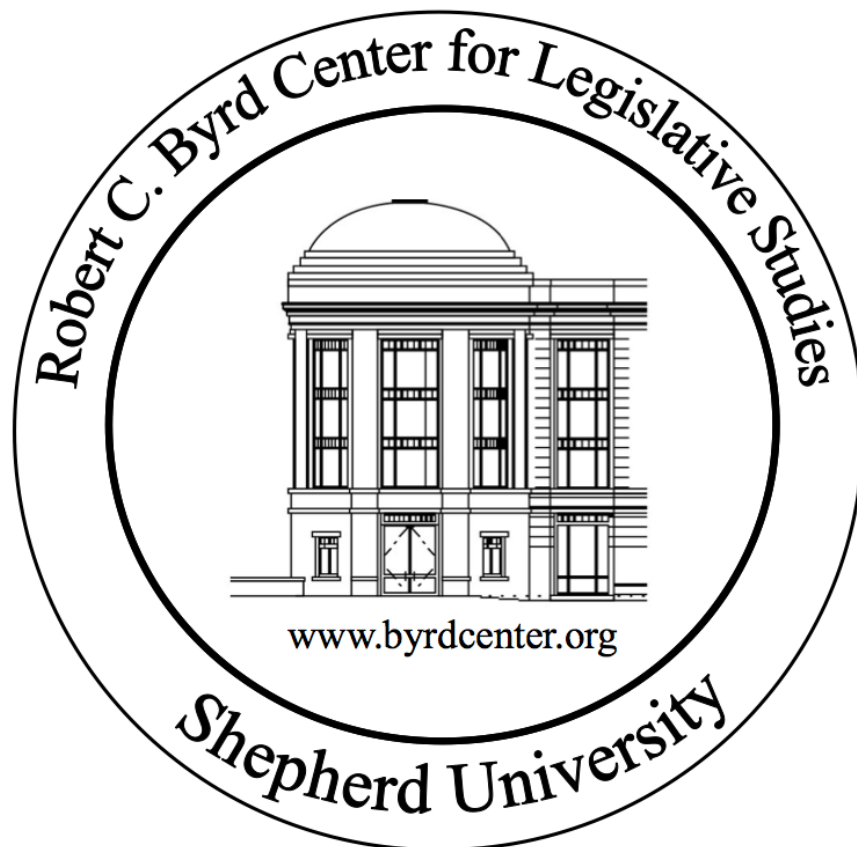


Robert C. Byrd Legacy Project

Oral History Interview

Louis Fisher

August 8, 2012



Preface

by Keith D. Alexander

Dr. Louis Fisher worked at the Congressional Reference Service and the Law Library of the Library of Congress for forty years. The author of twenty-nine books and hundreds of articles, he remains an active contributor to the literature on the separation of powers even in retirement. He earned his PhD in political science from the New School for Social Research in 1967.

In this interview, held at the Kensington, MD, home of interviewer Richard A. Baker on August 8, 2012, Fisher recounts his career with the Library of Congress, emphasizing his relationship and interactions with Senator Byrd. Fisher was especially impressed by Senator Byrd's extraordinary powers of memory and his energetic defense of the Senate's powers against attempts by the Executive branch to weaken the institution.

Fisher recounts several instances where Senator Byrd quoted lengthy passages of scholarly works from memory. In particular, though, Fisher mourns the passing of statesmen of Byrd's caliber, who are unlikely to appear again in an age of poor political education and vitriolic talk-shows masquerading as news programs. According to Fisher, in a post-*Citizens United* political climate, where politicians must spend so much of their time raising money for their own campaigns, it has become all too easy to delegate decision-making to the Executive branch and its proxies. Similarly, the age of the Internet has combined with heightened partisanship to displace the independent scholar ready and willing to render judgments regarding some of the major legal issues of our times, especially concerning the powers of the president to wage war.

About the interviewer: Dr. Richard A. Baker served as Senate Historian from 1975, when the office was established, to his retirement in 2009. He received his PhD in history from the University of Maryland College Park. He is the author of numerous books, the most recent of which, *The American Senate: An Insider's History* (with Neil MacNeil) was published in April 2013.

Interview #1
Wednesday, August 8, 2012

Baker: So, just for the record, I'm Richard A. Baker. Today is August 8, 2012, and at the request of the Robert C. Byrd Center for Legislative Studies in Shepherdstown, West Virginia, it's my pleasure to be speaking with Louis Fisher at my home in Kensington, Maryland. Lou, first of all, I think, maybe, it would be useful to kind of divide these questions into a few about you, and then we'll switch to Senator Byrd and your relationship with him. And one of the first questions people ask on Capitol Hill, at least from my experience, when they meet somebody for the first time, is, "Where ya from?" You know, where are you from?

Fisher: I was actually born in Virginia Beach, Virginia. My folks were New Yorkers. My mother is from Brooklyn and my father is from Manhattan. And somehow they left New York City and he was a writer, he did some really – I think public relations is a better way to call him, and he did some writing. He did a little book called *Thoughts*. So, after three years we moved up to Washington, DC. So, I was basically brought up in Washington, DC and in the Virginia suburbs.

Then, I was in the army and my background was chemistry and physical chemistry at Johns Hopkins. I did graduate work in physical chemistry.

And there was something about the specialization that bothered me and I went in the army and got a job, initially at the Dow Chemical Company in Michigan, and then what I really wanted to do was write. And I got a job in Manhattan. I was thrilled about that, and then I started taking undergraduate classes in social sciences, and then I got my PhD in political science at the New School for Social Research.

Ten years in New York City and I feel like I still am plugged into Manhattan, the energy of Manhattan...

Baker: It never leaves you, does it?

Fisher: It never leaves you. So, I do think what I've done in social science is better because of all those years I did in the hard sciences, because you get a little taste of what evidence and method are. As you know, the social sciences can be pretty flaky.

Baker: For sure. But just how you shape a problem, how you identify a problem, and then explore the problem from a scientific point of view, that has a political science side to it as well.

So, you were in New York at the New School, then you taught in New York?

Fisher: Yes, my last three years in New York...I always lived in Manhattan, but I taught full-time at Queens College in Flushing. And one of my teachers at the New School was Paul Douglas, when he was defeated...

Baker: Oh my goodness, Senator Paul Douglas.

