LAWYERS IN CONGRESS

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I

INTRODUCTION

When academics examine the role of the government lawyer, they tend to focus on the conflicting duties of members of the Executive Branch. Some question whether prosecutors are using the power of the state in a fair manner.[1] Others write about the competing loyalties and incentives of the lawyers who work for the federal agencies that regulate private industry.[2] Still others write about the tension between the partisan goals and professional responsibilities of lawyers who serve in the high-profile ("glamorous" would be too strong a word) political positions in the Executive Branch, such as those who work in the White House Counsel's office,[3] the Office of Legal Counsel of the Justice Department,[4] or, most famously, the Solicitor General's Office.[5] The legal difficulties of President Clinton are sure to provoke yet more examination—this time on the question whether government lawyers may represent the President in a personal as well as an official capacity.

Curiously, these academics commonly ignore what the Framers considered to be the most dangerous branch of government: Congress.[6] A quick check of various electronic databases reveals very little to no legal scholarship on the

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1. *See, e.g.*, Carol A. Corrigan, *On Prosecutorial Ethics*, 13 HASTINGS CONST. L.Q. 537 (1986); Monroe H. Freedman, *The Professional Responsibility of the Prosecuting Attorney*, 55 GEO. L.J. 1030 (1967); H. Richard Uviller, *The Virtuous Prosecutor: In Quest of an Ethical Standard*, 71 MICH. L. REV 1145 (1973).

2. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, *Reflections on Professional Responsibility in a Regulatory State*, 63 GEO. WASH. L. REV. 1105 (1995); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293 (1987).

3. *See* Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17 (1995).

4. *See* Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

5. *See, e.g.*, Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CAL. L. REV. 255 (1994); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799 (1992).

6. This is not to say that there is a complete void in the study of the Congress. For example, Professors Ted Kaufman and Christopher Schroeder have recently established the Center for the Study of the Congress at Duke Law School.

role of lawyers who work in the legislative branch. This neglect may occur for several reasons. Congress is a notoriously difficult subject for legal scholars to grapple with. When Congress passes a statute, it does not issue documents like judicial opinions that provide relatively clear decisions, explain the authority of the decisionmaking body, and set out the reasons for the decision. Unlike the Executive Branch, Congress does not leave behind a trail of memoranda, briefs, or records of meetings that allows the legal scholar to reconstruct decision paths and thought processes. Congress is home to a cacophony of people, issues, arguments, reports, hearings, speeches, and events, in which it is often difficult for an outsider to determine what has happened, why it has happened, and sometimes when it happened. A legal scholar researching Congress sometimes must feel like the head of the KGB once did while gathering intelligence on the United States: When the subject under study makes so much noise, it is difficult to tell what is important and what is not.

Legislative lawyers also may receive little attention because of the image of Congress in legal academia. Public choice scholars, for example, view Congress as a great auction house, in which legislation is sold to those narrowly focused, rent-seeking interest groups that channel the most money into legislators' campaign coffers.[7] Under this approach, lawyers serving in Congress would play the role of glorified sales clerks or, if they have risen to higher levels as congressional aides, personal shoppers. Others view Congress as a willful, unpredictable, and even arbitrary institution that lacks the procedural protections and decisionmaking neutrality possessed by the executive or judicial branches. Further, according to this view, legislative processes should be structured to make legislation difficult to enact, or at least designed in such a way as to promote deliberation.[8] While one might expect some discussion on the role congressional lawyers can play in structuring legislative process to enhance deliberation, little attention has been given to this topic, perhaps because the legislators and even their aides are seen as the willful, self-interested actors that the legislative processes must control. Even in positive political theory literature, which seeks to model the strategic interactions of goal-oriented legislators,[9] congressional lawyers continue to receive scant attention.

Whatever the reason, scholarly neglect of attorneys in Congress is unfortunate. The role of congressional lawyers is richer and more complex than the standard story about the executive branch lawyer's internal tug of war between politics and public service. Because of the unique institutional function of

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7. *See, e.g.*, DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 12-17 (1991); Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31 (1991); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

8. *See, e.g.*, Frank Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Symposium, *Discovering the Republican Civic Tradition*, 97 YALE L.J. 1493 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

9. *See, e.g.*, William Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992).

Congress in our political system, the functions and duties of the lawyers who serve in the legislature also are unique. To illustrate these features of the congressional lawyer's role, I will discuss different events that occurred in Congress during my service as General Counsel of the Senate Judiciary Committee from 1995-96. I had watched the November 1994 elections as a law clerk to Justice Clarence Thomas during the October 1994 Term, an eventful term in its own right.[10] My work in the Senate began just as the Contract with America was sweeping through the House and was meeting with resistance in the Senate, and it ended just after Senator Bob Dole resigned as Majority Leader and President Clinton appeared to be on his way to reelection. During that period, Senator Orrin G. Hatch of Utah was chairman of a committee of ten Republicans and eight Democrats—some freshman Senators elected in 1994; others had been in the Senate for several decades. While I served as General Counsel, the Judiciary Committee handled the Partial-Birth Abortion Bill, the Property Rights Bill, the habeas corpus reforms of the Anti-Terrorism Act, the investigations into Whitewater and what was later called "Filegate," and the criticism of President Clinton's nominees to the federal judiciary. In discussing some of these issues, I hope to demonstrate the unique role played by the lawyers who serve in Congress.[11]

II

THE LAWYER AS CONSTITUTIONAL ADVISER

A significant aspect of the congressional attorney's job is as constitutional adviser to a Senator, a committee, or both. The unique institutional function of Congress in our republican system defines the contours of its lawyers' duties in the same manner that the function of the Executive Branch shapes the responsibilities of executive branch attorneys. The latter experience a struggle between their loyalty to their President's political agenda, their allegiance to their agency or institution, and their duty to uphold the law, as passed by Congress, as interpreted by the judiciary, or as established by the Constitution.[12] Some scholars and Solicitors General, for example, have argued that the Solicitor General owes a primary duty to the Supreme Court, not to the President or to the Executive Branch, because of the special relationship between the Solicitor

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10. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995); Missouri v. Jenkins, 515 U.S. 70 (1995); Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); Miller v. Johnson, 515 U.S. 900 (1995).

