you want to hold off just a minute, Mr. Cutler, for this?

**Cutler:** No, that's fine.

**Riley:** Okay. Darby, I think, had one more question about the role of the counsel and then Dan had a question or two.

**Morrisroe:** About the executive order. I'm wondering if you can elaborate on one question I had that you mentioned briefly in your piece about the role of the counsel, which is the role that you played as counsel in review of intelligence activities. During your tenure as counsel for the Carter administration, did you sit in on National Security Council meetings? How did that play out?

**Cutler:** In the Carter days I would sit in the foreign policy meeting and I would deal on a regular basis with the counsel for the NSC. There has always been an awkwardness as to whether the NSC should have its own counsel who doesn't report to the White House counsel, or not. In my time, it worked itself out well because the NSC counsel was usually very good and would consult me directly on an issue or consult Justice directly. So it's a theoretical problem more than it is a real problem.

On covert action authorizations, especially when they would reach the level of exactly what you would tell the intelligence committees, I was usually consulted on all of that. There were relatively few that occurred while I was there. I have the impression—I sit with George Tenet on an advisory committee right now—there are many, many more covert actions and many, many more things going on in which the intelligence people are playing far more than the fact-finding role, that are more or less an operations policy role. So that is going to keep the counsel very busy and the Justice people.

**Knott:** There were reports at the time of the hostage taking, that there was small group of Americans who had managed to hide in the Canadian embassy at the time that the American embassy was assaulted. I believe that information was withheld from members of Congress or from the intelligence committees. Does that ring a bell at all?

**Cutler:** I remember the episode. There was a group sheltered in the Canadian embassy who were then smuggled out, I guess one by one. But I don't recall—or maybe I just wasn't there at the time it became an issue—whether it should've been reported to the committee or not.

**Riley:** Dan?

**Ernst:** Well, I think this ultimately is about White House counsel work, but I guess I have to go at it circuitously. I went back and read that article in the Yale Law Journal and all that you wrote, growing out of the seminar that you did at Yale, and it was very much an eye-opener for me.

**Cutler:** Is this about regulation?

**Ernst:** Yes. Because I guess I viewed these issues—and I'm afraid other people will even though we've done this in print—through the eyes of the polemical debates of the '70s, where you try to assume what your opinions would have been on this question of control of the iron triangles in the executive branch from what you would imagine from a Nader group. You would imagine that you would be an apologist for an iron triangle. One of the things that struck me in the piece is how much of the critique that Theodore Lowi and others launched of what had happened to the executive branch, you accepted. You had a very different solution, which was greater control through the Presidency, in effect to have a responsible bureaucracy.

**Cutler:** Balanced competing interests.

**Ernst:** That would balance the competing interests. One of the things that interests me is that the lawyers for much of the postwar period seem to be on the technocratic, what you would call the technocratic pole. That many of the people, going back to [Felix] Frankfurter, thought the way to solve social problems was to have good lawyers and good administrations and commissions work it out on their own. They resisted that kind of executive branch, presidential control. That's what the political scientists, like the Brownlow Committee wanted to do. [Kennesaw] Landis, Louis Jaffe said, "No, no, no, that's bad." So I almost see that as a Harvard-type approach to the growth administration.

You seem to be articulating a different view, one that's more based on the electoral process and presidential mandates to control what the executive branch was like and what happened in the executive branch, which I missed completely. Was there a split among . . . ? Maybe working lawyers in the Washington legal community didn't think on these grand levels, they just did their job. If they were building an iron triangle in the '50s, they didn't worry about the consequences.

**Cutler:** Certainly the iron triangle is going to be there and the lawyers and lobbyists who were working on them don't spend much of their time philosophizing on what a good regulatory policy or organization ought to be. Mixed into the situation and really complicating it is the whole notion of the independent commission, the sort of [Joseph] Eastman approach, the ICC [Interstate Commerce Commission] approach, which was, you couldn't trust the politicians and the government, as you say, but you should have technocratic experts who figure out how to run railroads or regulate railroads, and others who figure out how to regulate communications, environment, whatever it might be.

The article is an effort really to resolve that problem and also the problem of regulatory agencies that are expressly within the executive branch, since we have been about as inconsistent as you could possibly be on, for example, anti-merger activity. It's a function of both the Department of Justice and the Federal Trade Commission. In fact, they fight issue by issue, industry by issue, industry by industry, over which has the next turn. Computers are really the business of the Justice Department. Other things, like fair advertising, are the business of the Federal Trade Commission. What we tried to argue was that since every agency has a social policy goal of its own and the goals often conflict, both as to long-term effect on the economy, which may be the biggest problem in the government, and as to how to organize the government so that the economy grows, rather than so that one particular segment grows or environmental supervision grows, or whatever.

Actually, in the Clinton Administration they did create this office within OMB [Office of Management and Budget], in the White House, called OIRA [Office of Information and Regulatory Affairs], which was run by Sally Katzen, who used to be a partner here [at WCP]. They put together a reasonable set of rules as to how to do it. That is, anything that the White House office urged a particular agency would be made a matter of public record so people could answer the arguments, it wasn't a backdoor communication of any kind. But the right of the government as a whole, the President, a single, unique President who has all of the executive

power, in theory in his own personal hands, their right to balance out the competing interests, I think is now accepted and the war is over.

**Ernst:** I take it you were at least working out writing up these ideas when you were at Yale for that seminar. Is that right?

**Cutler:** I went back and forth several times. The other author of the article, who really may be more principal than I was, was the young partner here [at WCP] named David Johnson.

**Ernst:** Did you have any discussions about these issues with members of the Yale faculty, several of whom I gather you are fairly close to?

**Cutler:** I did a lot with Geoff Hazard, with Steve Breyer, who was then on the Harvard faculty but working in this area.

**Ernst:** To what extent when you then were White House counsel—you couldn't actually do the proposal that you wanted to do in the law journal piece. But to what extent in the Carter administration, at least, where you have as you put it 80 percent offense and only 20 percent defense—rather than switched around in the Clinton administration—to what extent were you able to try, through the White House counsel, to be the vehicle for bringing executive branch policy into some control? I imagine it may not be a formal thing. It might be sort of informal reciprocity. You just mentioned earlier that one of the things you could offer to the counsel is that you are the issue spotter for the whole executive branch legal community. I could imagine you saying to somebody, "Look, I can only do this for you if you tell me what you are doing and there are no surprises."

**Cutler:** Yes.

**Ernst:** Did something like that happen? Were you thinking about these issues when you were Carter White House counsel?

**Cutler:** It did happen and I mentioned what the driving force behind it was. That was to centralize the decision-making on executive privilege: when the President would produce documents and when he wouldn't. We had a uniform policy that would be established throughout the executive branch.

**Ernst:** So, executive privilege was the occasion—I mean at other times inflation, the concern about the inflationary impact of the orders was the basis for the White House counsel . . . ? I'm trying to figure out what the levers are that get the counsel in the various executive branches to respond.

**Cutler:** One of the reports you should have is the one on separation of powers, which was another Senate project, wasn't it? But some of it is spelled out in there: Executive privilege should be used more rather than less; Presidents make short-term expedient decisions. But if I refuse to furnish Congress with something it wants, I'm covering up, I'm hiding something.

**Riley:** Can I ask you to connect this train of thinking with the train of thinking that led to your article “To Form a Government”?

**Cutler:** I think that’s quite different. That had more to do with, are there features in the parliamentary system that we could use.

**Riley:** It was written, if I understand correctly, as in part a reflection on the inability of a presidential administration to convert its policy preferences into law. Your service during the period of the Carter Presidency was a time in which the Presidency basically was at a kind of constitutional low point. After Watergate, the emergence of the Watergate class in Congress, an effort by Congress to kind of reassert itself with the War Powers Resolution and so forth. I’m just wondering if this question of regulation, or executive privilege rather, gets tied into these larger questions of presidential power at the time.

**Cutler:** Well, executive privilege clearly does, I think. But regulatory policy, it’s a different corner of the world, I think entirely.

**Riley:** Okay.

**Knott:** I was wondering if I could ask a political question from the Carter years. Somewhere in this mass of material that Darby assembled, there was passing reference to you, a statement that you allegedly made to President Carter urging him to take a pretty hard line against the Senator [Edward] Kennedy challenge, particularly when President Carter was going to head up to Boston for the dedication ceremony of the Kennedy Library. Senator Kennedy was going to be there and he was due to make his announcement in a couple of weeks, that he was going to challenge the President. Do you recall this at all? Is that a true story that you urged President Carter to—?

**Cutler:** Well, it may be a mixture of a couple of stories. I did go to the opening of the Kennedy Library. The President was to make a speech and a number of us had input into various drafts of that speech. I had recommended that a paragraph or two be put into the speech, since it was going to deal with JFK and pay him appropriate tributes, that he wasn’t always right. Others objected and the language never did go in, but the precise words I don’t recall.

Then we get to the 1980 convention, which was shortly after that. I was there, of course, trying to help the President win the nomination. Our biggest problem was the teachers’ unions and others who had large representation in the convention as a result of the [George] McGovern reformation rules, chose to make a stand about the MX missile. That even though we had retained the right to build and install MX missiles as part of the SALT II negotiations, that we simply should not do it. I was one of the group that went around from one state delegation to another, saying that didn’t make any sense and it was terribly important that we should do it.

**Knott:** Kennedy said that it took this thing right to the bitter end. It was a fairly bitter fight. Were there efforts made behind the scenes, with people that you may have known in the so-called Washington establishment, to get him to back off when it was clear that he was not going to get the necessary number of delegates to win the nomination?



**Cutler:** If so, I wasn't involved in it. That's a good question to put to Bob Strauss. What was he doing? I guess for a time there he was head of the DNC [Democratic National Committee].

**Riley:** Right. I may have another question or two about the campaign, but I want to go back and ask you, I also had noted that same point, Steve, so I'm glad that you posed that question. You wrote a very thorough assessment of what had happened in the last 48 hours or so of the Carter Presidency with respect to the release of the hostages, which was very useful. But we don't know that much about what you were doing before that final period, in the way of pressing along with the negotiations to get the hostages out. Your role actually began fairly early, if I understand correctly, in convincing the Shah to leave. Is that correct?

**Cutler:** No. Convincing the Shah to leave was a project that Brzezinski, among others, was involved in. There was a general, I forget his name, who we sent over for that express purpose of urging him to leave. I get into it when the Shah has left. First he's in Mexico, then he's in the Bahamas, and then he gets sick and he needs to come to a New York hospital. We have to move him from place to place. But that's the part of the relations with the Shah that I was involved in.

**Riley:** I see. Can you tell us anything more about that?

**Cutler:** Well, I'll come back to that in a minute. But on the negotiations, I was more or less the home base of the negotiating group. Remember Warren Christopher was in charge of it and he was to be traveling back and forth to Algeria. The posture was that the Iranians wouldn't deal with us. We were the great Satan, we could not negotiate, but they would deal with the Algerians and we dealt with the Algerians. You won't find in any single document signed by the United States and the Iranian government. You'll find these so-called Algiers Declarations, which were we tell the Algerian government what we'll do and they tell the Algerian government what they'll do.

**Riley:** Can we go back then to this question about your role in trying to deal with where the Shah was and where he would eventually end up? Can you tell us some details about that?

**Cutler:** Yes, a lot of them are written up. There is a book by [William] Shawcross I think. Don't you have that?

**Riley:** I don't know that we do. If it's there then just give us a skeletal outline and we'll take that reference for any future researcher to rely on.

**Cutler:** All right. Well, as you know, after he left and the embassy was seized for the second time and hostages were taken prisoner, nobody in the world wanted the Shah. He was then, I think, in Mexico. He needed an operation. We had said to the Shah earlier that, "If you need medical attention, we'll let you come to the United States for that." His doctor at New York Hospital, the Shah's doctor, recommended that he have a spleen or some other operation up there. He had a whole series of blood disease problems. In the breakfast foreign policy meeting that was reported, I think everybody there just as a matter of routine said, "Sure." So he came to New York.