Fisher: They offered him a job and some of the economists in the department resisted because he hadn't published anything recently in the journals.

This is the person who produced the Cobb-Douglas function, an economic model widely used to analyze productivity. I took every class he offered and he was marvelous and I knew I didn't want to just teach and write. I wanted to apply, just like a laboratory in chemistry, and that's what the Library of Congress gave me. I'm coming up with material from my research. Is it useful to a Congressional office? It may not be because of this and that. The application of what I was doing, to me, the mix of my scholarly work and the applications to committees and Congress that was just perfect.

Baker: Was Paul Douglas instrumental in your deciding to go to the Library of Congress?

Fisher: Well, I don't know how I ever heard of the Legislative Reference Service, but I certainly knew of it, because he [Douglas] was chair of the Joint Economic Committee.

Baker: Right.

Fisher: And William Proxmire by the time I was going through I think was the chairman, so I was always in touch with this, even in New York City. I was always writing, not just to committees and members, but to agencies. So my heart was always in DC on these connections.

Baker: So, you're writing to them both professionally and looking for ways to work there?

Fisher: I was already starting to write. I think my first article was in 1967, '68, something like that, and I was writing about things that were happening in DC in the federal government. So, I still have letters today, people on the Hill writing me back. I don't know if they still do that today, but they were wonderful. My first law review article was 1969 in the *George Washington Law Review* and it was on impoundment [Fisher, Louis. "Funds Impounded by the President: The Constitutional Issue." *Geo. Wash. L. Rev.* 38 (1969)].

Baker: Very topical.

Fisher: And that issue would come up, and that's how I worked with Senator [Samuel J.] Ervin. Wonderful timing. Today, to get a law review article published, you usually send it out to fifty places, and then if you get acceptance by some lower-tier then you go up the food chain.

I just got accepted there. I didn't know anything. I thought some law review in Washington, DC would be interested and sent it to *George Washington Law Review* and they accepted it. [laughter]

Baker: Just like that?

Fisher: Just like that.

Baker: What kind of response did you get from its publication?

Fisher: Well, the response I got by the time I got to the Library of Congress...In September 1970, impoundment had been of some dispute, but then Nixon, as you know, really kicked it up, probably in '71, but then with the campaign in '72 he just went overboard. So the Senate Judiciary Committee and Ervin's Subcommittee on Separation of Powers asked for my assistance. There'd been about five articles written on impoundment, and I had done two. I had done one for *George Washington Law Review* and another one for *Administrative Science Quarterly*, so they said get over here, and I was pretty much full-time with them for about two years up until the 1974 Act, where we passed the Impoundment Title as part of the Congressional Budget and Impoundment Control Act of 1974.

Baker: So, when you started in September of 1970 – now wasn't that about the time the Legislative Reference Service became the Congressional Research Service [CRS]?

Fisher: Yes.

Baker: And expanded by what?

Fisher: They thought it would go from maybe 300 to triple and I think it got up into the 800s, and for now, for recent years, it's been around 700.

Baker: Right, right.

Fisher: It was not just the big expansion, but they created these Senior Specialists, at that time, GS-17 and specialists, at that time, GS-16s. This was to be a core of experts to make Congress better able to compete with experts in the Executive branch. So, that tone, and as you know if you see the last chapter in my book, *Defending Congress and the Constitution* (2011), that tone and substantive capacity has been lost to the CRS. Not only lost by not having any of those people left, but giving those titles and salaries to full-time administrators who cannot possibly do research.

Baker: Right, right.

Fisher: So, it's a real tragedy now, and it's painful to see this development. A lot of my friends and I started off in the early '70s. We all felt grateful that we were there at a time when that was appreciated and valued. It's just a tragedy what has happened.

Baker: So, did you start as a Senior Specialist or a Specialist?

Fisher: No, no. I came down as a GS-12, as a section head – Congress section – and they wanted to pay me twelve thousand dollars and I said, “I'm getting twelve thousand dollars at Queens for nine months. I want fifteen thousand a year.”

“Ok, ok, fifteen thousand.” [laughter]

Baker: Wow, those are the days – holy smokes.

But, but they had a lot of jobs to offer at that point, right? I mean, if they were almost trying to triple the size of this new Congressional Research Service.

Fisher: They did.

Baker: There must have been a lot of money available.

Fisher: They did. Then, all of us were in the main building – the Jefferson building – what became the Jefferson building, and immediately, of course, most of my dissertation at the New School was done at NYU Law School and other law schools, so, immediately, I'm spending time at the American Law Division Library.

I'm very comfortable there, but someone said, “Why are you here? You're not a lawyer are you?”

I said “No.” And then a second person asks the same question, and then a third person. By the time the fourth person asked I was ready, and I said, “Are you familiar with the Annotated Constitution?”

“Of course I'm familiar with it.”

I said, “Do you know who wrote the first edition of the Annotated?”

“Of course I do – Edward Corwin.”

I said, “Do you think he was an attorney?” Whoops. Corwin had a PhD in History.
[laughter]

But that was a tension throughout my forty years at the Library: CRS attorneys being very uncomfortable about anyone getting into their area.

Baker: Right, right, it’s all about turf.

Fisher: It’s turf, but I don’t know why. People in the American Law Division didn’t testify – they would write their memos and that’s it. And I was the only one in the Library of Congress to testify regularly on constitutional issues. I loved it.

That’s probably the most fun of all – to sit and have maybe five minutes to get out some thoughts and then have a dialogue with committee members. I loved it.

Baker: How soon did you start doing that after you arrived in 1970?

Fisher: Senator Ervin asked me to testify on impoundment, and unfortunately the management said, “Oh...well we don’t let people testify.” I wish I’d pushed it a little bit more. But, I think after a few years they started to relax. If you remember Gil Gude –

Baker: I do.

Fisher: House member. He opened a lot of windows at CRS, and I’ve testified over fifty times and on big issues. Telling committees that something is constitutional, it’s not constitutional.

And I loved it. It was really perfect.

Baker: I mean, the experience of testifying fifty times straight before the House Committees, Senate Committees: Did it get easier over time, or did it – how did that go?

Fisher: I don’t think it ever gets easier because – I had a friend at CRS who, in college, was in the theater, and he said he always felt nervous on stage and he did a good job. Except, one time, he wasn’t nervous at all, and it didn’t work.