11. I intend to discuss here only the role of the lawyer who serves as an aide to a Member of Congress, Committee, or the leadership. A different set of incentives and norms may inform the role of lawyers who serve Congress as an institution, such as members of the Senate Office of Legal Counsel, which is responsible for representing Congress in court. I also do not address here the role of lawyers who serve as Members of Congress, nor the manner in which their legal backgrounds may or may not affect their way of looking at these issues.

12. Numerous examples of this tension abound. For one firsthand account, see CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION (1991).

General and the Court and the Constitution.[13] Others maintain that, as a member of the Executive Branch, the Solicitor General must follow the constitutional and jurisprudential views of the President.[14]

A related question arises concerning the breadth of executive branch interpretations of the law. Since the beginnings of the Republic, Presidents such as Thomas Jefferson, Andrew Jackson, and Abraham Lincoln have argued that the Executive Branch has an independent, coordinate power to interpret the Constitution. Such a power is rooted in the President's oath to defend and uphold the Constitution, and his constitutional duty to "take Care that the Laws be faithfully executed."[15] As Thomas Jefferson forcefully argued concerning his position that the Executive Branch ought not enforce the Alien and Sedition Acts because he believed them to be unconstitutional, "[t]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch."[16] Based on similar reasoning, President Lincoln argued that the Executive Branch had no obligation to enforce *Dred Scott* beyond the parties to the case itself.[17]

The view that the Executive Branch has independent authority to interpret and enforce the Constitution is shared by many scholars,[18] but recently the view has gained ground that the Supreme Court's power to "say what the law is"[19] requires that judicial precedent bind the Executive Branch.[20] Basically, the Supreme Court articulated the same argument in *Cooper v. Aaron*;[21] it holds that the Supreme Court interprets the Constitution, that its decisions are law, and that, therefore, its decisions are entitled to supremacy and to enforcement by the Executive Branch. Others have argued recently that the other branches should obey the Supreme Court because it performs the function of settling

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13. *See, e.g.*, Lincoln Caplan, THE TENTH JUSTICE 232-33, 255-67 (1987). For a spectrum of views on the role of the Solicitor General, see Symposium, *The Role and Function of the United States Solicitor General*, 21 LOY. L.A. L. REV. 1047 (1988).

14. *See, e.g.*, McGinnis, *supra* note 5, at 802-03 (reviewing FRIED, *supra* note 12).

15. U.S. CONST. art. II, § 1.

16. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *reprinted in* 9 PAPERS OF THOMAS JEFFERSON 311 (Paul C. Ford ed., 1897).

17. *See* Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *reprinted in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215, 221 (1989).

18. See most recently Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). *See also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 263-64 (1962); EDWARD S. CORWIN, COURT OVER THE CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 15-17 (1938); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

19. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

20. *See, e.g.*, Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991); *see generally* Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993); Symposium, *Elected Branch Influences in Constitutional Decisionmaking*, 56 LAW & CONTEMP. PROBS. 1 (Autumn 1993).

21. 358 U.S. 1, 18-19 (1958).

contested issues,[22] although this view seems to ignore the purpose of the separation of powers in guaranteeing that no one branch of government holds such final, authoritative power.

While congressional lawyers may undergo the same internal conflict as those in the Executive Branch, the Court's claims for judicial supremacy may have less force as applied against them. Congress' function as the lawmaking, rather than law-enforcing, branch requires attorneys in Congress to think more creatively about law. As is often the case, Congress must interpret the Constitution in areas that the Supreme Court has never and may never reach in the course of deciding cases or controversies.[23] Fulfilling its constitutional duty as the voice of the people inevitably forces Congress to test the outer limits imposed on its powers by the Constitution. As James Madison wrote in *The Federalist*, the legislature

> is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department, that the people ought to indulge all their jealousy and exhaust all their precautions.[24]

Attempting to remain faithful to the will of the people, Congress at times will articulate a vision of the Constitution that is at odds with that held by the Supreme Court. Perhaps the most notable example was the New Deal Congress' efforts to pass sweeping economic regulations in the face of hostile judicial precedent concerning the scope of the Commerce Clause. To be sure, the Supreme Court can and does strike down congressional efforts to reverse judicial decisions of constitutional law.[25] Nonetheless, the same rationale that compelled Presidents Jefferson, Jackson, and Lincoln to challenge judicial supremacy applies with at least equal force to Congress: Congress is an equal coordinate branch and is entitled to interpret the Constitution in the course of fulfilling its own constitutional duty of legislating. Although Congress may not force the judiciary to follow its theory of constitutional law, *City of Boerne* cannot compel Congress to adopt the Court's positions nor can it necessarily prohibit Congress from using the other powers at its disposal to achieve the ends it believes to be constitutional.[26] In fact, Congress' error in *City of Boerne* may have been in using the federal courts to enforce its expanded notion of religious

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22. *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

23. *See generally* GERHARD CASPER, SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD (1997); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS (1997); STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC 1788-1800 (1993).

24. THE FEDERALIST No. 48, at 334 (James Madison) (Jacob E. Cooke ed., 1961).

25. *See* City of Boerne v. Flores, 117 S. Ct. 2157 (1997) (striking down the Religious Freedom Restoration Act); United States v. Eichman, 496 U.S. 310 (1990) (striking down the Flag Protection Act of 1989).