At that point, a great hue and cry arose, partly from patients at New York Hospital, that they wouldn't be safe or their loved ones who were in the hospital wouldn't be safe. Partly, even from the children in one of the exclusive private grade schools where the Shah's son was a student, and they were making a great hue and cry. So I had the job of going to New York and persuading the Shah that he should move to Kelly Air Force Base in Texas, where there were very good medical facilities and where he would be close to his doctor, his friend, Dr. [Michael] DeBakey in Houston.

We got him out at 2 o'clock in the morning, in the middle of the night. I went up to New York Hospital to negotiate with them earlier. The FBI met me at the airport. They gave me dark glasses, a white smock, and a mustache to wear to get into the hospital, posing as a doctor, because they didn't want anybody to know who we were negotiating with. I said, "That's ridiculous, nobody's going to recognize me anyway." The worst thing would be to get caught wearing the false mustache and the eyeglasses.

**Ernst:** But I assume your mother would have been proud that you were finally a doctor!  
[laughter]

**Cutler:** So I got into the hospital with no trouble. The FBI, as I said, met me at the airport and then they were going to turn me over to another group of FBI people, had a rendezvous just outside New York Hospital. The second group had walked me in and we waited and waited for the rendezvous to occur. One of the other of the two FBI teams had the wrong address and was in the wrong place. That finally got smoothed out. The Shah agreed to go.

**Riley:** You met directly with him?

**Cutler:** Yes.

**Riley:** Was that the first time you had ever met the Shah?

**Cutler:** Yes.

**Riley:** And you had had briefings before about his temperament, personality, and condition?

**Cutler:** Yes.

**Riley:** And how did you find him to deal with?

**Cutler:** Very reasonable. Of course he is a very white-shoe Shah, he's not like [Mohammad] Mossadeq or any of the Iranian mullahs. He went to French and Swiss schools. He had houses all over Europe. What he could not understand was how the younger generation of the very people he had elevated, the businessmen and others he had elevated in Iran, sent their children abroad to school. The children learned about democracy and they came back and demonstrated against the Shah. He couldn't understand that, but he agreed to go.

We then had to move him from place to place as time went on. The Mexicans would not take him back, although they promised us he could come back. Eventually he gets to Panama, because nobody else would take him. And Hamilton Jordan arranged with Omar Torrijos—this was a sort of small dividend after the Panama Canal treaty—that Panama would accept him. [Manuel] Noriega was then the head of the Panamanian National Guard. He stayed in one of Noriega's houses on an island called Contadora Island, just outside of Panama City. We would go down to visit him there and Noriega would shake him down for all kinds of money for the use of the place and tap his phones. The Shah finally decided he had to get out of there too.

**Riley:** And you said you went down to visit him there?

**Cutler:** Yes. Several times.

**Riley:** The rationale for that, you were trying to use his knowledge to help resolve the hostage crisis at this point?

**Cutler:** No. What we were trying to do was carry out what we thought were our obligations to the Shah. We had been supporting him and he had been our staunch ally for 20-30 years. Henry Kissinger, David Rockefeller, and others were pleading with us, "You have to take care of the Shah." Then he needed a spleen operation. He asked for Dr. DeBakey to come down and do it. The doctors at the hospital, the Panamanian doctors, took umbrage at this and they said that a spleen operation was something anybody could do and that it would be an insult to the Panama doctors if an American specialist were brought down to do it. The head of the surgeons in the Panama hospital literally went to see the Shah and urged him to let them do it. He said to the Shah, "I have already turned down \$1 million to lose you on the operating table, so you don't have to worry. I'll take care of you."

Once the Shah heard that, he wanted to get out of there. So on an emergency basis we had to arrange for [Anwar] Sadat to take him back. Carter at first felt it would be an imposition on Sadat, who was having all of his own troubles. The last thing he needed was the Shah. But Sadat said, "No, he's my friend and he can come." Then we chartered a plane from one of these charter agencies, which turned out to be a CIA dummy, and we flew him out. There was one last effort on the part of Noriega and the Panamanians to turn the plane around at the Azores and send it back, but in the end he did get to Egypt. He had the operation there and sometime after that he died.

**Riley:** You also had contact with other Iranian leaders during the course of negotiations. I don't know whether you said the Shawcross volume covered a lot of the Shah. Is a lot of this also covered in the Shawcross volume?

**Cutler:** All of it is.

**Riley:** All of it is. Well I think rather than taking—

**Cutler:** And it isn't 100 percent right, but it's pretty much right. Then there is another book about the negotiations, on the return of the Iranian National Bank deposits that we had attached and impounded.

**Riley:** Okay. We'll refer to those then, rather than taking our time with that. You said you were at the 1980 Democratic convention. Did you do any additional work on the re-election effort that year?

**Cutler:** I must have. Mostly I spent a lot of that time working on the hostage negotiations.

**Riley:** Exactly, exactly.

**Cutler:** You remember, the Republicans were worried sick that we would pull something off, there would be an October surprise. I wish we could have.

**Riley:** Did that news, to your knowledge, change the dynamic of your negotiations? I know you've written some things about this, but I don't know that you've dealt with that question directly.

**Cutler:** About the October surprise?

**Riley:** Yes.

**Cutler:** Well, the notion floated. Incidentally, Gary Sick has also written about this. The idea that was being circulated at the time was that the Reagan people had tried to reach the Shah. Let me see if I can remember this correctly. There had actually been secret meetings, if I remember correctly, between Reagan and George Bush, the vice presidential candidate, in Paris or some such thing, saying that, "We'll give you a better deal." We all later concluded that it wouldn't have made much difference anyway. I remember a talk with Ed Muskie when he became Secretary of State, in which we both concluded that even if we could pull off a deal that would be an honorable one before the election, that he still would have lost.

**Riley:** Steve, do you have any follow up on that?

**Knott:** No.

**Riley:** Mr. Cutler, you argued the *Buckley* case before the U.S. Supreme Court. Can you tell us about your involvement in that and your preparations and experience in that case?

**Cutler:** Yes. *Buckley* is the first campaign finance law case. We were counsel for the League of Women Voters and Common Cause, along with Archie Cox and a number of others. We divided the argument. We all wrote a common brief and divided the argument. The part that fell to me was the presidential campaign fund. Remember, the basis of the decision is that contributions can be regulated, expenditures cannot be regulated, but if you accept presidential money for the presidential campaign fund, and as a condition of that you had to agree not to raise any other money and not to spend more than you were given by the federal government, that would be

constitutional. On that part we did prevail. We always thought we had a difficult problem with the independent expenditure issue. That's what we eventually lost in the end.

The other thing we lost, of course—after the fact, we didn't know it at the time—was that the Federal Election Commission, which was part of the statute, was to consist of six members and it was built to malfunction. It was built to deadlock. They allowed, gradually over time, all of the so-called soft money contributions, which hadn't been covered at all in legislation. It was a fascinating case because it was one of the first of what are now a whole group of cases on campaign finance and budget balancing and other things, in which the Supreme Court gets expedited jurisdiction. There's a fact finding before a trial court and then it goes immediately to the Supreme Court. They are close to, but not quite, advisory decisions, because it's all dealing with what is constitutional on the face of the law, rather than particular actions taken pursuant to the law.

**Riley:** Do you have any specific recollections about the process of oral argument in this case?

**Cutler:** Yes. In fact I have a whole bound volume of the briefs and the argument, if you'd like to see it.

**Riley:** Okay. Were there any surprises for you in how the decision was reached or who lined up where in this particular case?

**Cutler:** There are always surprises, but if I recall correctly, they ended up writing it as a per curiam decision. There were many authors of different sections. The opinion itself is about 100-150 pages. It's a huge opinion because there are so many issues.

**Riley:** Are there any other questions about any other cases?

**Cutler:** It might worth noting that in those days, and it's not so far back, we were given a whole day to argue the case, instead of a half an hour to a side.

**Riley:** So how much time would you have spent before the Court in this small part?

**Cutler:** I must have had a good three-quarters of an hour.

**Riley:** Goodness. Back to the political realm, the election goes Republican in 1980. Did you have any kind of relationship with the people in the Reagan administration, apart from your service on these various commissions that we talked about?

**Cutler:** Yes, I knew George Shultz very well.

**Riley:** Were you working with him in an informal advisory capacity?

**Cutler:** Yes, in part because we were about to make the deal with the Iranians. They had of course a lot of objection among the Republicans and commentators, that this deal was being forced down our throats. It was the so-called leonine deal, and that we should refuse to sign it or

if Carter had signed it, the next administration could denounce it as non-binding. We persuaded the Republican team working on it, which included Paul Wolfowitz, that they should go ahead and defend it and that it was the best deal we could possibly get.

It was very much in the Republicans' interest to leave this issue, since we had resolved it and bitten the bullet, that they shouldn't try to upset it. That's the judgment that prevailed and we did win it in the Supreme Court.

**Riley:** Was there significant dissent within the Republican foreign policy establishment?

**Cutler:** Yes, yes. There are a lot of ideologues in the Republican Party, as you well know. This had to do with Communism, with the Middle East.

**Riley:** Your relationship with the Reagan administration seems to have been much more favorable than your relationship with the Nixon administration.

**Cutler:** Oh, I was number 12 or something on the Nixon enemies list.

**Riley:** I remember that, and I'm still sitting within eyesight of Chuck Colson's memo on your wall.

**Cutler:** Yes.

**Riley:** To what do you attribute your better relations with the Reagan administration?

**Cutler:** Well to begin with, they're better people. In my book at least, we now know that Nixon was not only as bad as we thought, he was worse than we thought. It's all there in the [H.R.] Haldeman diaries and it's all there on the tapes.

**Riley:** That's the beginning. You said, "To begin with, they are better people." Were there other—?

**Cutler:** Of course, we now know that Nixon was even going to have a rule in the second term that you couldn't approach anybody in the Nixon administration with a Democratic lawyer, that you had to get Republican lawyer.

**Riley:** Exactly.

**Cutler:** And then he wanted the tax returns of all of the Democrats audited. When Shultz wouldn't do that, he called him "candy-assed."

**Riley:** But you yourself just said that there were a lot of ideologues in the Reagan administration. You would not have been a favorite of the ideologues.

**Cutler:** No.

**Riley:** So I suppose I'm reaching to find out, again—

**Cutler:** An administration comes to power and has hundreds of different issues. What I think of as the ideologues goes back more than anything else to foreign policy.

**Ernst:** When did you first meet Ronald Reagan?

**Cutler:** I think probably not even until his second term. By the time of the Reagan administration I had become first a member and then the chairman of the Commission on Legislative Executive and Judicial Salaries, which met every four years. We would present those reports to the President. So I guess I met with him twice.

**Riley:** I think they are ready for us for lunch. We'll come back and talk about the [Brent] Scowcroft Commission.

[LUNCH]

**Riley:** Okay, the Scowcroft Commission. Why was that set up and what was your role in it?

**Cutler:** It was set up because after Reagan took office, he was left with the problem of the 50 MXs, which we were going to put in tunnels below the surface. They were going to be continuously in motion among the canyons in Nevada and Senator [Paul] Laxalt didn't like that. I think they did it first to temporize. They set up this commission and put Scowcroft in charge. By the time we were finished, we had reviewed the whole weapons policy: whether we should be developing new weapons or not, Star Wars. We were very rough on Star Wars actually, even that far back. I was called a "senior consultant," I got recruited to it late. But I went to most of the meetings and took part in the drafting.

**Riley:** Who recruited you?

**Cutler:** Scowcroft. And I think both Harold Brown and Bill Perry. And John Deutch. And I still remember—I may have told you this before—we listened to an explanation from the generals in charge of Star Wars about how they were going to have a spaceship with lasers that would attack the incoming missiles. We said to them, "Well, if the Russians are going to attack, what's to stop them from knocking down your spaceship first?" They answered, "It's going to be like a fleet of aircraft carriers. The spaceships, they'll be the carriers, and they'll be surrounded by space cruisers, space destroyers," this, that, and the other thing. That was the vision and they are still at it.