Baker: Got to be nervous.

Fisher: You can’t be so nervous that you can’t speak, but you get, really, the adrenaline moves. I’ve seen a lot of people testify and you don’t even know what their contribution is.

Baker: Right.

Fisher: So, I've always, very good to say, given the legislation, I have three points I want to make, very practical application, and then get into a dialogue.

Baker: I mean, it would just be rather disconcerting to be testifying and having the members who are testifying before you get up, walk out of the room, talk to somebody else, consult their notes. By coming up with three points, did you find they were really looking at you and engaging with you?

Fisher: I've never read testimony. Some people will read testimony or summaries and I've never done that.

Baker: Right.

Fisher: I look at them, and I think if you look at them, they don't do what you say, you know, look at staff and talk and look back. And a friend of mine was going to testify for his first time before the Senate Judiciary Committee. We were testifying together. He had written a summary of his testimony that he was going to read us. I said "Don't read. They won't pay any attention; they'll turn around and talk to people behind them."

Baker: Right.

Fisher: But, he was so nervous – he had it prepared. But before us was somebody from the AFL-CIO, who read and senators were turning around. [Fisher turns around in chair, voice becomes fainter].

Baker: Yeah, there you go. [laughter]

Fisher: So, he took his piece and just [sound of crumbling paper]. He was marvelous. I mean, no one could connect better than this guy. He was wonderful. So, I think when there's something where you honor them by having three points of value to them, and you're looking at them, the eyeball stuff is good.

Baker: At a very human level.

Fisher: Yes.

Baker: Did you notice any difference, in general, between testifying before a Senate Committee and a House Committee?

Fisher: I don't think so. Probably the Senate has a little more formality to it, but not necessarily. I've always been frustrated, you probably are too, when you watch these hearings and a member of Congress asks a witness a question – a clear question...

Baker: Right, right.

Fisher: And the response has nothing to do with the question. “Well, now I’ll go onto question number two.”

Don’t do that. A member should ask, “Did you hear my question?”

Baker: Right, right.

The process of testifying before House and Senate Committee, you’ve done it so many times, over so many years, has that process changed in any way, or is it pretty much what you first encountered?

Fisher: I think it’s still a wonderful experience, because a lot of people lionize the Executive branch with all their expertise, but they don’t go through anything like that over there. I’m sure they have meetings. But this is a real public meeting with legislation or oversight in mind and bringing experts in from the outside. I think members of Congress are really very good at the way they express themselves in such a way that not just the experts on the panel, but the members, so the constituents back home can follow it. They’re really very good at that.

Baker: Just to back up, because [we’re on] the subject of your expertise: What was the topic of your doctoral dissertation?

Fisher: It was called *Presidential Economics*, and what it was, was John Kennedy around ’61 or ’62 toyed with the idea of asking for what were called Stand-by Tax and Spending Authority in case of a recession. The New School prided itself on being interdisciplinary and that attracted me. So, I had four people on my doctoral committee, two political scientists and two economists, and one of the economists was Robert Heilbroner and the other economist had been in the Weimar government, Hans Staudinger from Germany.

Baker: Wow, what a guy.

Fisher: And two political scientists, Saul Padover and Jacob Landynski. So, the more I wrote about fiscal policy, and monetary policy, and credit policy, the more anxious the two political scientists got, and they really said: “If this is what you want to do, do the whole thing over in the Economics Department.” But then, as you can imagine, I would get into problems of separation of powers and checks and balances and the spending power and all of that...

Baker: Right.

Fisher: ...and the prerogatives of Congress, and that pleased the political scientists, and the two economists would ask: “Why are we here?”

So I said “Don’t anybody leave,” and I did it in like nine or ten months, and it got an award at the New School. It was everything that you can imagine – all the separation of powers and constitutional issues.

Baker: I didn’t quite hear what you said. You said something about an award at the New School?

Fisher: It got an award.

Baker: Ok, what you did.

Fisher: Dissertation award.

Baker: Oh, terrific.

Fisher: And it led to my first book, *President and Congress* in 1972 that was with the Free Press.

So, already, I was into the war power and spending power and taxing power and delegation of power, from the start. So, for anyone to tell me you don’t have a law degree, you can’t do that – it’s just natural to me.

Baker: Right, right, exactly.

What spectacular timing for you to become available – just as these were becoming huge national issues.

Fisher: Oh, it was wonderful. And I, at the hearings in the Senate it was Senator Ervin chairing. Usually the staff director or the general counsel would sit behind him. Those people got to sit there. But there was a woman, I forget her name, an aide for Senator Ervin, said, “That’s for Dr. Fisher,” so I sat right behind him at the hearings.

Baker: Excellent.

Fisher: And one time we had a guy from the Justice Department testify: tall, lanky guy with long sideburns and bright ties. He was head of the Office of Legal Counsel – Bill Rehnquist.

Baker: Bill Rehnquist, right.

Fisher: In marking up a bill, normally the general counsel would sit next to Senator Ervin. But the subcommittee general counsel didn’t keep up with the issue of impeachment, he

didn't know the bill, the substance, – so the general counsel for the full committee said to him: “Don't sit next to Senator Ervin. Lou's going to sit there.”

Baker: Did that cause any heartburn on his part?

Fisher: He would've had more heartburn sitting next to Senator Ervin because he didn't understand this stuff.

You know, Ed Muskie, Jacob Javits, and all these senators were at the table, they'd have their amendments, either written out or handwritten, and Senator Ervin would call on one and he'd give it to Senator Ervin. Senator Ervin would hold it up in front of his eyes and look at it, say nothing, and give it to me, and I'm telling them that this is a good amendment or it's got a problem because of these things and if you change it, etc. So what heavy stuff is that, to be the advisor. Then they wrote it, they asked me to write in the conference report the title on impoundment and I did that and I write clearly and no one ever changed anything.

I knew the substance, and I did the Conference Report, and then they said, “We think there should be a dialogue between Senator Ervin and Senator Hubert Humphrey on the floor to explain why we need this legislation and its purpose.” Again I got to know both of them quite well. I knew their speaking style and I did this dialogue and no one changed anything and it's in the *Congressional Record* and – however, after the dialogue someone I think from Senator Ervin's office called and they weren't quite sure he was there for the dialogue, and I think someone said they weren't sure Humphrey was there for the dialogue. But it's in the *Record*.
[laughter]

Baker: Sometimes these are referred to as colloquies, right?