26. For a criticism of *City of Boerne*, see Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153 (1997).

liberty. Congress still might be able to use its other constitutional authorities, such as the Spending or Commerce Clause powers, to achieve its goals.[27]

In assisting Congress in the performance of these functions, lawyers in Congress play an important role in advising members of the Senate and House. At a formalist level, because Congress does not bear the responsibility of executing the laws, congressional lawyers may not bear the same obligation to support the Constitution as that imposed on members of the other branches. Thus, any claim that Supreme Court decisions must be enforced because they are "law" might not apply to Congress with the same force as it does the Executive Branch. Unlike the Solicitor General, congressional lawyers do not hold any special relationship with another branch, such as the Supreme Court, that might override their loyalty to the members or institution of Congress. Although Article VI's Oath Clause includes senators and representatives, state legislators, and federal and state executive and judicial officers, it leaves out congressional officers and employees from the same duty to support the Constitution.[28] Taken seriously, this selective omission suggests that the responsibility to uphold the Constitution belongs to the elected members of Congress, not their staffs. This reading, however, does not present a threat to constitutional government because members of Congress are the only ones who can exercise legislative power upon private individuals.[29]

Even if one believed that congressional lawyers possess the same obligation to support the Constitution as that imposed on lawyers in the other branches of government, lawyers in Congress still may enjoy greater freedom to interpret the Constitution than their executive or judicial peers. If we view the committee counsel or legislative aide as the attorney, and the Member of the House, the Senator, or the committee as the client, then the proper job of the counsel or aide when confronted with a constitutional question is to explain the different approaches and arguments available. The client retains the ultimate authority to choose which actions to pursue and which legal arguments to adopt, and he or she cannot make that decision without being presented with the full range of constitutional arguments and options. Of course, this role is little different than that played by executive branch or private attorneys. Similarities to other lawyers, however, may end when it comes to the scope of arguments that congressional lawyers may make because their clients have different constitutional duties. As mentioned above, Congress has less of a law-enforcing function and more of a creative law-making role. To the extent that congressional lawyers have a duty under state bar rules of professional respon-

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27. *See* Jesse H. Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2270 (1998).

28. *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.").

29. *See* INS v. Chadha, 462 U.S. 919, 952 (1983) (classifying as legislative power action that "had the purpose and effect of altering legal rights, duties, and relations of persons . . . outside the Legislative Branch").

sibility not to advance frivolous arguments, it seems that the duty to enable the Member of Congress to perform his or her creative law-making function must trump that obligation.[30] Furthermore, unlike lawyers outside of the legislative branch, there is less need for quality control of congressional lawyers because any frivolous legal arguments they might make do not reach any court; they instead are filtered through Congress.

Under either view of the constitutional obligations of the congressional lawyer, it is the role of the lawyer to provide the Congress and its Members with the full range of constitutional arguments and options. The lawyer, however, plays a tempering role as well. At least in my experience, Senators take seriously the prospect that the Supreme Court may invalidate legislation they support. Aside from their desire to avoid unconstitutional decisions, they also want to avoid Supreme Court invalidation because of both the negative public attention as well as the delay such a legal challenge creates for legislative efforts to solve national problems. A congressional lawyer can advise a Senator to vote against a bill because it is flatly unconstitutional, or, even more usefully, he or she can counsel a Senator to modify or oppose a bill because it will be invalidated by the Supreme Court. In order to render predictions about the future actions of a coordinate branch of government, the congressional lawyer necessarily utilizes his technical knowledge of the legal and judicial system, as well as his political acumen, by developing a strategy that takes into account the likely actions and desires of other political actors.

The substantial political costs associated with Supreme Court intervention allow the lawyer to restrain unwise assertions of constitutional power or at least to persuade members of Congress to consider carefully certain courses of action. Of course, the lawyer must also balance this cautionary role with the lawyer's job to enable his client, who has the independent right to interpret the Constitution, to achieve his goals.

These dual aspects of the lawyer's role were evident during the Senate Judiciary Committee's consideration of several significant constitutional questions from 1995-96. One example involved the proposed Partial-Birth Abortion Ban Act of 1995.[31] In that bill, opponents of abortion (including Chairman Hatch) proposed legislation that would ban certain types of late-term abortions throughout the country. Two questions were immediately raised: whether such

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30. Just as states are not permitted to use their taxing powers to interfere with the effective operation of federal instrumentalities, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), so too they may not be allowed, through their authority over state bar organizations, to interfere with the proper conduct of members of the legislative branch. Relying on the Supremacy Clause, Attorney General Richard Thornburgh took a similar position in 1989, when he issued a memo stating that federal prosecutors should not be held liable to state bar ethics rules when contacting parties without first alerting their attorneys. *See* In re Doe, 801 F. Supp. 478, 489 (D.N.M. 1992). Attorney General Janet Reno affirmed the policy in 1994, *see* 28 C.F.R. § 77.1-.2 (1998), and in 1995, a proposed crime bill would have codified the rule. *See* Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors*, 65 FORDHAM L. REV. 355 (1996); Fred C. Zacharias, *Who Can Best Regulate the Ethics of Federal Prosecutors, or, Who Should Regulate the Regulators?: A Response to Little*, 65 FORDHAM L. REV. 429 (1996).