**Riley:** How did you manage to get such an expanded portfolio over time? If you're starting with a fairly small issue and then you get, as you say, into dealing with everything. Was it Scowcroft—?

**Cutler:** Once you're created a commission, you can write whatever you want. You don't have what you write being edited. Of course, somebody like LBJ would put somebody on the commission to make sure that nothing untoward was said. On the Violence Commission, after he had appointed the whole set and they were exquisitely balanced politically, he added Leon Jaworski, his own lawyer, to be sure we didn't do anything out of hand.

**Riley:** Who was Reagan's inside person? Was it Scowcroft?

**Cutler:** Scowcroft.

**Riley:** Okay, so he appointed somebody who he felt sure wouldn't be too rough on him as the chair.

**Cutler:** With Reagan, who knows? Maybe it was Ed Meese, maybe it was somebody else, who said, "You ought to appoint a commission."

**Knott:** There was a fairly active nuclear freeze movement in the early '80s.

**Cutler:** That's right, that's right.

**Knott:** Some members of Congress, particularly in the Democratic Party, were gravitating a bit in that direction. Was that a concern to you?

**Cutler:** I don't really recall that. But certainly, the whole business of entering into a working arms control agreement was very important. Of course, SALT itself, SALT II, was only going to last five years and it was observed pretty much during the entire five-year period.

**Knott:** Secretary [Caspar] Weinberger, he was not part of this commission, obviously. Or was he?

**Cutler:** No.

**Knott:** Do you recall any resentment in his part towards it? In a way, it was kind of a preemption of his—

**Cutler:** No. His primary concern was Laxalt.

**Knott:** I see.

**Cutler:** You know, there's that famous story about commissions, of the university president who has to resign. He tells his successor that, "I've left you three envelopes. Each time a crisis arises, just open one of the envelopes." The crisis comes, and he opens the envelope, and it says, "Blame it on your predecessor." Then a second crisis comes, and he opens it, and it says, "Appoint a commission." Then the third crisis comes, and he opens the third envelope, and it says, "Prepare three letters." [*laughter*]



**Cutler:** Were there any specific disputes within the commission, to your recollection, over how aggressive you should be, or the direction of the commission?

**Cutler:** Not that I recall.

**Riley:** So it was a fairly collegial enterprise.

**Cutler:** I haven't looked at the report, though, for years.

**Riley:** You got along well with Brent?

**Cutler:** Oh, very much so.

**Riley:** He's somebody who would not have fit in the ideologue category, as you described it earlier?

**Cutler:** No. He's even a dissenter from a lot of the things that the Bush people are doing.

**Riley:** The current Bush people?

**Cutler:** The current Bush people.

**Riley:** You mentioned earlier the Salaries Commission. How did you get your initial involvement in the Salaries Commission?

**Cutler:** Nick Brady had become the Secretary of the Treasury, and he was appointed the head of the Salary Commission. He's an old friend of mine and he recruited me. I think I was vice-chairman in the beginning, but in those days it was supposed to recommend every four years. By the second four years, I was the chairman.

**Riley:** You were the chair. During that process, you actually made a recommendation for a salary increase?

**Cutler:** A major, about a 50 percent increase, yes.

**Riley:** And this was in 1984—was it 1984? Okay.

**Cutler:** The first one would have been when [John] Sununu took over as Chief of Staff, so that would be in 1988, I guess. Because Reagan had two terms and when I was chairman, we made our recommendation to Bush I. Sununu was the one who shot it down.

**Riley:** I see. Did the politics of that play out—in the case where the major increase came in, the 50 percent increase. Again, my memory is fuzzy on this. I was thinking that Reagan was still President when that recommendation came through. But in any event, there were stories that the administration, whichever one it was, had undercut the credibility of the commission a bit by

sending signals about the acceptability of the size of the increase at that time. Is any of this ringing a bell?

**Cutler:** No.

**Riley:** Okay, I'm afraid I'm raising a fuzzy set of questions then. But the politics of salary raises is a very complicated business in Washington.

**Cutler:** And it's still with us, as you know. It's basically that Congress also needs and wants the raise and is afraid to take one. So they hitched themselves to the judges. You can't really have a raise with the judges without doing something for the Congressmen at the same time. Of course the Congressmen can't afford to have their opponent say, "He went to Washington and he raised his own salary."

That's one reason why we now have what's called the 27<sup>th</sup> Amendment, which was one of the original twelve that never got adopted at the time of the Bill of Rights. We adopted it just a few years ago. It hung around for more than 200 years before it got adopted.

**Riley:** Darby, you might want to check on the dates of that. Let's move onto something else. The [Robert] Bork nomination during this administration, you had what turned out to be a fairly prominent role in that event. How did you come to know Robert Bork?

**Cutler:** He was a professor at the Yale Law School. I was back and forth at Yale teaching and doing other things during this period. One of my good friends was Alexander Bickel, you all know who he is. Bickel had a cancer. When I would go up to New Haven to lecture or something, I would usually stop and visit at the Bickel house. Bork was often there doing the same thing. Then when he was nominated, I thought he was what we called in those days, "within the mainstream." I really believed that at the time.

The Democrats opposed him on ideological grounds and they paid for it in the end, because the shoe would be on the other foot pretty soon. Looking back, and especially since Bork had his sort of religious epiphany and is now saying that Congress ought to have the right to reverse Supreme Court decisions construing the Constitution, I'm not so sure I was right at the time. I'm glad he's not on the Court at the moment.

**Riley:** There were reports that even within the firm here, there was some controversy over your decision to take a public role in the nomination process?

**Cutler:** I don't think there was any controversy over individuals saying what they thought, but one of the opposing groups was the Lawyers' Committee for Civil Rights, which I'd helped to organize at the beginning. Some people in the firm wanted to take on requests from the Lawyers' Committee to prepare a firm position, or for a brief analyzing the cases. I thought that was not appropriate as a firm matter. The way it ended up, everybody did what he wanted personally.

**Knott:** It's sort of conventional wisdom in conservative ranks that that bloody fight to try to confirm Bork and then followed a few years later by the Clarence Thomas nomination battle, it

changed things forever in terms of judicial nominations. Whereas some Democrats would argue that it began with Abe Fortas and the efforts the Republicans made back in 1968 to stop the Fortas nomination. Do you have any reflections on this? I mean, has the process gone south? Did it start with Bork?

**Cutler:** Yes, I think it's going south. You might say it started earlier with the North Carolina judge named [John] Parker, who was a Fourth Circuit judge appointed, I think, by Hoover, I'm not sure. Was perfectly respectable, but the unions ganged up on him because of some decision that knocked down a so-called "yellow dog" contract. I can't even remember what "yellow dog" stood for at the moment. That was the first recent case.

I guess even before that, but in an entirely different phase of our history of Supreme Court appointments, it was true in [Louis] Brandeis's case. Brandeis was highly controversial. But in those days, if you were nominated, you never testified. It was considered improper to testify, although Brandeis was behind the scenes, was lobbying like mad for the job. So it's probably been with us from the beginning. Of course the Supreme Court has become more and more important ever since it changed from a court that really defended the propertied classes to a court that upheld everybody's individual rights, which was really a transition made by the [Earl] Warren Court.

**Knott:** Not to jump ahead here, but did you take a public position—if you did, I missed it—on the Clarence Thomas nomination?

**Cutler:** No. Thomas was a classmate of my daughter at Yale. He is a perfectly agreeable fellow. If you talk to Steve Breyer, who sits next to him on the bench, they get along very, very well personally. The fact that he had no opinion—while he was testifying, he had no opinion about *Roe v. Wade*, you remember. My daughter says it's not surprising, that he had no opinion about anything when he was in law school. I think he is a genuine black conservative in the sense that he really does believe that even though he and others are beneficiaries of affirmative action, that it would be better just to let blacks survive on their own.

**Riley:** [Antonin] Scalia had been appointed before Bork, right?

**Cutler:** Scalia predates Bork.

**Riley:** Scalia predates Bork. Scalia was before Bork and then the Bork nomination. You had been supportive of the Scalia nomination also?

**Cutler:** I took no part in that.

**Riley:** You took no part in that, okay.

**Cutler:** I think I would have been supportive. Scalia's track record, as a professor and a justice, was very good.

**Riley:** I wonder if you might comment more generally about the role of the American Bar Association in the selection process. Maybe that's something you've written on and I just missed.

**Cutler:** I've written on judicial selection and we do talk about the ABA. The ABA performs a very useful function because when they do it properly and when they're properly organized, they really can go to the lawyers and the judges in the community and get much more useful information than a vetter of the FBI can get. So they're valuable from that point of view. They also give the President a defensive mechanism if he's being pushed to name somebody who doesn't get ABA endorsement.

**Morrisroe:** Did you find any merit in the criticism of the ABA committee on judicial selection, that there was bias in their ratings of judges, for instance Bork's rating?

**Cutler:** Only once, when Jerry Shestack was the head of the commission or at least a member of the commission. I think it had to do with Bork, but I'm not sure.

**Riley:** You'll have an opportunity to look at it and you can strike it. In the Bork case, when you testified on Capitol Hill, did you do that at your own initiative or did people from the administration call you and ask you if you would be willing to do it?

**Cutler:** I was asked by Bork to do it. I used to sit in on planning meetings on the presentation of the nomination.

**Riley:** In the White House?

**Cutler:** I remember the ones I went to were in Bork's house.

**Riley:** I see. Can you tell us a little bit about those? Who was there?

**Cutler:** Well, most of it was sort of a moot court. "You wrote such an article or opinion and you said this or that. How do you defend that or explain why you came out that way?" We must have had people from the Justice Department there, but I don't remember who at the moment.

**Riley:** Were you the only Democrat involved in that exercise?

**Cutler:** I don't remember.

**Riley:** Was it an uncomfortable period for you?

**Cutler:** There were a lot of anti-Bork people who thought I was out of my mind, in that sense. Whereas judges are always unpredictable, but where Bork has come out at the moment really does surprise me. What is it, *Hurting Towards Gomorrah*, or "*Something*" *Towards Gomorrah*?

**Morrisroe:** Slouching.

**Riley:** Slouching, yes. Slouching.

**Cutler:** *Slouching Towards Gomorrah.*

**Riley:** Slightly different connotations, slouching and hurtling. What was your sense, overall, about the quality of Reagan's judicial appointments?

**Cutler:** I think pretty good. Certainly far less ideological than what Bush is doing now. Probably primarily Republican, primarily WASP [White Anglo-Saxon Protestant], but he did appoint a lot of them. I think it's a subject from which he was pretty detached. He left it to other people.

**Riley:** I'm going to dial back and ask a couple of questions, since we're dealing with a period in the 1980s. We skipped past the 1984 campaign. Had you been involved in the 1984 campaign on the Democratic side at all, with Walter Mondale?

**Cutler:** I supported Mondale. I contributed to Mondale. I went to campaign meetings with Mondale, but I never thought he had much chance.

**Riley:** Was there anything that he might have been able to do, you think?

**Cutler:** I doubt it, I doubt it.

**Knott:** What was your overall impression of Ronald Reagan? I know he was not an acquaintance of yours, but you were in this town for eight years, you served on various commissions.

**Cutler:** I think he'll be judged to have been better than we thought at the time, what the critics thought at the time. He had a sort of basic philosophy that made some sense. His standpoint on confronting the Russians probably did make some sense and probably did contribute to the fall of the Evil Empire. Having been an actor, he was somebody who was just comfortable in public and even his improvisations were very good. Remember, "I paid for this mike," which was just his own thought. I would say it was a general period of relative peace and tranquility and the Cold War united us. On the whole, people were quite content with Reagan. If we didn't have a two-term rule, he might very well have run and won another term, except he was so old.

**Knott:** So you put Richard Nixon in a far different category than Ronald Reagan.

**Cutler:** Oh, very much so, yes. Reagan was more like Ike [Dwight Eisenhower]. But whereas Ike was very, very good at working with other people and making them like him, I think Ike was much more reactive rather than a man of initiative, the way Reagan was. Neither of them worked very hard as President. I guess George W. wouldn't have worked very hard as President if it hadn't been for 9/11.