Fisher: Yeah, yeah.

Baker: And the Supreme Court has had some heartburn over colloquies.

Fisher: Yes, particularly Justice Scalia.

Baker: Right. Right.

Fisher: But it's funny. Everyone says, “Oh, that shouldn't count because staff did it.” Well, I don't think the president drafts his executive orders and proclamations, and I don't think cabinet members write their regulations. If you remember, President Carter, one of his reforms was to have cabinet heads read every regulation before it went out there. It was absurd. It didn't last long.

Baker: That was the road to greatness for him, wasn't it? But this concept of staff writing colloquies: Was that pretty common when you were doing it? Was there precedent?

Fisher: Oh, I'm sure there was.

Baker: Yes, it was not that unusual.

Fisher: And it sounds as though there's a potential for abuse or egotism, but there is none, because I knew whatever I wrote had to be correct, and I knew whatever I wrote would be read by other people. So, you have to be professional, and someone who used to work for Senator Douglas, I believe – after Senator Douglas made some floor statements and before it was headed to be printed in the *Congressional Record* – this staffer looked at what Douglas had said and was making, not just a couple changes grammatically, but big changes and crossing out stuff.

Baker: Oh my goodness.

Fisher: Some senator came by and looked and was really offended and went to Senator Douglas and [told him what his staff was] doing. So Douglas got upset and called out the staffer, and said, "Why would you make those changes?"

And the staffer says, "Because you didn't say what you meant to say." And Douglas read it and realized his staffer was correct. [laughter]

Baker: Could that staffer have been Howard Shuman, by any chance?

Fisher: I think so, exactly that, yes.

Baker: Sounds like him.

Fisher: Then, but again, Howard wasn't being manipulative. He was being responsible and catching things that would have been embarrassing.

Baker: Right, right.

Fisher: And he knew the subject.

Baker: I mean, that was the whole reason behind the Legislative Reorganization Act of 1946, right? To provide broader staff support –

Fisher: Yes.

Baker: – and to bring in more, and I suppose as soon as you bring in more staff, you're going to have staff doing just those kinds of things.

Fisher: Yes.

Baker: That's what members want them to do.

Fisher: It's just my impression. I wonder about your impression, because my impression in say the early '70s, I think into the '80s, I just seemed to work with staffers on personal staff and committee staff who had made it a career.

Baker: Right.

Fisher: And a career might be twenty or more years, and I don't see that as much. There's still a couple people like that around, but I see more often now, people coming in for their two or three years and they put it on their resume and they don't have that same commitment. So, is that your sense? I thought it strengthened Congress a lot to have that core professional long-term staff.

Baker: It's sort of what you hear about happening in universities, where you have senior professors retiring after thirty or forty years and not being replaced by another senior professor. My observation on the Hill has been that a lot of these kind of god-like staff people, when they leave, you don't know who their successor is. They're not replacing the same salary level, and that may get to the root of the problem – you know, they figure, going to cut the job into two or whatever, but...

Well, let's shift our focus to Senator Robert C. Byrd. I wanted to start by quoting from a document that Senator Byrd wrote in the year 2006 about you. He said, "Lou Fisher is a scholar of integrity and insight, of brains and backbone. He has assisted me on many occasions. Dr. Fisher understands that the Constitution's framers purposely placed the people's branch at the front of this government. The public needs people who understand the role of Congress, who share a determination to protect the people's liberties and who are unafraid to point out when Congress abdicates that role or when another branch of government tries to steal it away." Now, we perhaps can get back to the reason why he happened to write that in 2006, but just to start, first things first, what were the circumstances leading up to your association with Senator Byrd?

Fisher: I think it was another natural friendship. If you can imagine me, coming in in the early '70s and ending up with Senator Sam Ervin, that was a perfect match.

Baker: Starting with Paul Douglas.

Fisher: And Paul Douglas. Senator Byrd was – I've never been around anyone who had his love for the institution, and for the Constitution, and his integrity and his intelligence – never been around anyone like that, and at least in our private meetings, I never had a feeling that he was superior and I was inferior. I never had that feeling. It was just two people who loved talking to each other. I'm sure at times maybe he wasn't the most humble person around, but with me, it was just the two of us and full respect and full interest.

Baker: He became assistant majority leader in 1971, and then majority leader in 1977. At what point during that time frame did you begin to be active with him or to have a relationship with him?

Fisher: I don't even know. I was so active with Senator Ervin during the '70s. I don't know really when I started to spend more of my time with Senator Byrd. He had probably the best staff I've seen in any Senate office. I'm sure a lot of Senate offices are very, very good, but he had, again, people who were with him for a long time, and they were phenomenal, so I appreciated him and his staff.

Baker: Right. Were there some staff members that you particularly worked with during those early periods?

Fisher: Jim English and I name a lot of the people in the front of my book.

Baker: Right. We should say for the record which book you're referring to among – what, you've done about fifty-eight books?

Fisher: No, just about twenty, but all those editions. [laughter]

Baker: The current one is *Defending Congress and the Constitution*, for the purposes of our transcriber.

Fisher: Dedicated to Senator Byrd. In the front, I explain why, and I list probably eight or ten staffers I worked with closely. Some of them are still on the Hill. It was just a high quality outfit, and I don't know anyone who came close to Senator Byrd on protecting the institution and the pride of the institution. I don't think anyone, I don't think anyone, has replaced him.

Baker: Or ever will?

Fisher: When he was in top form...

Baker: When you met with him, what was the dynamic of your conversation? Did you come into his office? How did he get a hold of you, did he call you up and have a staff member call you up?

Fisher: Yeah, I think in the front of my book I mention that his staff would call – “Will you speak to Senator Byrd?”

And of course I would, and then he'll ask, “Lou what are you doing,” and I'd say, “I'm working on this” and I start to tell him what I'm working on.

He says, “Lou could you come over and talk to me about it?” So I’d go over and –

Baker: Immediately? Drop everything?

Fisher: Immediately. Again, I don’t know what other Senators or members of the House do, but I know a few who might do that – not just with me. Senator Byrd did it. I often would be invited, inviting some law professor in, and Senator Byrd would do this phenomenally cogent, coherent framework of what he’s going to ask this person, and he would just develop it, and so the person would know exactly what his needs are, and then he’d turn it over, and he did it over and over. I’m sure other Senators do that, but he did it on a regular basis.