31. H.R. 1833, 104th Cong. (1995).

a ban would violate a pregnant woman's right to an abortion and whether Congress enjoyed the enumerated power to pass a nationwide ban.[32] The Office of Legal Counsel of the Justice Department ("OLC") quickly circulated an opinion letter maintaining that the bill would violate a woman's right to an abortion as recognized in *Roe v. Wade*[33] and affirmed in *Planned Parenthood v. Casey*.[34] According to OLC, the violation rested on the bill's failure to provide an explicit exception for abortions performed to save the health and safety of the mother and its inclusion of criminal penalties, which would have a chilling effect on physicians who perform abortions.[35] Other opponents argued that, in light of *United States v. Lopez*,[36] the nationwide regulation of abortion lies outside Congress' Commerce Clause powers.[37]

In advising Chairman Hatch and the Judiciary Committee on the constitutionality of this legislation, committee lawyers undertook two tasks. First, they provided dual justifications for the legislation: one that might pass muster before the Supreme Court and one that relied as an original matter on the constitutional text, history, and tradition without reference to recent Supreme Court doctrine. For the first justification, committee lawyers noted that the undue burden test adopted by the plurality in *Casey* failed to provide a clear answer to the question of whether an exception for the health or safety of the mother was required in all cases. As the bill lacked such an exception, they recommended that, to be safe, the Senate could amend the bill to add such language, but they also stated that it was unclear if the ban, without the exception, would fail constitutional muster.[38]

In the second, alternative justification for the proposed statute—the one outside the context of the Supreme Court's opinions—committee lawyers noted that Congress could reach its own interpretation of the Constitution and could decide, if it wished, to enforce it rather than the doctrines of the Supreme

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32. *See The Partial-Birth Abortion Ban Act of 1995, Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. 104-260 (1995) [hereinafter *Partial-Birth Abortion Ban Hearings*].

33. 410 U.S. 113 (1973).

34. 505 U.S. 833 (1992).

35. The Clinton Administration's position was recapitulated in the written testimony by the Assistant Attorney General for the Office of Legal Counsel of the Justice Department in a Senate hearing on the bill. *See Partial-Birth Abortion Ban Hearings*, *supra* note 32, at 300-05 (testimony of Walter Dellinger).

36. 514 U.S. 549 (1995) (holding that congressional action must have a substantial effect on interstate commerce).

37. *See Partial-Birth Abortion Ban Hearings*, *supra* note 32, at 193 (testimony of Louis Seidman).

38. *Casey* declared that the state has an interest in prohibiting abortions after fetal viability, and because partial-birth abortions were defined by the bill as occurring only when the fetus was alive, it appeared that the proposed statute would be triggered when the state's interest in protecting the fetus had reached its highest point. *See id.*, at 193. Therefore, under *Casey*, the Court would balance the interest in the mother's life when in most, if not all, cases it appeared that alternative abortion procedures would be available. Congress certainly could reach its own judgment that such a balance should be struck in favor of the fetus. Even if the Court's case law was read to require a health and safety exception, this would require the invalidation of the statute as applied, but not facially, as evidence indicated that the mother's life was at stake in only a few of the cases in which the procedure was used.

Court. Following the reasoning of the dissent in *Casey*,[39] Congress could maintain that abortion rights could be regulated by government free from the restrictions of the Fourteenth Amendment, based on a reading of the text of the Fourteenth Amendment and its original understanding. Such an aggressive use of Congress' authority to interpret the Constitution was unnecessary, however, because Congress could argue merely that in this gray area, in which the Court's own precedents were unclear—phrases like "undue burden" or "the health of the mother" leave a lot of room to maneuver—the legislature could interject its own interpretation without challenging the whole structure of abortion rights.[40] Given the unsettled nature of this area of the law, Congress might have a special duty to use its lawmaking powers either to clarify this situation by legislation or to force the Court to reconsider its own precedents in such a politically controversial area.[41]

The congressional lawyer's role also might include providing Senators with political advice about the benefits and costs of relying upon different constitutional bases for action. It seemed unwise for pro-life Senators to pursue a more aggressive effort to challenge the Supreme Court, given that the Justices of the *Casey* plurality (Justices O'Connor, Kennedy, and Souter) were still on the Court and that President Clinton's two appointments (Justices Ginsburg and Breyer) clearly were pro-choice. Further, the Court's general approach to abortion rights was in harmony with the opinion of the majority of Americans (as indicated by polling data). As a result, it was very likely that any veiled effort to reverse *Roe v. Wade* would fail, and the negative political fallout from such an attempt would be correspondingly severe. On the other hand, polling data also showed that public opinion supported the narrower ban on partial-birth abortions. As such, Congress could enjoy a political upside and potential judicial success if it chose to operate within the Court's constitutional framework. This meant either amending the statute to include an exception for the life or health of the mother, or producing convincing evidence that the life and health of the mother were implicated in a statistically minor number of cases in which this procedure was used.

While these political judgments cannot restrict Congress' power to interpret the Constitution, they can influence how individual Senators choose to use that power. As an adviser, the lawyer in Congress performs a dual role in both recognizing the independent force of Congress' interpretive powers and tempering it. Congressional lawyers can moderate this power not by urging deference to the Supreme Court's opinions, but by demonstrating to Members of Congress the political benefits of operating within the Court's jurisprudence. The lawyers are able to do this, of course, because of the substantial prestige and respect that the Court has gained among the American public. However, as the

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39. 505 U.S. 833, 979-1001 (1992) (Scalia, J., concurring in part and dissenting in part).

40. *Cf.* McConnell, *supra* note 26.

41. For other examples, see Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb-2000bb-4 (1994), and the Property Rights Bill, S. 605, 104th Cong. (1995).

Court expands the scope of its review farther into areas of social regulation over which the nation is deeply divided, it may weaken the congressional lawyer's ability to recommend cooperation by Congress and may provoke more congressional challenges to the Court.

III

THE LAWYER AS DEAL-MAKER

A second, more common role of the congressional lawyer is his job in developing legislation. Because many important members of congressional staffs have law degrees, congressional lawyers often supervise the legislative process: the meetings with interest groups, the hearings, the committee mark-ups, the deals between legislators, the floor debates, the public and press relations, and the votes. To be sure, the staff lawyer's role usually does not extend in a significant way to the setting of legislative and political priorities and the initiation of legislation, which are within the domain of the Members of Congress, the Executive Branch, and non-governmental interest groups. Nonetheless, the lawyer's role in operating the procedures through which these proposals must pass raises interesting issues concerning the nature of the legislative process and the lawyer's role in that system.