**Knott:** We sort of left the Bork nomination, but I do want to ask one more question about it. The campaign, the effort against him, involved a considerable amount of public advertising, television announcements from Gregory Peck and others. Were you bothered by what you saw

with this? Was this a disturbing development, that it became kind of, which interest groups could prevail in this nomination?

**Cutler:** Somebody put it, “You’re famous just because you’re famous.” Clint Eastwood would be a good example. In the marketing world with so many transmission channels, we’re bound to have that. We’ll see more and more figures who’ve made their mark in another field, usually in the entertainment field, who run for office later on. That’s not necessarily bad.

**Riley:** Like Governor “Terminator” out in California.

**Cutler:** Arnold [Schwarzenegger]?

**Riley:** Yes. You know Arnold?

**Cutler:** I know him only because he made a movie here. You know, he’s married to Maria Shriver and they rented the house right next to us in Georgetown. We benefited from his security. He had 24-hour security around the house.

**Riley:** I would think a guy who’s the “Terminator” would be his own security!

**Cutler:** Fortunately, he can never be President.

**Riley:** Is that true?

**Cutler:** That’s right, he’s not native-born. He was born in Austria.

**Morrisroe:** Yes.

**Riley:** This is completely inside pool and maybe we’ll have to take it off. We had a conversation in Salzburg over breakfast one morning.

**Cutler:** About Campobello?

**Riley:** Exactly!

**Cutler:** Yes, I was wrong about that.

**Riley:** Okay, well, I’m delighted that you remember it. The occasion was that my son was born in Hallein, just south of Salzburg in Austria. Mr. Cutler and I were having a conversation over breakfast and I made the comment that it was too bad that my son could never be President of the United States. I was correct at that point, but you’re saying that that factual basis of that question—

**Cutler:** I had mis-remembered that FDR was born, I thought, on Campobello Island. You remember, they had their vacation home there. In fact, just before his mother gave birth she was moved off the island, either to a city in Maine or in New York.

**Riley:** I think someplace in New York. I actually went back and checked it.

**Cutler:** So he was literally born in the geographic United States.

**Riley:** Well, that clarifies that then. Now I've completely lost my train of thought. Was your counsel at all sought formally or informally once the Iran-Contra controversy arose?

**Cutler:** I did get involved in it; I'm trying to remember in what context. It had to do more than anything else with Colonel [Oliver] North, [John] Poindexter, and the creation of the private CIA. Remember, they took the money they were going to get on arms sales to Iran, the secret arms sales, and they were going to use it to do foreign intelligence that would not be a part of the U.S. government.

**Riley:** And your advice was sought or—?

**Cutler:** Well, I remember being involved and writing papers and other things. I don't think I had any official role.

**Riley:** You don't remember who would have sought you out for this purpose?

**Cutler:** No. The principal part I played in it was when an independent counsel was appointed, Ed Walsh. I became Shultz's lawyer and I was his counsel over the six-year period that Walsh carried on his investigation.

**Riley:** Go ahead. I'm sorry, Steven.

**Knott:** Walsh went on to indict Caspar Weinberger.

**Cutler:** And he threatened to indict Shultz.

**Knott:** Right.

**Cutler:** He wanted us to, in effect, testify against Weinberger.

**Knott:** Would you be willing to give us a general assessment of the Walsh efforts?

**Cutler:** Well, it would not be favorable. He wrote a book, a brand new one just about a month or two ago, which I have if you want it. He describes why he made the case against Weinberger and why he tried to get Shultz to support him.

**Riley:** You had mentioned earlier that you had not taken a favorable view of the idea of the independent counsel.

**Cutler:** Yes, I was an original supporter of it. At least in my version, the independent counsel would have been selected by the Attorney General.

**Riley:** Can you tell us about your evolution from being a supporter to being not a supporter?

**Cutler:** There was always the great risk of what we used to call “the man on horseback,” the lawyer who got appointed and rode it right into the Presidency. We used to call it Tom Dewey, although he was several cuts above some of the independent counsel, I would say.

**Riley:** Okay. Did your change of opinion occur before the Walsh service in there?

**Cutler:** Remember it was a statute that would sunset every five years. Clinton had to make a decision after the Republicans allowed it to sunset, whether he would revive it. He had pledged during the campaign to revive it, so he went ahead and revived it. That’s how [Robert] Fiske got fired and they picked our friend Kenneth Starr.

**Riley:** To your mind, by the time that re-energizing the statute came, you had already reached the conclusion that it was a bad idea?

**Cutler:** Yes.

**Riley:** Did you give private counsel to people in the Clinton administration who thought that they ought to let it go?

**Cutler:** I did and I spent a lot of time, actually, when we did move to revive the statute, on what is somehow or other—we should protect Bob Fiske and say in fact that he continues what he is doing. That the revival of the statute would only apply to new cases. Then for a combination of Senator [John] East, Judge [David] Sentelle and Mrs. [Jane] Sentelle, who worked for the other North Carolina Senator—

**Riley:** Jesse Helms.

**Cutler:** Jesse Helms. Ended up deciding they had to take Fiske out on the phoniest of reasons. Have we been through that?

**Riley:** I think so.

**Ernst:** It is in that interview, but I was wondering why you say you thought Fiske, as the regulatory counsel, why you thought he was doing a good job with the role of independent prosecutor and contrasting it with Ken Starr.

**Cutler:** Well, he was very objective, he was nonpartisan, he had a team of very good lawyers. He was disposing of the issues one by one. I felt that if he had just been left there, the whole thing would have been over by 1995, instead of 1999 or 2000 or something, the way it finally turned out.

The grounds for throwing him out were so fishy. It was that Davis, Polk, his law firm, were counsel for International Paper on matters relating to Lake Champlain pollution. The Whitewater



properties had been sold or purchased, I think, from International Paper in a totally different transaction that had nothing whatsoever to do with what Fiske was doing. It wasn't material to anybody whether the Whitewater sale was International Paper or the XYZ company.

**Riley:** Sid Blumenthal—and I have no way of verifying this—but he actually reports in his book that Ken Starr's firm had also represented International Paper, but nobody bothered to make the connection.

**Cutler:** We looked into all of those things and it may very well be true. They also had other relationships with the Republicans who were attacking Clinton.

**Riley:** You said that you had registered your strong concerns. With whom in the White House where you were working at the time, was that through Bernard Nussbaum or were there other people?

**Cutler:** It was mainly Bernie and with Joel Klein, who had been Bernie's deputy and became my deputy.

**Riley:** Let me dial back. We jumped ahead a little bit on the independent counsel thing in relation to Walsh, but I want to go back because I had asked you about Walter Mondale, and do the same thing with the 1988 campaign with Michael Dukakis. Were you at all involved in the Dukakis campaign?

**Cutler:** Only on the side. I knew a lot of the Dukakis campaign people and I kind of like Dukakis, although I don't think I had a horse in that race.

**Riley:** During the course of the 1984 and 1988 primary season, had there been other Democratic candidates that you had latched onto? That's not the right word, but other Democratic candidates that you had been impressed by, that you had been more actively supportive of, and that you had hoped would rise to the nomination and get in the White House?

**Cutler:** There were some of us who talked at the time about trying to run Bob Strauss, but it never really got off the ground. He probably could've beaten Dukakis for the nomination.

**Riley:** This was in '88, then?

**Cutler:** Yes.

**Riley:** In '84, basically Mondale was your person.

**Cutler:** That's right.

**Riley:** Okay. By 1988 you were looking at other alternatives than Dukakis.

**Cutler:** Right.

**Riley:** What kind of President would Strauss have made?

**Cutler:** I think very good. He had a lot of natural political instinct. He's a good liberal. He turned out to be a good diplomatic negotiator. He was able to cross the party line and became just as intimate with the Bush people as he had been on the Democratic side.

**Riley:** Had he ever been a candidate before?

**Cutler:** He never ran for anything that I know of.

**Knott:** He had developed a pretty good relationship with the Reagans as well.

**Cutler:** He did. I told him it would be hard to think of anybody with whom he did not develop a good relationship. I say that in an admiring way.

**Riley:** Of course. Why would he decide not to try this, do you know?

**Cutler:** Well, he had never run. There had never been a Jewish President or a Jewish candidate. He enjoyed making money.

**Riley:** He and [Joseph] Lieberman, you don't think of as—

**Cutler:** Lieberman is an odd development. Of course we all liked him, but then he turned out to be too religious, I think, during the campaign. Today, although Lieberman has raised a good bit of money, it's hard to think of him as a viable candidate.

**Riley:** I don't think of him in the same sentence that I think of Bob Strauss, whose personality type seems to be very different.

**Cutler:** Yes. I mean, Lieberman is a very good man. His positions are good. He is totally ethical, but he's not very big on charisma.

**Riley:** Before we completely leave the 1980s, you had raised the *Synar* case earlier, if I'm correct?

**Cutler:** Yes.

**Riley:** Why don't we go back to that? That would have been sometime in the late '80s, '86 or '87, something like that.

**Cutler:** I have the bound volume of that too, if you want, by the way.

**Riley:** Okay. Well, tell us about your involvement in the *Synar* case. You cited this as being kind of an interesting experience.

**Cutler:** Yes. Gramm-Rudman had a provision in it saying that if so-called discretionary expenditures, which are entitlements, welfare, and so forth, everything but the military and a few other categories, if they exceeded a certain amount, if they created a deficit above a certain amount, the Comptroller General could make such a determination, and then in that case the discretionary expenditures had to be reduced. The issue in the case was whether that discretionary decision could be made by the Comptroller General, who is by statute an officer of Congress, rather than an officer in the executive branch.

The Comptroller General position was created about a century ago. The Comptroller General was appointed by the President, but removable by Congress. The Court decided that he was therefore an agent of Congress and that on separation of powers principles, this discretionary determination about the budget could only be made by an agent of the President or by the President himself. And that's how we lost it. We argued and we got two justices to go with us, that if anything was unconstitutional it was the original Comptroller General statute that said he could be removed by Congress. If you're going to knock anything out, knock that out, rather than paralyze the ability of Congress and the executive branch to roll out a sensible method of controlling the budget. But we lost it.

**Riley:** How did you get invited into that case?

**Cutler:** [Charles] Bowsher I knew very well. You know, he had been the head of Arthur Anderson for a long time. He was the first Comptroller ever to create a true capital budget for the government. He asked me to do it. We did that on a paid basis, but at some substantial discount.

**Riley:** Anything memorable about the oral arguments in that case?

**Cutler:** Something memorable about what we heard had happened before the oral argument.

**Riley:** Okay, enlighten us.

**Cutler:** One of the discretionary expenditure categories that would have to be cut back was the judicial salaries and appropriations for the Court. Warren Burger had said to somebody on the case who went to the Supreme Court, "I can't wait to get my hands on that case." He's dead now, so I'll think of whether you can keep that in there or not.

**Riley:** So that's in your mind as you're approaching the bench.

**Cutler:** If you want the bound volumes on any of these cases, they're all right in there.

**Riley:** Okay, good. I'm trying to decide how we would make use of it right now, but let me think about that. Is there anything else before we get to the Clinton years, anything about the politics of the 1980s, Reagan?

**Knott:** I sort of already asked this question, but I asked you your assessment of Ronald Reagan. Clark Clifford once referred to Reagan as "an amiable dunce," and I was wondering if you had

any reaction to that or if you wanted to add anything else to your assessment of Reagan as President.

**Cutler:** That was something Clark said at one of Pamela Harriman's "Pam PAC" dinners, her fundraising dinners, which you had to pay \$1,000 to be invited to, among other things. It's probably something Clifford should never have said. He should have realized it would circulate. But it's similar to what some people, good Republicans used to say about Ike, that, "He's a boob, but he's my boob." Certainly Reagan was much better than an amiable dunce.

**Riley:** I take it you've been to some of these Pam PAC dinners?

**Cutler:** Yes.

**Riley:** Can you tell us what those are like?

**Cutler:** Well, they're taped. Usually it would be some important Democratic office holder or prominent person like Clifford, an ex-office holder. All of the lobbyists would be asked to contribute money to come. They'd come to be able to say to their clients, "Last night I had dinner with Clark D. Clifford and he said . . . ."