Baker: How did he do that? Did he work with you to develop that framework or –

Fisher: Well, I think sometimes his staff knew people who worked in this area and ought to meet with Senator Byrd, and sometimes he’d pose the questions to me and sometimes to anyone else, so, other people. But that was the student side of Senator Byrd. He loved to learn, he loved to check. He brought me over one time because he said he was in a little bit of a dilemma. He in the past had taken a position against flag burning, and he’d been thinking about it a lot more and wondering whether it makes any sense to have the government spend its time prosecuting flag burners.

Baker: Right.

Fisher: He asked me what he should do, and my thought was that I think your constituents like to hear people rethink matters and change their mind for various reasons, and he did. So, that soul searching going on – I did this and now that I’m thinking about it, maybe it wasn’t a good idea.

Baker: Maybe when he was against flag burning he was not in a leadership position in the Senate, maybe it was more of a constituency – this is a question, I’m just wondering: As he moved into leadership, did his general approach change, did his views about national issues and structural constitutional issues evolve?

Fisher: I doubt it was anything that severe where he was just thinking of constituents and taking one position and now [that he was in the] leadership another.

Baker: Right, right.

Fisher: I just think it’s likely in a leadership position to take a position and it seems like a reasonable one, and then over time it just doesn’t seem to make sense. First of all, flag burning is not a problem, and you’re going to make it a problem by prohibiting it.

Baker: Exactly, right. So are you suggesting that the Senator Byrd you knew, over a long period of time, was pretty consistent in his views throughout that period?

Fisher: Well, there's a view he changed which I thought was admirable, for all of us to think that something is reasonable, and over time you either learn more or you see problems that no one could have predicted. So you change. And his love of learning and getting into things and checking his views – it's pretty rare.

Baker: You look around at the people you encountered in your career, and in terms of a self-taught individual, he seems to rank at the top of my list of experiences with people.

Fisher: That's a nice thought you have – self-taught because he went to law school later than most people. Maybe that is part of the answer, because a lot of people get their undergraduate and law degree out and by age 23, 24, they know everything and they don't look back. He was not like that, so he was someone going to law school at night. I forget what age – he was probably in his 30s then or more.

Baker: He was a member of the Senate. He would talk about the fact that he'd have to do all his homework on the weekend because he didn't have time during the week, and that people in his class would judge him as a Senator, not as just a colleague, a fellow student, by his performance.

Fisher: But I've always thought that's the danger: you get your undergraduate degree, your graduate degree, and [you think] your education is over – no.

Baker: Right.

Fisher: It's just starting.

Baker: It's just starting.

Fisher: And I think that was his attitude – just starting and never stops.

Baker: At his funeral or memorial service, one of the ministers said that Senator Byrd had told him that you live as if you're going to die tomorrow and you learn as if you're going to live forever.

Fisher: Oh, yes, yes.

Baker: And that just seemed to be exactly, exactly right for him.

Fisher: Years ago I read an interview with someone in Egypt who was the world's master at classical Arabic, and someone asked, "How did you ever master classical Arabic?" He says "I never have." That was his attitude, you know. He's getting there.

Baker: Working on it.

I'd like to mention four topics. These are huge topics, and you've written one or more books on each of these topics, but this is for the purpose of our focus on Senator Byrd. The first one is the line-item veto. In 1993, while chairman of the Senate appropriations committee, Senator Byrd delivered a series of fourteen floor speeches against the line-item veto, through which the President could strike out a specific item of appropriations, subject to review by Congress. What role did you play in that project, in assisting him and his subsequent successful campaign to get the Supreme Court to declare the Line-Item Veto Act of 1996 unconstitutional?

Fisher: Well, of all the things I've testified on, the line-item veto I've testified on more than any, and I would regularly oppose the transfer of that power to the president. At that time, CRS management had no problem with me taking positions. It's not just CRS we should be thinking about: it is something about the academic community. About two or three years ago, I was at the Miller Center in Charlottesville [Virginia], and all of us were presenting papers, panels of usually three or four people, and it went on for two days. On my panel I presented my paper on national security law, and a woman I've known for a long time presented her paper on budget policy. The commentator told the audience that he was not able to critique either one because he doesn't have the background, and I'm wondering why he was a commentator. Then he says to the audience, "I found both papers objectionable because they're normative." Now, I'm not around the academic community a lot, and I don't know words like that.

So, I asked him, "When you say normative – does that mean that Jasmine and I took positions and came to conclusions?"

He said, "That's what I mean."

So, that's a scary part of the academic community and to me a scary part of the CRS that they now are telling experts, don't come to a conclusion because you'll be normative, or you'll violate the neutrality principle, which never existed until 2004 in CRS. So you're not going to be invited to come and testify if you say, "I don't have a position, but I noticed three things on this side and three things on..." I mean, get out of the room, we're trying to get somewhere on this.

I always testified against the line-item veto. I testified against a lot of other things, testified for a lot of things. Neal Devins, who testified with me on the line-item veto, and I wrote a piece for the *Georgetown Law Journal*, because a lot of people said, "Oh, the president should have the line-item veto because governors have it!" Neal and I said that the state model has nothing to do with the national model, so that was a strong piece. Going back to my New School

days, the basic separation of power, checks and balances, legislative prerogative, spending power – you can't get more basic than that.

Baker: I found a paragraph in your book that seems to pertain specifically to what you're talking about, and I'd just like to read that paragraph. You wrote, "On another occasion, I was with a senator," unnamed, "who enjoyed calling experts in and asking them questions. He did that with me often. He was excellent at building a context and an understanding of the issues that interested him. He very kindly and generously described the credentials of a law professor seated before him. He then asked about a particular war power dispute: 'What do you think the framers would have said about that?' The individual responded: 'It would be very problematic.' The vagueness of the reply produced disappointment on the senator's face. He had asked a straight question and wanted a straight answer."

Fisher: Do you know who that was?

Baker: I have a pretty good idea. That appears on page 279 of your *Defending Congress*. [Louis Fisher, *Defending Congress and the Constitution*. Lawrence, Kan.: University Press of Kansas, 2011.]