For example, some students of the legislative process believe that Congress primarily acts as a forum for the making of deals between interest groups.[42] In this model, legislators are motivated by the desire for re-election; to be re-elected, officeholders need to raise money to fund their campaigns. Interest groups purchase legislation by funneling campaign contributions to these candidates; in return, legislators enact laws that benefit these groups. Interest groups usually will form when a small class of interested individuals or entities can receive high rents from some narrow piece of legislation. Of course, interest groups also will form to stop legislation that harms them; the more concentrated the harm inflicted by a bill, the more likely an interest group will form to stop it. Legislation will pass, this model predicts, when the rents received by an interest group surpass the amount of campaign contributions it will cost to pass, and when the costs imposed on others by the legislation are spread diffusely. Although some public choice scholars are dubious that legislative process advances the "public interest," pluralists view interest group politics as desirable because it facilitates stability, moderation, and broad satisfaction with the political system.[43]

Of course, the model described here is an extreme simplification of the public choice theory of legislation. Nonetheless, if the interest group-driven

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42. *See, e.g.*, JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); WILLIAM RIKER, LIBERALISM AGAINST POPULISM (1982).

43. *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 50 (1994); THEODORE LOWI, THE END OF LIBERALISM 51 (2d ed. 1979).

theory of politics is correct, it will impact the nature of the lawyer's role in lawmaking. A congressional staff lawyer in this system might perform duties similar to that of a corporate transaction attorney. For example, the staff lawyer might want to use his skills to help different groups find common ground to reach mutually advantageous deals and to provide ways for the actors to be sure that the others will keep their promises. He might want to make sure that his Member of Congress received the support of the interest groups in exchange for his legislative support. He might counsel his Member and even the interest groups on different ways to structure a legislative deal so as to maximize benefits, on the likely strategies of opponents who want to stop the deal, and on how to reduce legislative transaction costs.

Other models of the legislative process might alter a lawyer's duties accordingly. In response to the bleak vision of the legislative process painted by public choice theorists, a new body of political theory known as the new institutionalism or positive political theory has arisen. This approach holds that political outcomes depend on the interaction of multiple decisionmakers and the manner in which they anticipate the positions and responses of each other.[44] Institutions and rules play important roles in this model because they regulate the manner in which the players interact. If a congressional lawyer believed positive political theory to be correct, then he might devote his energies toward ensuring that the different players in the system communicated to one another accurately and that the procedural rules that determined their role in the legislative process were followed. A different reaction to public choice theory, neorepublicanism—which can trace its roots back to the legal process school—holds that the legislative process should be designed to promote deliberation and reason in order to use government power to promote the common good.[45] A congressional lawyer who believed in such notions might seek to follow legislative procedures that lead to well-informed, deliberate, efficient decisions.

The potential conflict between these different roles makes itself apparent in the advancement of legislation through Congress. For example, if the lawyer views the legislative process solely as an arena for interest group bargains, then the lawyer's duty may be to ensure the passage of legislation regardless of the method. The most effective approach might be to slip the desired legislation directly into a bill that must be passed, such as a continuing resolution or an emergency spending measure. The lawyer could tuck the provision away into the larger bill by amendment directly on the floor of the House or Senate, preferably by voice vote, without a hearing or committee mark-up. This method reduces the chances that opposing interest groups, the press, or the public will discover the legislation and seek to stop it. Acting stealthily also undercuts the significant power of the majority leadership to set the legislative agenda by con-

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44. *See, e.g.*, PETER ORDESHOOK, A POLITICAL THEORY PRIMER (1992); Eskridge & Ferejohn, *supra* note 9.

45. *See, e.g.*, Symposium: *The Republican Civic Tradition*, 97 YALE L.J. 1043 (1988); Frank Michelman, *supra* note 8.

trolling floor consideration of bills. One might expect such behavior to occur when important financial and business interests are seeking a narrow change in a regulatory law that would impose significant, but diffuse, costs on the public, such as when an industry wants its treatment under the antitrust laws relaxed so it can engage in activity that might raise consumer prices. Legislative history, if any, could be produced by the interest group itself, and legislators and their staff would rely on the interest group to mobilize support among other Members of Congress, track the progress of the legislation, and generate and distribute information about the proposal.

Such maneuvers, however, are not limited just to bills of interest to financial or business groups. The attachment of riders to appropriations bill or continuing resolutions is a time-honored tactic that can be used for legislation that is more public-spirited in nature. In 1996, for example, the Senate Judiciary Committee considered the Prison Litigation Reform Act,[46] which placed substantive limits on the authority of federal courts to manage prisons.[47] While the bill received a hearing,[48] it never received an executive mark-up or approval by the Senate Judiciary Committee for floor consideration. Proponents of the bill, which included members of the Committee, succeeded in attaching the legislation to a funding vehicle whose passage was imperative. While opponents of the legislation knew of the riders and had some opportunity to debate them on the merits, this process certainly was not as open and robust as that afforded by a usual up-or-down vote on a stand-alone bill.

All legislation, however, does not follow this path. For example, during the 104th Congress, I helped manage the Judiciary Committee's consideration of a bill offered as The Omnibus Property Right Act of 1995.[49] The bill sought to codify recent Supreme Court decisions in the area of takings[50] and to create bright-line rules to govern when federal agencies had to pay just compensation for imposing regulations on private property.[51] Unlike more narrow special interest legislation, this bill went through the regular process of legislative decisionmaking. It was introduced as a free-standing bill by Senator Dole and thirty-one co-sponsors. The Judiciary Committee held three hearings, which included witnesses such as property owners, Senators, Justice Department officials, the Chief Judge of the U.S. Court of Claims, law professors, lawyers, and Joseph L. Sax, my colleague at Boalt Hall who was at that time the Counselor to the Secretary of the Interior Department.[52] Several days of committee meetings were held, during which Senators engaged in vigorous debate over the

46. Pub. L. No. 104-134, Title VIII 110 Stat. 1321-66 (1996).

47. *See* John Choon Yoo, *Who Measures the Chancellor's Foot: The Inherent Remedial Authority of the Federal Courts*, 84 CAL. L. REV. 1121, 1174-77 (1996).