**Riley:** Are there other staples of the Georgetown social life that one ought to be aware of, if you're looking back at the history of politics in the 20<sup>th</sup> century?

**Cutler:** If you take that sort of long-range view, Georgetown and the Washington establishment, so-called, were much smaller during World War II and for years thereafter than they are today. People like Joe Alsop, for example, and his brother and Scotty Reston, were very much intimates of the Presidents. Every President just broke his neck trying to win them over. JFK did it, Johnson did it, FDR did it. Now it's much more complex than that.

The people who used to live in Georgetown, a lot of them now live in McLean, they live in Cleveland Heights, and they go home. They're part of large organizations. Most of them don't really stay and make a lifetime in Washington.

**Riley:** Is there less leisure time in Washington than there was in an earlier time?

**Cutler:** Probably. It's again one of those difficult questions to argue. There are so many more types of leisure to enjoy that are now within reach.

**Riley:** Sure, sure. It seems to me that as part of the Washington social scene, if the business of governing is taking up more of those 24 hours in the day than they did before, then the social aspects can't possibly loom as large as they would have in an earlier period of time. I'm posing that, sort of throwing that out as a proposition or a question.

**Cutler:** You can theorize that, but it's part of a much bigger evolution. Everything is different and bigger, less intimate, more diversified than it ever was before. The number of people who still live in the same town where they grew up diminishes all the time.

**Riley:** Sure. I'll raise this as a theoretical proposition, suppose you discover a Democratic Governor or a member of the House of Representatives that you're just sure is a hot item. You want to get that person introduced into the Washington community properly. How would you go about doing that, Mr. Cutler?

**Cutler:** Introduce him to the journalists, introduce him to the politicians, give a dinner, which is probably just the way you did it 40 years ago.

**Riley:** Although the journalists are different.

**Cutler:** Different individuals, yes.

**Riley:** But the character of journalism is the same now as it was 30-40 years ago?

**Cutler:** It's much more diverse and competitive and there are many more outlets. The competition to be first means journalists tend less—as we've learned from the *New York Times*—to check things.

**Riley:** But I get the sense—and again I'll throw this out because it's only based on what I hear from others that we interview on our projects—that at least since Watergate, that the character of journalism is much more confrontational and combative than it was in an earlier time.

**Cutler:** That's right, and the way to get ahead in journalism is to be an investigative reporter and identify yourself with some great exposure of something. But we have a free press for that very purpose. We want somebody watching the government very carefully, even if it commits excess. That's why we have rules like public figures. It's not necessarily libel to say something that is false about a public official, if you believe that you made reasonable efforts to check it, and so forth.

**Riley:** I don't know that we have many questions about the Clinton experience because we went over that pretty thoroughly before.

**Cutler:** I think we did.

**Riley:** I am going to ask you one question, though, and that is in the earlier discussions you had indicated that you had provided advice to people in the White House after you had left your position as counsel, when the President was in difficulty in the second term. You were a little bit reluctant to talk about that earlier, and I don't know whether you are any less reluctant to talk about that now than before.

**Cutler:** It's certainly true that I did work with my successors as White House counsel, and that when the threat of impeachment came along and the actual resolutions and the trial came along, I was very much involved in working with them in trying to negotiate a solution. There isn't much I can say about it; most of it hasn't been printed yet.

**Riley:** Okay. Is there anything—?

**Ernst:** I just had one question about which you characterize as the “show and tell sessions” in the Clinton White House with the executive branch counsel. Did you inherit that or is that something—I don’t know if I’m clear, but I guess you went to different agencies or the counsel came to you?

**Cutler:** I don’t know whether earlier White House counsels had done the same thing. Maybe we were the first to do it and I don’t know if it’s done today, but it was one way of unifying—not only keeping all of them up to date and vice versa on what we were each doing—but a way of unifying positions on these executive privilege issues.

**Ernst:** Did you feel they succeeded?

**Cutler:** They seemed to work at the time, but I remember we were able to put out memos saying, “Here are the ground rules for the future,” which Ab Mikva and I did just about the time that I left and he came on. But just as to how it worked in application, I don’t know. For example, one rule we had, which Ken Starr tried to exploit himself, is that we had said that we would not assert executive privilege when an issue of personal misconduct about an individual member of the administration was involved. He used that to argue that the administration should not invoke executive privilege about anything Clinton or the various other witnesses had done.

**Knott:** I think we went down this path during your first interview where you talked about your role in the Clinton White House, but I want to ask another question about Ken Starr. You knew him fairly well prior to all of this. Were you surprised at the extent to which he pursued—this is after you left the White House—he still continues to go after various, down all sorts of paths? Did that surprise you?

**Cutler:** It didn’t surprise me because we subjected him, or the White House subjected him, to a great deal of personal attack. We may have goaded him into some of his positions to justify what he was doing. We had big arguments about that within the White House, in which I certainly took the position, as long as he’s there, you don’t attack him. You do your best to work with him on everything you can.

**Knott:** So you had people like James Carville and others?

**Riley:** We had Carville on the other side, who was threatening to resign and just going out as an individual to attack Starr.

**Knott:** So it’s possible in your mind that Starr would not have been as aggressive had he not been attacked?

**Cutler:** Right. But I also think Starr probably should never have taken the job in the first place, because he was actually advising some women’s groups and others on issues related to the Paula Jones case, before he was even approached to be in the independent counsel.

**Riley:** I don't know that I've got any other Clinton era questions, but I'll look to my colleagues to see.

**Morrisroe:** There was a passing reference that I found in some news articles discussing your involvement in the Dayton negotiations. You accompanied Secretary Christopher to the Dayton negotiations. I wasn't able to find much else discussing that. Can you comment on that?

**Cutler:** Yes. The Dayton meetings were run by Warren Christopher and Dick Holbrooke. Holbrooke invited me to work on the portion relating to the constitution of Bosnia-Herzegovina, and in particular how the three ethnic groups within that country could get along and how power was to be shared and divided. It had some awful provisions in it. For example, that if the President were of one ethnic group, the Vice President and the other members of the executive council had to be of other ethnic groups. It intended to preserve the distinctions between the groups, rather than mix up the whole thing.

I did that and I went out to several of the meetings and worked with General [Wesley] Clark and others about the mass graves and [Eduard] Shevardnadze and the bombings and so forth, and the boundary lines around Sarajevo. Looking backward, I think that the general consensus now is that what we did in Bosnia was the right way to deal with this sort of a crisis and what we did in Kosovo was also. Now, how you translate that to Iraq or Afghanistan is something else again. Does that cover it? Holbrooke has written up a lot of it, of course.

**Morrisroe:** Okay, I'll check it out then, thank you.

**Cutler:** I think it was called, *To Make a Peace* or *To Win a Peace*, or some such wordage.

**Riley:** Let me dial back and ask you how you got involved with the Salzburg seminar?

**Cutler:** More or less coincidence. You know enough about the origin of the seminar itself. Most of the faculties, at least of the law sessions that I was involved in, were academics. Carl McGowan, who became a judge here, initiated the idea of inviting some practicing lawyers to come and take part.

**Riley:** That's to an annual session on American law and legal institutions.

**Cutler:** That's right. I did that and then I was invited to join the board. I became chairman of the board, and then we picked a good president who knew how to raise money.

**Riley:** How did you settle on Olin [Robison]?

**Cutler:** That's the fellow we picked. He was good at raising money, although the deficit today is probably as big as it was in my time or bigger. He raises us a lot more money. Instead of a \$1 million a year budget, it's probably \$10-15 million.

**Riley:** Olin likes to tell the story that he came in and after he had examined the original books he said, “Lloyd, you lied to me, this a lot worse than I thought it was.” Is that your recollection of how that meeting happened?

**Cutler:** Well, I wouldn’t use the word “lied”! [*laughter*]

**Riley:** That’s Olin’s word.

**Cutler:** I answered all of his questions.

**Riley:** There are other commissions here that we need to ask you about. Some of these we talked about in advance and you said there wasn’t much of a story to them. We’ll probably skip those, but there were some that you identified as being relatively more important to your thinking and your role. One of those is the Commission on Federal Election Reform, which was organized by the Miller Center. You should tell us how you became involved in that.

**Cutler:** Well, it was Phil Zelikow who got us interested in it. With Phil’s help we went to Carter and Ford and they endorsed it. We put together a good commission and we got that financed, I believe that one was financed privately, that is, from the major foundations. Despite what looked like an irreconcilable dispute between Republicans and the Black Caucus, we put out a report that actually got enacted into a statute. That carried out the basic goal that if you made an effort to vote, your vote would be counted. If you were not registered in a particular district where you wanted to vote, you could at least file a provisional ballot.

We got that through finally with the authorized appropriation of \$3-4 billion to start out with. It got endorsed by the Bush administration and it finally went through Congress. It’s a working statute that exists today. I don’t think the full amount has been appropriated. Finding the money was very important because most money on elections gets spent by the counties. The counties have to build the roads, they have to run the schools, and they don’t have much money left over for election law expenditures. What we’ve done in effect is earmark money that they could use only for that purpose.

**Riley:** What were the thorniest issues that you had to contend with in the internal politics of the commission?

**Cutler:** One was who would supervise violation of the civil rights laws, whether that should remain in Justice or should it be carried out by the existing Federal Elections Commission, or whether it should be put in the hands of a new agency created by the new statute. We were in favor of the last of the three. The Black Caucus and a lot of liberal representatives were very much in favor of keeping it in Justice. We prevailed on that.

The other really thorny issue, which you would think is relatively minor, is whether convicted felons would lose their right to vote. Many people felt, including President Carter surprisingly, that if you’ve served your time, you should have your civil rights, including the right to vote, restored. We prevailed on that in the end. The Black Caucus was against that too. I mean, the Black Caucus—



**Riley:** Was in favor.

**Cutler:** Was very much in favor of the right to vote. Of course we have to deal with the 13<sup>th</sup>, 14<sup>th</sup>, and 15<sup>th</sup> Amendments, which did take away the right to vote from people who had joined the rebellion.

Another we haven't talked about, or two more, three more really. One is the job that Howard Baker and I did for the Secretary of Energy about proliferation controls with the Russians, which we did I guess about two years ago, three years ago. That was government-financed. Then we set up a commission to deal with this problem of the hole in the Constitution that I've written about, about what happens if 218 Congressmen are killed or incapacitated. That's privately-financed.

**Riley:** Right.

**Cutler:** And then there's a National Academy of Sciences study on privacy in the information age, of which Bill Webster and I are co-chairs. That's ongoing and that will go on for another year or so.

**Riley:** Going back to the Continuity of Government Commission, what are the thorny issues, what were the thorny issues that you had to deal with in that case?

**Cutler:** We're still dealing with them. But the thorniest issue is that the definition of a quorum to do business in Congress is built right into the Constitution, a majority of the members, with a couple of exceptions like adjournment from day to day, compelling the attendance of absent members, all of which support the theory that those are the only cases where you can do business with less than a majority. If you can't do business in the House, the government's paralyzed. The Congress as a whole cannot function. You can't declare a war, you can't appropriate money for military or other purposes, you can't appoint or confirm judges, you can't make treaties. We'd be literally unable to cope with another successful 9/11.

The Senate fixed this problem for itself back when we adopted the 17<sup>th</sup> Amendment, calling for the direct election of Senators. They put in a provision saying that the Governor of the state could appoint temporary Senators to fill the vacancies until the election is held. The House has been asked several times to do that and has refused every time. There are some legitimate reasons for refusing.

**Riley:** You say it's been asked several times. That's subsequent to the—

**Cutler:** Subsequent to the 17<sup>th</sup> Amendment.

**Riley:** The 17<sup>th</sup> Amendment, yes.

**Cutler:** And the most recent being the time of the Cuban missile crisis, even though we faced the threat at that point of a nuclear attack on Washington. You can see why Congressmen would object to this; in the first place it's like making your will. Secondly, if party control in the state

legislature or the federal legislature is very close, very close margins, if you let the Governor make the appointment and he picks a member of his own party, that may change the balance of power in the legislature, either state or federal. Do you want to give the Governor that power or do you want to restrict his power of appointment?