Fisher: I'm just reviewing a book on national security law, and it's an edited collection, and there's a pretty good article that I'm getting a lot out of, and in a margin I'm putting in the number of times "problematic" is used. Nine times in that article, and it's meaningless.

Baker: Right, right, exactly.

Was it Robert LaFollette who was one of the first founders of the Legislative Reference Bureau back in the nineteen-teens, George Galloway? What these guys wanted were opinions – opinions of equal quality to the opinions being rendered in the executive branch by experts.

Fisher: Yes, and not just opinions, but how you got to that opinion.

Baker: That's right. That's what it's all about – it's that process for sure. So, anyway, you spent a lot of time on the line-item veto.

Fisher: Yes.

Baker: And helped Senator Byrd as he requested?

Fisher: He asked me – his staff asked me – to do a memo on the likelihood of him getting standing, challenging the Item Veto Act, and I did a long memo saying it was not likely because members of Congress will bring a case to court, often complaining that the institution didn't protect itself. There are only two cases I know of where members got standing in order to pursue it, and under very unusual circumstances. Otherwise, the court said, "Look, if the

institution is not protecting itself, you're going to come in here with your twelve colleagues saying that the president is wrong and we have another twelve colleagues coming in with another brief saying he's right."

Baker: Right.

Fisher: "So, it's an intramural contest and we're not going to get – The institution has to protect itself, we're not going to do it for you." So, the case that Senator Byrd brought on the item veto was thrown out on standing.

Baker: As you had predicted it would be.

Fisher: Yes, and then within a year or so, a private party that was injured and could show injury got standing, and it was struck down.

Baker: I've never known of a Senator who threw himself into a project as deeply and as thoroughly as he did – in terms of these fourteen speeches that he gave attacking the item veto. As I understand it, he memorized each of the speeches, he wrote them all himself, and then memorized them and stood on the floor and gave them without a note – the man had a prodigious memory.

Fisher: He did.

Baker: A photographic memory for sure. Then he put [the speeches] together in a book that he called *The Senate of the Roman Republic: Addresses on the History of Roman Constitutionalism*, and the book actually sold out from the government printing office. They had to do another printing.

Fisher: You know, when he was chair of the Senate appropriations committee, he had a lovely suite of rooms looking out toward the Mall. He had so many rooms. He and I were in a room back there and he was citing James Madison, one of *The Federalist Papers*, and a fairly long passage, by memory! I mean, I couldn't do it. I think I was so stunned, I didn't do the nice thing and say, "I'm amazed at what you just did." I just sat there open-mouthed, good heavens, you know.

Baker: Ken Bowling, who is the editor of the diaries of William Maclay from the First Congress – Senator William Maclay – was equally astounded [with Byrd's memory.] When Senator Byrd was at an event, I think giving an award to maybe the first volume of Senator Byrd's *History of the Senate*, Senator Byrd stood up and recited – cold – two paragraphs from the writings of William Maclay. [laughter] This editor, who had spent his whole life...he just, he couldn't, he was dumbstruck.

Fisher: Yes, yes, absolutely yes.

Baker: What a talent.

The second topic is expedited rescission authority – these are similar.

Fisher: Similar, yes.

Baker: Similar, I mean, the item veto seems to resurface in new clothing, addressed as expedited or enhanced rescission authority with a modification that presidential cuts would be sent to Congress with an up or down vote required within forty-five days. How did Senator Byrd respond to such presumed modifications?

Fisher: Well, another weakening of Congress.

Baker: Right.

Fisher: Those follow on ideas, and it's still around, I think even a couple of months ago, the House again passed this so-called expedited rescission, and Byrd saw it for what it is: Congress simply passing legislation like that is admitting publicly that, "We don't know what we're doing, we're irresponsible," publicly saying the responsible party is the president. And he's not going to do anything. I mean, the president's not going to put together that list of items to be terminated. Who's doing it? You've either got careerists doing it or you've got politicians who have their own agenda. Senator Byrd knew the leverage you would give to the president. They have a draft list of items and projects to be terminated, and then they call a member and say, "You know, a project in your state or your district is on that list, and we don't think it should be, because we see a lot of merit, and we're going to take steps to take that off the list. And by the way, the President has a spending bill to increase spending. Can we count on your support?"

Baker: There it is. [laughter]

Well then, another topic, recess appointments. Senator Byrd used to take a dim view of presidents' efforts to expand their Constitutional authority and make appointments to executive and judicial posts while the Senate was in recess, thus unable to provide timely advice and consent to those appointments. How did you assist him on this volatile issue of recess appointments?

Fisher: Well, again, I assisted him and I testified on that and I had written a lot on it. Certainly if the Senate is out of session for a month, twenty days or so, and if that particular office can't function – say you've got five commissioners and you don't even have a quorum anymore, so to function it's a short-term recess appointment. So, there's a legitimate reason, but as you know, with Senator Byrd, they would send up a name and the Senate would hardly even have time to have a hearing, to explore the person's credentials, and suddenly the person has a recess appointment. So, Senator Byrd would do the right thing as Majority Leader and said

you're not going to get any nominations – period – no matter if they're qualified or not unless you stop that.

And this was in the Reagan years, so he had a club and he didn't hesitate on using it and it was respected – he knew the institution and didn't want any monkey-business going on. A lot of Senate majority leaders don't protect the institution that way. So he saw mischief going on, he saw abuse going on, and he stepped forward, and everyone knew that he's not to be played with – it would be very costly if you go down that path.

Baker: Well then, this relatively recent device, not adjourning at the end of a session, but rather recessing and having *pro forma* sessions to prevent presidents from being able to submit recess appointments – did that start with Senator Byrd?

Fisher: I think it started in 2008 under Harry Reid. It might have been done before, but in terms of announced policy that there'd be no recess appointment, I think that goes back to November 2008.

The current issue with President Obama having Richard Cordray to head the Consumer Bureau and then three members added to the National Labor Relations Board, it's going to get litigated. And in fact, the National Labor Relations Board was before the Supreme Court a couple years ago and it was limping along with a quorum of two, because they had only three members, but it's authorized five. And the Supreme Court says no, you have authorized five and a quorum is three – that means that everything you've been doing is invalid.