48. *Prison Reform: Enhancing the Effectiveness of Incarcerations: Hearing Before the Comm. On the Judiciary*, 104th Cong. (1995) (hearing on S. 866).

49. S. 605, 104th Cong. (1995).

50. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

51. *See* S. 605, 104th Cong. § 204(a)-(f) (1995); *see also* S. REP. NO. 104-239, at 20-26 (1996).

52. *See* S. REP. NO. 104-239, at 12-13 (1996).

constitutionality and effectiveness of the bill. In the end, the Committee passed the bill ten-to-seven and issued a report in which no outside interest group had any hand. Although successfully reported out of the Committee, the bill never came up on the floor for a vote because of the likely success of a threatened filibuster.

If the simplistic version of the public choice model of legislation held complete sway, these stages of congressional decisionmaking might have been superfluous. If a Senator's individual wishes or a party's agenda on legislation was bought and paid for by an interest group, a more effective tactic might have been to hold minimal hearings, if any, then bypass a committee vote and seek to attach the bill as a floor amendment to an omnibus spending bill or a continuing resolution. Instead, in this case the Judiciary Committee tried to ensure that Congress received a wide variety of information and that it carefully and fully deliberated on policy decisions. As a result, the Committee used the full legislative process, which gave all interested parties—property owners and environmentalists alike—an opportunity to present their opinions, recommend changes, and observe committee actions. If we were bestowing narrow benefits on rent-seeking interest groups, such as property owners, I was not aware of it. During the process of moving the bill forward and drafting the committee report, neither property rights groups nor environmental groups played a significant role, although I was always open to the compelling arguments of my academic colleague in the Executive Branch. More importantly for purposes of the distributional approach to legislation, these groups generally were not funded, did not seem to make large campaign contributions, and did not determine legislative priorities. To be sure, the staff had not placed the property rights bill on the congressional agenda; no doubt outside interest groups influenced that decision. Once the legislative process began, however, interest group influence waned in favor of control by the congressional staffs.

A political scientist might observe that the Committee's procedures operated to gather, generate, and disseminate information. Some scholars have maintained that Congress is organized so that policymakers can collect information to address uncertainty concerning the effect of decisions.[53] However, this was a byproduct of the legislative process, not its main focus. For example, the Committee did not use hearings in any meaningful way to gather information about the impact that different takings provisions would have on property rights and environmental regulations. Such information is more readily available and digestible in the form of written studies and case reports. Instead, hearings were an opportunity for Committee members to test-fly different arguments and ideas to justify the bill. Hearings not only provided an opportunity to present victims' stories to the other Members of Congress and the press, but they also served as a forum for legislators to explain why they were sup-

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53. *See, e.g.*, KEITH KREHBIEL, INFORMATION AND LEGISLATIVE ORGANIZATION (1991); William N. Eskridge, *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 356-57 (1991).

porting or attacking the bill. Committee reports and mark-ups served the same purpose. One Senator spoke for almost three straight days in mark-up about why he was voting against the property rights bill. He did so less to win Senators to his position—the votes were all accounted for before the mark-up even began, or there would have been no mark-up—than to float criticisms of the bill to see which ones gained the most "traction." Although it would be a gross overstatement to say that hearings or mark-ups acted as glorified press conferences, they did serve to test arguments—running the traps or bulletproofing, as it were—and create a "record" upon which debate over the legislation could occur.

Throughout this process, the congressional lawyer seeks to achieve certain procedural goals. The goals are not simply to distribute information that is favorable to the lawyer's side, but rather to see that certain elements of what might be called legislative procedural due process are followed:

(1) All hearings allow both the majority and minority to call witnesses;

(2) Witnesses receive the opportunity to make full statements for the record and to supplement the record with additional materials after the hearing;

(3) Senators of both parties receive equal time to ask questions and present their observations;

(4) The Executive Branch enjoys the right to testify on any issue;

(5) Both sides may include statements of virtually any length in the committee reports; and

(6) Senators may speak for an almost unlimited time during mark-up.

These procedures, which are developed and observed by committee lawyers, ensure that both the majority and minority have an equal opportunity to make their arguments known.

Disseminating information by itself, however, serves little purpose. I would suggest that lawyers in Congress work to guarantee the free flow of information because it leads to greater deliberation about the merits of policy decisions. Presenting arguments in hearings and mark-ups forces the other side to respond to them. Contrary to the more pessimistic theories of legislation, no Senator likes to vote yes or no simply because he or she was told to do so by an interest group. During my tenure working for the Senate, no Senator in the Judiciary Committee rose and declared that he was voting for or against the property rights bill simply on the orders of the Sierra Club or of the Defenders of Property Rights. Instead, a legislator—regardless of his motivation for vot-

ing on a bill—wants an argument, a rationale, a justification for his vote, and the testing of these reasons leads to greater deliberation before the public on issues of policy.