For example, to say that the replacement has to be of the same party as the member who died, or would you switch to what the French do, actually, and that is if you are elected to the Assembly and then you are appointed to the Cabinet, under French law just like our law, you have to give up your seat in the legislature. What the French do is, when someone is elected to the legislature, he designates a person or a list of several people to replace him if he's later picked for the Cabinet. So that's another way of going about it.

Then there's a whole totally unresolved problem of what happens not if somebody is killed, but temporarily incapacitated, unable to get to Washington, in a hospital with two broken legs or some such thing, and how do you deal with incapacity. We do a very bad job of that. We need a way of fixing it.

We've come up with a Constitutional amendment that would say in essence that if a certain number of members are killed and there is no quorum, then the Congress can take such steps as may be necessary to provide for a lesser quorum. Then add on the provision that is in most recent amendments, saying that Congress can enforce this amendment by appropriate legislation. That way, if we make a mistake, you can fix it with another statute rather than having to do a second Constitutional amendment.

**Riley:** But the ratification process becomes slightly more complicated because of the vagueness of what this actually does.

**Cutler:** Right, right. It's a very complicated issue, but there are so few things we can do about what's happening to us. This is one that we really need to do, this we can do.

**Riley:** Questions? Why don't we take about a five-minute break.

**Cutler:** Fine.

**Riley:** Then we'll come back and we've got a couple of hours left, maybe we can get into a couple of more general questions.

[BREAK]

**Cutler:** —the Department of Defense commissions that have been set up, one to deal with trials before military commissions. And the other to deal with so-called Total Information package, Admiral Poindexter figures in on this. The Defense Research Agency developed software that will enable a search of everything about you if you were suspected for one reason or another of being a terrorist, or having an Arab involvement, or knowing somebody who did. They can look

up everything about you. [Donald] Rumsfeld has appointed a commission on that second point, about this Total Information, of which Newton Minow is the chairman. Floyd Abrams is a member, I'm a member, Griffin Bell is a member, Zoë Baird is a member. Our function really is to make some recommendations about how they can carry on what they're doing in a way that it doesn't interfere improperly with civil liberties. We're just getting started.

**Knott:** Is this the Carnivore system or is this a different—?

**Cutler:** Well, Carnivore is one of the ways in which you can assemble information. The real problem, two problems. One is how do you avoid duplications. If you've ever looked yourself up in Lexis/Nexis or Google or one of the other search engines, you'll find all sorts of junk in there about other people who in one way or another got into your file, and you're probably in a lot of other people's files.

**Riley:** There was a Russell L. Riley affiliated with the Truman administration and there was a Truman Presidential Oral History. If I did a search on myself—

**Cutler:** It always turns up.

**Riley:** It comes up in a hurry because the Presidential Oral History—

**Cutler:** What I've found is there is another Lloyd Cutler living someplace in Nova Scotia with a wife and family I've never heard of.

**Morrisroe:** That's the story you're sticking with now. [*laughter*]

**Cutler:** And I suppose he's in my file.

**Riley:** The first thing that you mentioned was this advisory role to the Secretary of Defense on the trial of terrorists by military commission. What precisely is your role in this? You were relying on your own experience—

**Cutler:** You mean, why am I there?

**Riley:** Yes.

**Cutler:** Partly, I know Rumsfeld. He's a very good friend, he and his wife, from an earlier time in Washington, good friends of my wife. Partly that I was involved in the trial of the eight saboteurs, which was *the* famous military commission trial that made all the law on the subject.

**Riley:** Have you had meetings on this particular commission?

**Cutler:** Yes.

**Riley:** Can you tell us anything about that, or is it—?

**Cutler:** In the end the President made the initial determination that we can't have military commissions for non-citizens. He delegated to the Secretary of Defense the job of drafting a so-called military order to set up the rules for when you appoint a military commission, what its powers would be. Our job was to help draft the military order and that's been going on now for six months and it's all now published.

**Riley:** There are two to three things that we'd like to do in the time allotted to us. Some of this is to ask you some global, retrospective questions. But we haven't talked very much today about developments in your private practice in the last couple of decades. I thought that maybe this would be the appropriate time to ask you about that. Are there some notable things that have gone on? I guess growth must be the biggest thing.

**Cutler:** Very, very substantial growth and an effort, which I think has been mainly successful, to keep the sense of collegueship, spirit, and public service before us all of the time. As you grow and you acquire new people—not only ones you've trained yourself, but people with a special skill that you need for some corner of your practice, what we call lateral entries—as you acquire them, you run the risk that you never knew them quite well enough before you took them in. Or that some of those who look very good on paper are sort of rolling stones who left another firm and in due time will leave your firm. It's an aspect of law firm life that none of us like very much.

We think back romantically to the days in Britain when there was a rule in solicitors' firms that after you reach the 25 solicitors practicing in one office, you have to hive-off, so-called, and somebody would have to leave and start a new firm. That's how the major British law firms got started. Most of the other British firms you know about today are offshoots of Slaughter and May in one way or another. But there's no way to restrain growth. It helps in the sense because you have to make opportunities for these very bright young people, and the rest of us are getting older and older. Retirement is either impractical or we just live longer and want to stay active longer. Given that combination, rather than tell the youngsters, "You have to wait until the vice president in charge of so-and-so dies," you have to grow. You just have to create new business.

**Riley:** Has the practice also diversified?

**Cutler:** It has internally specialized. That is, for every law book of regulation or transaction in print, there are probably 100 or 1,000 times as many today as there were then. Lawyers generally get bored by over-specialization. They like their law firm, they like the other people. But if for example your specialty has become ERISA [Employee Retirement Income Security Act]—which is the federal agency that supervises corporate pensions and how they're administered and how the money gets invested, and also supervises the business of being an investment advisor—you get into something like that and you do nothing but ERISA work, you could go out of your mind.

**Riley:** *You* would, but is it universally true of lawyers?

**Cutler:** What is universally true is that lawyers generally feel that they are over-specialized and bored with their work. I think I told you before, we have a psychiatrist friend. I asked her what

percentage of her patients are lawyers. She said it used to be around 25 percent, now it's over 60 percent.

**Knott:** So can you give an ERISA lawyer a sabbatical? I mean, how do you do that?

**Cutler:** We all know how to use a sabbatical. If the older people in the firm set the example, we're all a combination of feeling we're indispensable to our clients, but what if we aren't? If you have a very strong client relationship, you think twice about turning it over to some younger partner while you go off on a six-month sabbatical.

**Riley:** Your policy here is a sabbatical every 10 years, is that correct?

**Cutler:** It's essentially every 10 years for six months, but then we change it around, so that if you have young children and you can't really take them out of school for six months, you could take it in three-month or two-month blocks.

**Riley:** Is it mandated that you take this sabbatical?

**Cutler:** You don't have to, but you're encouraged to. The spouses tend to enforce it: "They're going, why aren't you going?"

**Riley:** Exactly. When and where did you take your last sabbatical?

**Cutler:** I've had several. Most of the time I've taught. I've taught at Yale in the Law School and the School of Management. I've been over to Oxford three times.

**Riley:** And do you find those periods—?

**Cutler:** Oh, they're wonderfully refreshing. And the best part about doing that and turning over large chunks of your work to other people is, you find when you get back that the client is quite happy working with the new person. You can pick up some other thread, the next thing that comes along.

**Riley:** Do you—and again I'm posing this question out of ignorance—I'm interested in the kinds of pro bono work that you advocate. Is there a percentage of time that you insist that your people here spend in pro bono work?

**Cutler:** We see to it that the firm spends at least 5 percent of its working hours on pro bono work, which we do. We set incentives for the young people. Everybody is required—or not quite required, but expected—to work a certain number of chargeable hours. Different firms have different rules about what you do with pro bono work. The way we do it, if it's pro bono work, we supervise it in the firm. You could spend your whole year doing one major pro bono case and it would not hurt you. We've had very good luck and attention lately because the Michigan cases are our cases and the McCain-Feingold cases are our cases, the campaign finance cases that are all going to be argued in the Supreme Court next fall.

**Riley:** And Ted Killory was involved in this Texas case?

**Cutler:** Ted was just involved in this Texas case for, what is the name of the town? Portillo or something like that, in Texas. This is the one with the drug enforcement sheriff who turned in a number of blacks alleging that they had been caught with cocaine or something else, I don't know. Much of what he did was false and the Texas courts have now released all of these people after about 10, 12 or 20 years.

**Riley:** How do these pro bono cases come to you?

**Cutler:** They come from all sorts of sources. From the ACLU [American Civil Liberties Union], from the Lawyers' Committee on Civil Rights, from the NAACP [National Association for the Advancement of Colored People].

**Riley:** So the clients are directed to you?

**Cutler:** We have a pro bono administrator within the firm. As things come in, he decides or finds somebody to do it. If we find somebody who's interested and we think it's worth doing and it doesn't get us into some conflict situation.

**Ernst:** You mentioned in conjunction with the Lawyers' Committee and the Bork nomination that there was a dispute about whether the firm would take a stand on the nomination or whether it should be left to individual lawyers. That's a question that plagues a lot of different institutions and legal institutions too. We've faced that in the law schools. Are there some things that are important, some issues that are important for the firm to take a public stand on?

**Cutler:** I guess the answer has got to be yes on a lot of personal, ethical issues relating to law practice. That would be true. In the case like the Michigan case, one thing we use are briefs filed by institutions, universities, the military academies and others who apply affirmative action in one way or another, and feel if the Michigan case went adversely that it would hurt the educational and diversity goals of the institution. So I guess if we weren't counsel on the case, we wouldn't blink about having filed an affidavit on it.

**Ernst:** What we've been faced with is whether there's an excess—if the issue grows naturally out of the mission of the institution, then it makes sense for the institution to make a stand on that. So if you think that it's important for the law firm to be diverse, for the legal profession to be diverse, that would be okay.

**Cutler:** Yes.

**Ernst:** Bork wouldn't fall into that category?

**Cutler:** I don't think Bork could fall under that category. I'll give you another example, and that is there was a case in the Supreme Court relating to Vince Foster, the Clinton partner who died, and to Jim Hamilton, who was his counsel. The case involved whether the papers relating to Foster were still protected by the attorney-client privilege of Jim Hamilton, even though Foster,

the client, had died. A number of us filed briefs, which were I think over the firm's signature, saying that we had always understood that the lawyer-client privilege stood forever and survived death.

That's the kind of issue on which we might commit the whole firm. Another case involved the issue of whether, if you were in the government and you gave advice to the secretary of your department or to the President, whether that was protected by the privilege. A number of us signed a brief on that.

**Ernst:** You've written about the importance of the revolving door. You gave three cheers for the revolving door. An interview you gave in 1969 emphasized that. You said a lawyer is "just as useful in persuading companies and businesses to understand and accommodate themselves to the felt needs of the government ... as he is in persuading the government to appreciate and understand the needs of the business community." That may have been written in the shadow of the Nader exposés and attacks and all that, but it's pretty clearly something you believe generally.

**Cutler:** Yes.

**Ernst:** Could you give us some illustrations of that? I mean, it makes sense to me, but it may help folks to have concrete examples of how it would make a difference in a counseling matter, let's say, with a client.

**Cutler:** I think I gave examples in the articles by naming people who had entered the government, left the government, returned to private practice or business, re-entered the government five to ten years later. I tried to show how they benefited. They were much more able to advise people well and take care of themselves ethically if they had had both experiences, if they had been part of the government and they had been part of the private sector.

I think I made a mistake in at least one of my examples. I think I gave Clark Clifford as an example of somebody who never really was questioned ethically about anything he ever did, and then of course in the end he stumbled on the Pakistan Bank case. But the point, I think, is a very valid point.