That's a risk for the current National Labor Relations Board and it certainly could be the same problem with Cordray and everything he's doing during this time. It's a complicated issue because it took President Obama twelve months to get Cordray's name up to the Senate – and partly that is the funny Dodd-Frank Bill that delayed it. But even though you can't put a director in for twelve months, you can certainly get the name up early and get the process going.

Baker: Right.

Fisher: Then the other odd thing about it is the Senate Republicans announced that they're not going vote for Cordray or anybody for that spot unless the underlying legislation is changed. And Don Ritchie and his Office of Senate Historian was asked by one of the senators, "Do you know of this ever being a position?" He says, "I've never seen this one before."

Baker: Right.

Fisher: Because it would mean that every time you have a new administration, you're not taking your agriculture guy and your Secretary of Defense until you change the underlying legislation. [laughter]

Baker: Right, right.

Fisher: Paralysis.

Baker: What a nightmare, what an absolute nightmare. [laughter]

I always used to tremble at those kinds of questions – “Have you ever,” when you know there’s a strong political motivation for raising the question to begin with.

Fisher: Yes.

Baker: Well then, the fourth broad topic area is war powers. And just some background – in 1973, Congress adopted the War Powers Resolution to constrain presidential authority to unilaterally commit armed forces beyond responding to short-term emergency situations. Beginning with President Nixon’s veto of that measure, which Congress overrode, every subsequent chief executive has viewed the War Powers Resolution as an unconstitutional infringement on the president’s powers as commander-in-chief. When George W. Bush signed the Iraqi War Resolution in October 2002, he went out of his way to note that his request for a resolution of support, as he termed it, did not change the White House’s long-standing opposition to the War Powers Resolution. The Senate adopted the Iraqi Resolution seventy-seven to twenty-three, although many of its supporters later expressed regrets for their votes. How did you assist Senator Byrd during the 2002 debate and more broadly in his efforts to make this endlessly controversial statute work the way that its original sponsors had intended?

Fisher: Well, I always felt, and I told him, that I thought the War Powers Resolution, which was passed as a reassertion by Congress, and the press picked it up that way – Congress reasserting itself – was actually a surrender and a giveaway. Senator Tom Eagleton was one of the original sponsors of the War Powers Resolution. He was a fairly young senator and the Senate bill was quite strong. The president has narrow authority otherwise. He has to get authority from us first. But the House never believed you could pass that legislation, and so you had a weak House bill and the Senate bill in conference and when it came out, Eagleton looked at it and says “This is a bastard – it should not pass,” so he voted against it.

One of the great speeches ever for someone who had sponsored it and saw this was a corrupt piece of legislation to empower the president and it would weaken Congress. So I always thought that statute itself was false – namely the Section 2(a) says “this statute keeps faith with the founding fathers,” and it doesn’t, it allows the president to go to war for up to sixty to ninety days. The framers would be astonished at such a position. So, on the Iraq Resolution in October 2002, I worked with Senator Byrd on that. We both agreed that the assertions by the administration as to why it was necessary and that Saddam Hussein has weapons of mass destruction, there were about six major assertions, that there was no reason to think that any of them had any substance to them, and they all turned out to be empty.

Baker: Right.

Fisher: So, Senator Byrd and I had the same attitude, and I think Senator Ted Kennedy did as well, that there should be no passage of that resolution or any authority for the president until you get people over there – there were inspectors over there anyway – but get people over there and find out and make an informed judgment. Tragically, Congress didn't do that. As you know, it was an election year and Rumsfeld, Cheney, and everyone said, "If you don't vote for this you're not patriotic and you're weak."

Baker: And we'll help to defeat you.

Fisher: Yes, and it helped Republicans very much in 2002. And it made a lot of... Now, without naming names, a lot of Senators were voting for that because they had their eye on the White House, and then they later would say oh, well, they somehow got misled – that's almost as bad as George Romney saying "I got brainwashed on Vietnam."

Baker: Right.

Fisher: I mean, you make a vote for something that important, you've got to be informed about it. So, it's awful to watch members of Congress pay no attention to their duties. I testified last year on the military action in Libya before Senate Foreign Relations, and you can tell not one Democrat cared about their institution. They were just an offshoot of the White House. There were some Republicans very good on challenging the constitutionality of this. Some people argue that the president doesn't have to go to Congress but can go to the UN Security Council for "authority" or to NATO allies for "authority" – you cannot – and you know enough about the Senate treaty process – you cannot have a treaty that takes Article I power from Congress and gives it to some outside organization.

Baker: Right.

Senator Byrd, among others, proposed the establishment of a permanent eighteen member Congressional consultation group to meet with the president in situations where the War Powers Resolution might come into play. What do you think of this proposal and its chances for implementation?

Fisher: Well, I've always had reservations about that proposal, and I have even deeper reservations – there was a Baker-Christopher [War Powers Commission] Committee that – again the Miller Center in Charlottesville, they put it together and they did exactly that – they said the War Powers Resolution doesn't work, and we should have a twenty-member consultation committee, but it was much more of a giveaway of legislative power than Senator Byrd talked about, which could be informal sessions and regular meetings. But the notion that some committee could be a substitute for Congress I find offensive because the most junior member has as much of a right to vote on that as senior members. I'm afraid the senior members meeting

get bought into it and be part of the team and forget that they are members of a separate branch. So, I've written sharply against Baker-Christopher. The protection for the Senate or the House could come – should come – from committee chairmen and party leaders and they're the ones who can articulate. But there are very few of them who will do it anymore.

Baker: Why?

Fisher: I don't know. I don't know why these Senators – you watch them and members of the House on committees. They will – hardly any of them, either House Foreign Affairs or Senate Foreign Relations or the Armed Services Committee – I can't remember anyone for a long time who's told the administration, "You have no authority to do that – you have to come to us first."

So, I don't know what the failure is, either at the party leadership level or the committee chairman or the subcommittee. I have the feeling a lot of political scientists were critical of Congress for being too decentralized, having a subcommittee government, and I kind of like subcommittee government, because if you're fragmented like that it's harder for the executive branch to get ahold of you. That's why I didn't like the Budget Act of 1974 because they centralized the budget resolution, and if the president could get ahold of that, as Reagan did in 1981, he can drive Congress – which is exactly what he did.

So, I think Congress is a decentralized body, I think it's a strength, and once you start to centralize, in either a consultative committee or anything like that, you're going to weaken it.