To be sure, the existence of procedures does not lead inevitably to the conclusion that Congress and its staff are working toward greater deliberation in policymaking. One could argue that legislative due process and the institutions that operate by it, such as committees, arose to ease problems that a public choice model of legislation might face. For example, if the legislature amounted to a bazaar with few, if any, procedures (other than the rule of the highest bidder), then the legislative process might devolve quickly into a political state of nature. Legislators might engage in extreme tactics—such as loading up every appropriations bill at the last minute with all manner of riders—because of a prisoner's dilemma problem. Procedures such as limiting the number of riders, or requiring bills to undergo the open process of hearing and committee mark-up, might arise after a series of tit-for-tat interactions by legislators. Rules could create the context necessary to allow interest groups to purchase laws—by providing mechanisms for measuring political support, for guaranteeing that legislators will keep their promises, and for facilitating bargaining—that avoid a sort of tragedy of the legislative commons.[54]

It might be thought that in pursuing either set of goals—greater deliberation or interest group politics—the congressional lawyer is not giving his full loyalty to his client (the Senator or committee that hired him), the Majority Leader that heads the Senate, or the political party that forms the network for the majority and sets its agenda. In regards to deliberation, because the congressional lawyer's ultimate client is Congress itself, Congress is best served when it acts in an open, considered manner rather than in a haphazard, *ad hoc* one. Not only may better public policy result, as neo-republicans like to think,[55] but a deliberative process promotes the image of Congress in the public mind, thereby bolstering the legislature's power to impose its preferences upon the other branches. For a congressional lawyer, this goal is also in the best interests of the party, the leadership, and the Senator or committee; strengthening the political reputation of Congress enhances the means by which these various clients will seek to promote their agendas. With regard to public choice or institutionalist theories, the lawyer allows the process to function smoothly by making sure that rules are clear and are obeyed. Without these rules, the resulting uncertainty would undermine the bargaining or strategic interaction necessary for the passage of legislation.

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54. A cynic might argue that the rules also conceal that interest group deals are being struck. Even if it were true that legislation is the product of interest group demands, Members of Congress could not afford to admit that this was the true state of affairs. Procedures would give the appearance that deliberation in the public interest was going on. But once these procedures are established, they would begin to have a normative force of their own and later actors in the legislative game might follow them simply because they exist.

55. *See, e.g.*, Michelman, *supra* note 8; Sunstein, *supra* note 8.

It also might be thought that the congressional lawyer is playing a role that is in tension with democratic government. If the people want a policy, and they elect representatives to implement that policy, then lawyers delay and slow down progress toward that goal by imposing legislative due process procedures. Visiting the United States in the early nineteenth century, Alexis de Tocqueville observed that lawyers love order and formalities, which were "naturally strongly opposed to the revolutionary spirit and to the ill-considered passions of democracy."[56] As a result, American lawyers, like the European nobility, "conceive a great distaste for the behavior of the multitude and secretly scorn the government of the people."[57] The lawyer's procedural, formalist mindset buttresses the existing procedural hurdles for legislation, such as the Senate, the filibuster, the presidential veto, and judicial review, which themselves are countermajoritarian. Although the congressional lawyer may not knowingly play this role, his actions further enhance the mechanisms established by the framers to tame the legislature, which they feared "is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."[58] In this respect, the congressional lawyer acts as an unknowing agent of the separation of powers.

IV

THE LAWYER AS INVESTIGATOR

The congressional lawyer's role as a check on the power of the institution he serves comes to the fore when Congress employs its powers of investigation and oversight. Congress' power to conduct such inquiries inheres in its power to study and pass legislation,[59] and it has used this power from the very beginning of the Republic to investigate maladministration in the Executive Branch, to determine whether social conditions require new legislation, and to review the success of existing laws.[60] Although the Reagan Administration ushered in the recent era of conflict between congressional investigatory powers and claims of executive privilege, such as the controversy over EPA Director Anne Burford or the hearings into the Iran-contra affair, the Clinton Administration has witnessed an intensified use of Congress' investigatory powers. Congress has undertaken numerous investigations involving allegations of misuse of official power, such as the hearings on Whitewater, on the firing of the White House Travel Office, on the misuse of FBI security files of Republican admini-

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56. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 264 (J.P. Mayer ed. & George Lawrence trans., 1966) (1835).

57. *Id.*

58. THE FEDERALIST No. 48, at 251 (James Madison) (Jacob E. Cooke ed., 1961).

59. *See* Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 174 (1927).

60. *See* Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 568-90 (1991).

stration officials, and on the 1996 campaign finance scandals.[61] As one would expect, lawyers populate these hearings and investigations, ranging from the criminal defense lawyers who advise witnesses to the special counsels who conduct the investigation to the lawyers who advise the Members of Congress who sit on the investigating committees.

Congress' constitutional power to conduct investigations and its auxiliary power to force witnesses to appear before it and produce evidence go formally unchecked. Congress may conduct investigations into any subject, so long as it is in furtherance of a valid legislative purpose.[62] It may call any witness, seek any evidence related to its investigation, and hire an army of lawyers and staff to conduct the investigation. To force recalcitrant witnesses to testify, Congress may use its own power to impose civil contempt sanctions, which can involve the House or Senate issuing and executing an arrest warrant and imprisoning the witness.[63] While Congress must observe the procedural guarantees of the Bill of Rights in conducting its investigations,[64] it may be under no legal obligation to obey other protections not rooted in the Constitution.[65] Since 1857, however, Congress has limited its own investigatory powers by passing a criminal contempt law that requires it to vote on whether to adopt a contempt resolution, and which then requires a contempt citation to be referred to a U.S. Attorney for prosecution.[66] Because this procedure permits the President to order the U.S. Attorney not to pursue a prosecution or even to pardon a witness convicted of contempt, it allows for some separation of powers check on Congress' investigatory powers. Such restraints, however, might not apply to Congress' inherent, non-statutory power of contempt.

Despite its untrammeled powers of investigation, Congress generally recognizes several unwritten rules of restraint. In 1996, for example, the Judiciary Committee led the investigation into the Clinton Administration's alleged improper collection and handling of the FBI security files of members of previous Republican administrations. Before the Committee's hearings, staff lawyers sent letters to the White House and the Justice Department that were framed very much like discovery requests in federal civil litigation. Claims of privilege were accepted if a proper explanation was provided, documents were delivered

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61. For background on these scandals and on the conflict between congressional investigatory powers and executive privilege, see, for example *id.*; Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987). For commentary on contemporary conflicts, see John C. Yoo, *How Congress' Subpoena Power Works*, WALL ST. J., May 28, 1997, at A19; John C. Yoo, *John Huang's Immunity Ploy*, WALL ST. J., July 16, 1997, at A23.