**Ernst:** I wonder sometimes about the authority of lawyers with clients. I can understand why, when the Washington legal community is so small, and if you were a businessman and you wanted to know what you needed to do, there are just a few places where you could turn to, to really find out what you needed to do. So you would have had enormous authority in those settings. You would always retain authority because of what you've done in your life, but I wonder now, with the Washington legal community being so large, that if you were a businessman and you got advice from somebody you didn't like, you could go someplace else.

**Cutler:** You go someplace else. Or you'd be careful before you hire somebody, or your general counsel would be careful, to go to the person he had been told was the best in the business.

**Ernst:** Maybe not for you, but do you think the authority of lawyers, the ability to invoke their knowledge of government, has weakened as the size of the legal community with that knowledge has expanded? I mean, you could go to your general counsel now.

**Cutler:** Yes, but lawyers are given a number of things for which you can be sued as an officer or director. Making sure your lawyer has vetted out what you are doing is so important. Lawyers have a very strong voice. If a lawyer says, “Maybe you can do this legally, but you’re going to get into trouble if you do it,” you won’t do it. If you have to report to the board that that’s what the lawyer is saying, they won’t do it.

**Ernst:** In one TV interview or something—I think Steven Brill was involved in it—you mentioned that you had received an offer to go in-house at a corporation, but that you declined it. It came up in passing in a conversation. I wonder if that was ever anything you would have actually seriously considered in your career, going in-house after creating this institution with your name on it.

**Cutler:** I did consider going to work, not as a lawyer but as an international businessperson for a major American company. I didn’t do it. That was before we formed the law firm. Well after we formed the law firm, I got an invitation to be general counsel of one of the major automotive companies and I didn’t do it.

**Ernst:** Was it something you had to think about?

**Cutler:** Yes, you think about the money! On the other hand, you would have to retire early. You could join the company one day and three days later somebody makes an unfriendly acquisition, which you fight and they succeed, and you’re back out on the street again.

**Riley:** That’s a pragmatic answer. I wonder if there weren’t other factors in place.

**Cutler:** There were a lot of lawyers, including a lot of members of our firm, who’ve gone to major companies like Citicorp. We must have three or four lawyers in senior positions in Citicorp. We had that many at ABC, the television network. Just what I would have done if multimillion-dollar bonuses and options were available, God only knows.

**Ernst:** Did you see just how much the environmental and health and safety regulation was going to expand the work for lawyers?

**Cutler:** Yes, I wrote about it, in fact, and it did expand the work enormously. Now securities law is doing the same thing.

**Ernst:** Political scientists have a problem with that legislation, which is that they don’t understand why business didn’t fight it. They don’t understand how the initial bills got passed. It seems like an impossibility.

**Cutler:** You’re talking about dumpsites or waste sites?



**Ernst:** Yes. There's a story out there that they just didn't see it. They were attuned too much to industry-specific regulation and they weren't quite prepared for how significant regulation that would go across the economy was. You wonder, because lawyers are supposed to be their early warning devices.

**Cutler:** They might have seen it and had been unable to do anything about it. It is the suburban, middle-class issue. Actually, EPA was started by Richard Nixon, before we finished tearing him into little pieces.

**Ernst:** What about the other side of it, the deregulation movement? In one piece, deregulation was starting and you were somewhat skeptical about it. You could see there were some advantages to it, but that it could go too far. What I'm wondering is specifically how it would affect the practice here. Has it resulted in less work for lawyers, more work for lawyers?

**Cutler:** If you were to look at, let's say, regulation of broadcasting, we went from total regulation, licensing of every station, program publications of somebody who got a government license, and so forth, to total deregulation. More lawyers are involved in litigating deregulation today than were ever involved in total regulation.

**Ernst:** I've heard Ed Berlin made the argument that that being true, lawyers were trained and all of their expertise was in regulation and, say, getting a rate increase or something. That they got into trouble because even though there is still legal work, it was of a different nature: now you have to figure out how to structure long-term contracts for government or something like that. And that the profession fell down a little bit because they knew how to train regulatory lawyers, they didn't know how to train deregulatory lawyers.

Have you seen anything comparable to that? You know, if you're a lawyer for Delta, you are against deregulation, it looked like to me when I read about the general counsel, because this was the world you were stable in, so those people didn't want to make the changes. I wonder if your firm, whether you're more agile on your feet and you're going to learn how to work in this new environment?

**Cutler:** You help your client by foreseeing what is likely to happen, predicting what is likely to happen, but by and large you'll argue the side that your client is on, unless there are no reasonable arguments to support it. The point I was trying to make, that we would never go to complete deregulation, is that you could argue that drugs would be just as safe and just as effective if you had no regulation and you left it to the marketplace, but that we would never do that. We know that drugs can be made shoddily or can be harmful, or have side effects or be badly manufactured. We want a regulator in place to govern all that. There are times when we want the regulator to go easy and allow more innovation and there are times when we want the regulator to step in and stop something. On the whole, we want regulation.

**Ernst:** Okay, that's what I have so far.

**Riley:** Okay. Did you have a follow up, then?

**Ernst:** A different kind of question.

**Riley:** Okay, go ahead.

**Ernst:** I was the one person who didn't listen to this transcript, but somebody on this calls you "an old New Dealer?" Was it [Nicholas] Katzenbach or Johnson himself?

**Cutler:** I think Johnson.

**Riley:** I think Johnson.

**Cutler:** "Is he an old New Dealer?"

**Ernst:** And it seems to me that you wouldn't really welcome that characterization. I just wanted to give you a quote that stuck out to me in an interview that you did in 1969. You were asked what JFK's assassination did. You said, "Well, it threw the leadership of the country back 12 years." You said, "All of JFK's advisors were 43 years or younger," and that Johnson naturally turned back to people from his generation, and he mentions Clark Clifford. Then you also say, "He went back to his friends like Justice Fortas," and of course he did.

But I sort of stopped with that, because Fortas is only seven years your senior and Yale, veteran, chief, went there young, whiz kid, if it matters, Jewish. Yet it seems like you really felt you were in a different generation, not just that you saw the world differently from Fortas—you're a different person from Fortas—but that you had a different outlook on the world. It didn't seem to me like it was the typical New Dealer. Where's the line, if there's a line?

**Cutler:** I would think that the point is a valid point across the board. It's certainly true that the Kennedy group were younger people. I was then the same age as everybody, as JFK was. Their staffs were younger, but there would be an occasional older person thrown in who would be, I guess, the exception to the rule. I'm trying to think. It's hard to think of anybody really older in his administration. Johnson had a lot of young people, in addition to old people. Johnson had Joe Califano.

**Ernst:** What did people expect from the agencies and for regulation from JFK? I mean, when you think of people around him, I guess you're also thinking about people in the White House. But there is that whole energizing of the commissions that happens. Did you expect, as a Washington lawyer, that the agencies would be doing different things during JFK's administration than they had been doing under Eisenhower? That it would be more exciting to be a regulatory lawyer?

**Cutler:** I think we expected he would adopt different, more welfare-oriented policies than the Eisenhower administration. I mean, there's a good point about the generations. The Eisenhower administration was a good deal older than the Kennedy people. It's always refreshing to have a change in the personnel of the government. Almost the worst thing is the rigidity of a civil service, or as in Europe, a permanent civil service so that when there's an election and one party

loses out and another comes in, barely 5 percent of the jobs change. Most of the bureaucrats are there doing the same thing, no matter which party is running the country.

**Ernst:** Is Manuel Cohen just the exception that proves the rule? I mean, I think you referred to him as the “Horatio Alger of the bureaucracy.”

**Cutler:** He’s the only one I know of who entered at the bottom rank of junior lawyer and came out as chairman of the Commission in the end. You might say the same thing about Wilbur Cohen, who started out at the bottom of Health, Education and Welfare, and ended up as the Secretary.

**Ernst:** I was just about to say, could you have done it at any other place other than the SEC? Just because of the prestige of the agency and the ability to recruit and recognize good talent.

**Cutler:** Yes, yes.

**Ernst:** But you just said, “Wilbur Cohen,” so—

**Cutler:** And it would depend on who was President. Johnson would love to do something like that. It’s like breaking a mold, putting the first woman on the Court.

**Riley:** I wonder if you can think back. In the course of the three interviews that we’ve done, there have been an awful lot of names that have come up of people that you have worked with. For students of Washington and American political history, who would be some of the—I don’t want to say “unsung heroes,” that’s not the right terminology—but are there people that you have worked with who are likely to be forgotten because they didn’t have a big public persona, that future historians ought to look back at and say, “Yes, this is somebody who really did have an influence on political life”?

**Cutler:** I’m sure there will be.

**Riley:** Are there any in particular that come to mind to you? People that you, reflecting back on your public career, that you were close to or that you knew had a great influence?

**Cutler:** Oh, sure. I can think of lots of people who I regard as better lawyers or better public officials than I ever was. Who had good lives but are not household names.

**Riley:** Are there any you care to share with us? I’m not trying to put you on the spot; it’s more of a general question, again, because what we are hoping to do is create a document that historians could look back on and maybe pick up some threads for their own research.

**Cutler:** I hesitate, really, primarily because I pick out, say, three people in this law firm and there are 300 in the law firm.

**Riley:** I understand.

**Cutler:** Or some other law firm.

**Riley:** The question wasn't specifically restricted to the practice of law, it was more in a public policy area. Let me get you to think, then, comparatively across the administrations that you've witnessed up close. From your perspective, who was the best President that you've witnessed in Washington?

**Cutler:** I guess I would say FDR. He certainly had greater opportunities. True, he was on every side of every issue over time, but he got us out of the Depression, he got us successfully into the war in time to win it. That took a lot of doing. I'd say the same thing, or at least there was the potential, with JFK. We'll never know. Truman certainly had his good points. There's a very good book, you know, by Robert Dallek, called *Hail to the Chief*, about the last six or seven Presidents and what qualities made them good Presidents or bad Presidents or average Presidents.

**Knott:** If you had to pick a Republican, who was your favorite?

**Cutler:** Among the Presidents?

**Knott:** Yes.

**Cutler:** How far back can I go? *[laughter]* If I might go as far as Teddy Roosevelt, I'll do that.

**Riley:** You spent a lot of time in the foreign policy area. What about Secretaries of State? Who among the Secretaries of State that you've witnessed do you think best filled that role?

**Cutler:** I think Kissinger did it very well. I think Vance did it extremely well, but he didn't like to appear on television. He was of the old New York school. I think on the whole we've had good Secretaries of State. I would say Henry Stimson made a great Secretary of State, although he's the one who stopped the code-breaking effort against the Japanese, as you know, and announced that "gentleman do not read one another's mail."

**Riley:** If you look back on your own—I'll include this in both public and your private—

**Cutler:** By the way, I put [Dean] Acheson very close to the top of all of the Secretaries. And [George] Marshall.

**Riley:** I think that would probably be reflected in some your earlier comments. In your own personal career, both publicly and privately, what would you identify as your greatest accomplishments?

**Cutler:** Longevity, survival. Maybe starting a law firm whose name will endure beyond your own death, your own generation. I mean, I don't think I've accomplished a great deal in that sense. I do think the opportunity to divide your life between public service and private work is very important and it gives great satisfaction in the end.

**Riley:** In the public dimension, are there certain things that you look back on, maybe not as great accomplishments, but could you think back to what gave you the greatest sense of satisfaction out of what you had done?

**Cutler:** I would put the Iranian settlement, helping to get Steve Breyer picked to be on the Supreme Court. There are very few pure satisfactions. There are wins and losses and there are survivals. There are problems that just never get resolved.

**Riley:** Are there particular disappointments that you look back on and you think, *That's one that I really wish I had a second crack at?*

**Cutler:** There are a lot of things I wish I had done somewhat differently that I did. One of which is whether we could have or should have allowed Fiske to continue and should have protected his right to continue.

**Riley:** I'm sorry?

**Cutler:** Whether we should have, when we renewed the independent counsel law, whether we could have gotten a provision in, whether we should have, saying that Fiske goes on with his work.

**Knott:** You particularly heard it in the Clinton years, but it persists to this day that there is a kind of viciousness in the political landscape that wasn't there before. It's partly fueled, so the argument goes, by things like talk radio and instant communications and so forth. Does that sound accurate to you?

**Cutler:** Yes, it does. In Congress in particular, the kind of camaraderie among members, especially in the House, is all gone. And part of that is the huge growth in staff. They don't see enough of one another, except they might sit together in a hearing where they take turns asking a five-minute question. But there are no bars to sit around and have drinks in. They go home every weekend. They just don't have the fellowship that they did. The Senate, because it's smaller, is somewhat better on that. The Senators find that life there can be very unsatisfactory. Of course, every Senator now has a staff, counting his committee staff and his personal staff, of 40 or 50 people.

**Knott:** So one change that you might recommend would be to reduce the size of these congressional staffs?

**Cutler:** I hate to make a rigid rule about that. Actually the New Jersey Senator who came in, who later became the head of the Salary Commission, made a proposal that governmental or congressional salaries ought to be increased. He said the way to do it is to allow, say, a \$10,000 increase for every \$20,000 by which you reduce the cost of your staff. That might have worked.

**Knott:** You wrote that famous piece 20 years or so ago in which you advocated some changes moving more in the direction of a parliamentary system—and maybe you guys have already talked about this in earlier sessions—but have you modified your stance on that?

**Cutler:** I never did believe that we could go to a parliamentary system.

**Knott:** Right, but there were certain things—

**Cutler:** All we were really arguing about was how we surmount the tendency of our system to create a divided government. We'd had one party in control of the White House and the other party in control of half or all of Congress for the majority of the time in the 20<sup>th</sup> century.

**Riley:** I think Steve's question is whether events subsequent to that time have caused you to rethink the basic arguments that you made in that article. Or do you still—?

**Cutler:** I feel about the same way I felt about the article. I did not advocate in any article any constitutional changes, or at least they were very slight ones. One was whether, in the event of a gridlock, whether the President would have the power or the Congress would have the power to dissolve and call for a new election. It works very well in the parliamentary system, but it's probably something we couldn't handle because we can't run an election in 30 days with our primary system and everything else. Most political experiments like that turn out to have side effects that you don't realize until centuries later. Look at the recall provisions for the California Governor and what a mess that's going to be.

**Riley:** Are there other things that you've seen that work in foreign settings that you think might be useful as experiments here?

**Cutler:** One is the use of a Prime Minister. We have the sole executive. There are other countries that have figurehead executives. There are some that have active executives, like France. But even in France, the President has virtually exclusive power in foreign affairs. In France, he can designate and the Assembly can approve a Prime Minister who worries about the legislative program and who has to take the blame if the economy goes south. Something like that could conceivably work for us, but it's very difficult to make it work when you have a bicameral legislature and a different party in each House.

**Riley:** I wonder if you might comment on—I don't really know how to phrase the question—but it relates to the Democratic Party. You've had a long-standing commitment to the Democratic Party and it's a different party now than it was when you first came to Washington. What changes in the party do you find particularly favorable? What changes in the party do you think have been not so good? Is there is a particular direction you'd like to see the Democratic Party move in, in the future?

**Cutler:** I don't think there has been that much change, really. The ethnic blocks, the labor blocks tend to stay where they were. To me, what the party needs more than anything else is a sense of fiscal responsibility for the generational gap. They'll probably face funding pension plans, for example, and Medicare, and it really is a serious problem. We are rapidly passing the point where we can do anything effective about it. We're going to end up financing all sorts of entitlements just out of the ordinary budget. That way we'll run up huge deficits. We don't do enough about that. That's more important than anything else.

**Riley:** Was it your sense that President Clinton was moving in the right direction?

**Cutler:** On economic matters, yes. And Bob Rubin had a lot to do with it. The President is the one who had to sign off on the fact that we won't fund particular things people want to do, but we will balance the budget. And he did it.

**Riley:** Exactly, but your sense says that that didn't take within the party at-large, that there is still not a sufficient devotion to that kind of behavior within the party at-large.

**Cutler:** That really depends on who the President and his Cabinet are. I don't think there is any cosmic change in the parties. We go through this periodically. Right now everybody is saying the Democrats are dead. Thirty years ago they were saying the Republicans are dead. They come back. That's one of the virtues of the system. Any party that stays in power too long develops weaknesses and resentments and corruption of one kind or another, that just requires a change.

**Riley:** I want to get your reaction to the anti-tax element of contemporary American politics. It seems to me that we've been through a period in at least—it was certainly very prominent during the early part of the Reagan years, but it's just remarkable how significant the anti-tax component of contemporary American politics is. My reading of American history, anyway, suggests that this isn't something that has been nearly as prominent a factor during the period of time that you had been in Washington. Do you have any thoughts about that? Am I overstating the case that we always had a powerful anti-tax?

**Cutler:** We always have. Usually Presidents have resisted it. Certainly this President is not resisting it. In Reagan's case, you had a tax cut, but you also had a huge tax increase. I don't subscribe to the notion that our essentially two-party system is changing. I think it's going to stay that way.

**Riley:** Okay. So you're not someone who is overly concerned about the possibility of a fragmenting of the political order with the advent of enduring third parties?

**Cutler:** That's right, that's right.

**Riley:** Okay. I suppose that the [H. Ross] Perot phenomenon had some people worried about that early on, but it didn't—

**Cutler:** It faded because of his own personality. Nader really faded because of his own personality. Nader was the one really who elected Bill Clinton twice. He probably elected Bush over Gore.

**Riley:** Which does suggest that there is a significant component in the electorate that finds some kind of alternative to the two major parties appealing enough to disrupt the standard procedures.

**Cutler:** You have to have a very close election for that. You can have a third party that will get 5 percent of the vote, but 5 percent of the vote usually doesn't matter. Certainly in 2000 it mattered.

**Knott:** You've known a number of Presidents, some better than others. Is there any one distinctive trait that these men possessed? Is there is a presidential personality?

**Cutler:** Yes. More than any other one thing, they want it very badly. They want it more than almost life itself. You can devote your entire life to it once you get bitten by the bug. We need it. To make the system work, we need it.

**Knott:** Was Jimmy Carter different from the rest of the group, in that sense? My impression from afar is that the answer to that is yes, that there was something different about Jimmy Carter from some of the others, both Democratic and Republican Presidents in contemporary times.

**Cutler:** He was different in a sense that it was a bad time to be the President. He was different in the sense that he lacked the physical attributes that we associate with the President. If you were going to do central casting for the President, you'd come out with somebody who looked like Gary Hart, or Clint Eastwood, or Ford or somebody like that. But he had a rock-like integrity and I think on most of the major issues he was right. I don't know whether I went into it earlier, but one of the big nuclear armament issues was the neutron bomb. The neutron bomb was going to be used on the battlefield in Europe. It would kill personnel on the battlefield, but not spread a poisonous cloud over the whole world. We had developed it and we knew the Russians were developing something like it.

We went to great effort to persuade the Europeans to allow us to deploy the neutron bomb all over Western Europe. We reluctantly, or [Helmut] Schmidt reluctantly went along for the Germans, the Dutch went along, the Italians finally went along. At the very last minute after we had done all of this arm-twisting, Carter came down one morning and said, "I've changed my mind. I talked it over with Rosalynn last night and I've decided we don't need it. It's too dangerous and it could get into the hands of the wrong people." Looking back, he's probably right about that. I mean, think of how nervous we would be if we'd made a few thousand of those neutron bombs and they disappeared from the German inventories. Or just a few did.

**Riley:** You tell this story because you think it's rare for Presidents to ultimately admit that they're changing their minds?

**Cutler:** Right. And in that case you do it not as a matter of expediency, but deep down as an ethical point, you think you wouldn't do it. It's almost like triggering a response to a nuclear weapon. If our warning signs indicate that there is a Soviet missile on the way, are we are going to launch a counter-missile to hit Moscow before we're wiped out here? That's the kind of gut issue. It's not a political issue, it's how you are inside.

**Riley:** We've asked you an awful lot of questions. What are we missing? Can you think of anything that we have not gotten into?



**Cutler:** I'll think of a lot of things after I look at it.

**Riley:** If you do that and there are areas that haven't been thoroughly covered, then you can either make additions to the transcript yourself, or if you want me to sit down with you with a hand-held recorder at some point, then I'd be happy to come back and make sure that everything is fleshed out.

**Cutler:** Let me look at these things about the law firm.

**Riley:** Okay.

**Cutler:** Do you intend to talk to anybody else for this history?

**Riley:** We've discussed it and I don't know that we will consider that in the scope as it stands now. Part of this is just a manpower problem, because we're devoted to doing three presidential projects.

**Cutler:** And if you did that with everybody who does one of these, where would you stop? *[laughter]* This is a recent article about the law firm you might want. It has to do with a partner that we lost and others that we gained, but it's very complimentary to the law firm.

**Riley:** Okay, good. Well, we'll make sure that this is copied, and a copy of it is appended to the interview transcript. Also, all of these are on the file, I take it. You're moving into a new space?

**Cutler:** Yes.

**Riley:** How soon will this happen?

**Cutler:** Between now and 2006.

**Riley:** The building is already standing?

**Cutler:** Well, there are three buildings all on a single square block opposite the World Bank. Two of them will remain and we'll move into to use first. The other one will be torn down and rebuilt. [Ed. Note: It is now called Lloyd N. Cutler Building.]

**Riley:** I see.

**Cutler:** I wish we didn't have to do it.

**Riley:** I'm sure.

**Cutler:** This one is more internal to the law firm; I don't think I can share this.

**Riley:** Okay. Well, what I would say is that also, as we're going through the process of getting the transcripts to you, think about whether there are additional documents that would be helpful

for a future researcher to have in relation to understanding your work and your career in the firm, that wouldn't otherwise be easily available. Anything that would show up in a Lexis/Nexis search, we don't really have to worry about because we would assume that would be kind of first stopping point for anybody who was doing research. But if you've got internal documents in any way that you wouldn't mind appending to this, we would certainly treat these with whatever degree of confidentiality you would wish. But that's the kind of material that a researcher otherwise wouldn't have available.

**Cutler:** Yes, well I have to think of that.

**Riley:** Hold on to that then. I do want to say, on the record, how grateful we at the Miller Center are that you've given us all of this time. It has been a fascinating and interesting experience for me and I think I can speak for my colleagues here. More importantly, I think it will be an extremely useful document for people who want to know something more about Washington and Washington lawyering during the period of time that you've been here. On behalf of those future scholars who will have the privilege of poring over these pages, I want to say thank you also.

**Cutler:** Who else do you have in this set of personal—?

**Riley:** We don't really have a set of personal interviews.

**Cutler:** This is a pioneering effort?

**Riley:** It absolutely is a pioneering effort, because I don't know that there are—well, obviously there are other people out there who have had long, distinguished careers, but yours, because of our prior relationship with you, we wanted to pursue the possibility of doing something like this. It's conceivable that at some point in the future, if the resources are available—and that's really the biggest problem—I think these kinds of interviews can be extremely valuable historically. But because our primary emphasis is on presidential oral history right now. I'm confronting the possibility of doing 100-150 Clinton interviews over the next four or five years and Steve is working on finishing up our projects on both Bush and Reagan.

It's difficult for us to divert a great deal of energy into biographical oral history, but my recommendation, based on our experience here, is going to be that we think about doing more of these. That we try to identify the additional resources necessary that would allow us to do this, because I think you get so much in the way of continuity and richness in the record by doing this. There are other folks who have had long and distinguished careers in Washington who would be of great benefit to all of us to make sure that their recollections are on the record. So I think we want to do more of this and I'll recommend that we do more this, but it's just a question of making sure that we've got the resources necessary.

**Cutler:** Sure. Well, I very much appreciate your coming here and sparing me that trip.

**Riley:** It's not a bad trip.

**Cutler:** I guess we're proving once again how much people like to talk about themselves.

**Riley:** It's been a real privilege for all of us and we're grateful.

**Cutler:** Thank you very much.

**Riley:** Thank you, Mr. Cutler.

**Ernst:** Thanks.

**Knott:** Thanks.