62. *See Watkins* 354 U.S. at 198; *see also* McGrain v. Daugherty, 273 U.S. 135, 172 (1927); Kilbourn v. Thompson, 103 U.S. 168, 190 (1880).

63. *See* Peterson, *supra* note 60, at 566-68.

64. *See Watkins*, 354 U.S. at 188.

65. *See* REFUSAL OF WILLIAM H. KENNEDY III TO PRODUCE NOTES SUBPOENAED BY THE SPECIAL COMMITTEE TO INVESTIGATE WHITEWATER DEVELOPMENT CORPORATION AND RELATED MATTERS, S. REP. NO. 104-191, at 11-12 (1995) [herinafter KENNEDY REPORT].

66. *See* 2 U.S.C. § 192 (1994).

in boxes at the last minute, Bates stamps and document indices were used. Committee staff conducted depositions at which the witness was permitted to bring counsel, invoke privileges, and refuse to answer questions. Staff lawyers recognized claims of attorney-client privilege, and they avoided areas involving the personal privacy of individuals (such as hiring records), even though Congress is under no obligation to observe discovery protections that are not rooted in the Constitution.[67] Committee staff even recognized claims of executive privilege, despite Congress' independent authority, as suggested earlier, to interpret the Constitution. Staff did not force witnesses taking the Fifth Amendment to do so on television.

In following these unwritten rules, the congressional lawyer's restraining role is placed in the sharpest relief. Here, lawyers are acting to control perhaps Congress' most unrestrained power, which can operate free from any substantial check by the executive or judicial branches. As with the Committee's adoption of the federal discovery rules, these norms of behavior serve the purpose of supplying an off-the-shelf, widely understood system that allows attorneys to impose order upon the investigatory process. Lawyers need these rules, furthermore, precisely because the investigatory process itself has no inherent rules and, as such, is most vulnerable to abuse by Congress in the service of personal or wholly partisan agendas.[68] As the only barrier standing between the individual and the broad power of Congress to conduct investigations, congressional lawyers are acting at their bravest; they cannot rely on Supreme Court decisions or other institutions to support their efforts to regulate congressional power.

V

CONCLUSION

One thing to note about these experience is the manner in which the role of the congressional lawyer modulates in response to the nature of congressional activity. In the lawyer's constitutional advice function, the attorney appears to take more of a technician's role in charting out different paths of argument for the Member of Congress to justify certain decisions. In investigations, how-

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67. I also advised Senator Hatch in his assignment to the Senate Special Committee to Investigate the Whitewater Development Corporation and Related Matters. In the course of that investigation, the Senate came close to voting to hold in contempt William H. Kennedy, formerly associate counsel to the President, for refusing to disclose notes of a November 1993 meeting at which a mixture of government and private lawyers discussed strategy for responding to various Whitewater inquiries. Even in that confrontation with the Executive Branch, the investigating committee did not base its claim to the notes on the contention that the Senate was not bound by the attorney-client privilege. Instead, the investigators argued that the communications during that meeting were not between an attorney and a client, but between President Clinton's private lawyers and government attorneys who were not part of the attorney-client relationship. *See* KENNEDY REPORT, *supra* note 65, at 11-19.

68. It might be argued that Congress as an institution also needs these investigatory rules. Procedural rules protecting witnesses reduce the chances that the proceedings will be dismissed as a raw exercise of power. They also are so widely accepted on normative grounds that they are cheap way to establish that the investigations will be perceived as fair.

ever, the lawyer plays perhaps his most independent, public-spirited role in restraining the unchecked power of Congress. The lawyer's activities in the field of legislation seems to fall somewhere in between, with his role fluctuating between a facilitator of interest group deals and an agent of deliberation and open government.

Perhaps one way to explain these changing roles is that when Congress acts in a less public-spirited, more partisan or self-interested manner, lawyers respond by expanding their roles in restraining Congress. When Congress itself is promoting deliberation, or using fair procedures, or exercising its independent right to interpret the Constitution, then the lawyer's role is less pronounced because it is less necessary. This function underscores the lawyers' role as a tempering, even civilizing force in politics. While Congress is not a free-for-all, it does exercise its enormous constitutional powers in a more *ad hoc*, immediate, and unrestrained manner than do the other branches. Congress does not have an Office of Legal Counsel to advise against passing bills that are unconstitutional; it does not have a cabinet or a National Security Council to deliberate policy and weigh options; there are no higher bodies of review, no precedents, no doctrines it must obey.[69] The framers designed Congress to be the most reactive and sensitive branch of government to the wants and desires of the people; it cannot be as hide-bound as the other branches in expressing the popular will.

Lawyers serve as an important check on such unleashed power by informally restraining and channeling Congress' political will. By training, lawyers understand the importance of neutral principles, of fair processes, and of rational arguments, and when working for Congress they inject these values into an institution that by its nature is designed to "exercise will instead of judgment."[70] On a smaller scale, lawyers in Congress perform the same function that Alexis de Tocqueville observed that they play in American society as a whole, that of restraining ill-considered democracy.[71] While they work to execute the will of Congress, congressional lawyers also act to temper that will, to ensure that it results from judgment as much as from passion.

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69. Of course, Congress has a committee structure and procedural rules that enhance deliberation. *See* Charles Tiefer, *The Flag-Burning Controversy of 1989-1990: Congress' Valid Role in Constitutional Dialogue*, 29 HARV. J. ON LEGIS. 357 (1992). Congress adopts these processes at its own pleasure, however, and it often bypasses their use.

70. THE FEDERALIST No. 78, at 526 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

71. *See* 1 DE TOCQUEVILLE, *supra* note 56, at 262-70.