I also think in the House there's been a move there toward greater power for the Speaker and for the Rules committee. The Rules committee in the House used to protect the institution. I testified there many, many times, and they seem to have dropped that role totally. I think in the past you could have a strong subcommittee with a good institutional sense, protect Congress, and I don't think that's around like it used to be.

Baker: How do we get back to that? Your books seem to make a very eloquent case for doing that, but how? I mean is it just too much a prisoner of the times we live in?

Fisher: How we get back I think has to be an understanding – a value of a democracy and fragmentation of power – that's what the Framers wanted. The Framers didn't trust the presidents. I think there are a lot of culprits here, and one is the academic community. Starting after World War II, you had presidential scholars, like Clinton Rossiter, Richard Neustadt, and the early Arthur Schlesinger – they lionized the president. He had expertise, he cared for the national interest, members cared only for the local interest. So it was a slipshod understanding of the Constitution and they idealized the president, and those books are absurd. I did a recent article on this idealization of the presidency for the APSA publication "PS." It's the academic community. So they've been teaching people the Neustadt book, which apparently sold like one million copies.

Baker: Billions of editions.

Fisher: Oh, amazing.

Baker: Yeah, yeah.

Fisher: So it's lousy education. I think the law schools aren't helping, because the law schools are going the opposite direction and say that the Supreme Court is the final word – that was never the understanding, that wasn't even John Marshall's understanding in *Marbury v. Madison*, it's a ridiculous argument. So, unfortunately the conservative movement used to very much value Congress as the first branch, used to value checks and balances, and do you know Mickey Edwards, the former House member from Oklahoma? He's a conservative. He says he doesn't even recognize the conservative movement anymore. He's not part of it. And this Judge Posner from Chicago, he said the same thing recently. He said, "I used to be a conservative, and I don't want to be near these people."

Baker: Exactly.

Fisher: So, you've got in the academic community a failing to do its job to teach people to understand, and I think a lot if it came maybe with the nuclear weapons and ICBMs [Intercontinental Ballistic Missiles]. These things are coming across in no time. Well, you don't tell Congress you don't count anymore because ICBMs exist.

Baker: Right, right.

Fisher: So, I think we've gotten very stupid about our constitutional system, and we – I'll send you something. You're familiar with this group called No Labels? There's some appeal to it. These are Democrats and Republicans.

Baker: Yes.

Fisher: But they recently came up with some proposals that they say "We don't have an agenda." But you'll see, I wrote for *Roll Call* an article saying, "You do have an agenda, it's just to empower the president and weaken Congress – that's your agenda." So I'll send that to you. [available at <http://www.loufisher.org/docs/ci/nolabels.pdf>]

Baker: Great, thank you. Yes.

Fisher: I've often thought for decades that all this work is less intellectual. For most of the people, it's emotional, and I will admit that emotionally I like checks and balances, I don't like power concentrated, and I don't think that's what the Framers believed. I think we know the cost of removing Congress, we know getting into Vietnam with the Gulf of Tonkin that the

second attack didn't exist. It didn't even exist, the cost is terrific, and the media I don't think helps at all. I don't know, I just flip around the channels and I don't see anyone seriously talking about anything on there, just screaming at each other. So, the moderating realm doesn't seem to exist anymore.

Baker: [By] the moderating realm [you mean] the media's moderation? The role of the media in moderating, or...?

Fisher: I think so. I mean, the news programs I used to watch back in the '60s and maybe the '70s would come on, you'd get some news, you didn't hear something shrill on one side or on the other.

Baker: Right, right.

Fisher: And that seems to have disappeared.

Baker: Right, right. It seems to reflect what's going on in the chambers of the House and the Senate itself.

Fisher: Screaming at each other.

Baker: Yes, exactly, right. [laughter] Who are the dealmakers, who are the people, the forces for melding views, differing views – compromise, if you will?

Fisher: I also think campaign finance...I think the *Citizens United* [decision] in January 2010 was a disastrous decision. First of all, it was five to four, and John Roberts said, "If I could get on the court I'll avoid these split five to four decisions. It's much better for the country to have seven or eight justices agree, and I'll decide things incrementally," and he didn't do that with that. With this health bill – when he threw in his fifth vote over with the liberal moderates, I think, fundamentally, he made a decision that, "If I do again what I did in *Citizens United*, I'm going to weaken the Court."

Baker: Interesting.

Fisher: And he found a way to uphold it. But that's a great danger, and as a result...I don't know what your feeling is. I mean, some members of Congress tell me they can spend 20-30 percent of their week raising money for their own race and for the party. Well, that's 30 percent of the time that you don't have to look out for your institution. They've always taken money, but because of television ads and so forth, they've never had to take *that* much money. So that's another reason.

When *Citizens United* came down, I did a piece for the *National Law Journal* saying that because the Supreme Court said, "Oh, if you want to have like a disclosure act, where people

have to disclose how much money they gave, we can do that, but otherwise, it's for us," and Justice Kennedy in that decision said that "*We hold, we hold* that expenditures do not lead to corruption or even the appearance of corruption." There's no basis for a Supreme Court – that's out of the air. So I said in my article that the only body capable of authority and competence to make a judgment is Congress, after extensive hearings on what damage is being done to our system and how much corruption or the appearance of corruption. That comes from Congress. As you probably know, just a couple of months ago, the court had a chance to take a look at a Montana Act restricting expenditures, because Montana's had a hundred years of corruption from originally with the copper barons.

Baker: The copper barons, exactly. [Fisher and Baker are referring to the Corrupt Practices Act of 1912, which was the result of copper kings in Montana who attempted to control the state with their financial superiority.]

Fisher: So there you had the Supreme Court of Montana deciding that that statute was constitutional and obviously was completely against *Citizens United*. But here you have a state and a Supreme Court based on evidence and the Supreme Court said no.

Baker: Throws it out, ignores it.

Fisher: No evidence, nothing.

Baker: Right, right, right. And the articles you send me we'll be sure to include as part of the transcript for this interview. [The article on *Citizens United* in *National Law Journal* is available at <http://www.loufisher.org/docs/ci/415.pdf>.]

Fisher: Ok.

Baker: And I would also mention to anybody reading this interview, they really then need to pick up your book, *Defending Congress and the Constitution*.

Fisher: Also, about a year or so ago, I had someone make a webpage for me, a personal webpage. [<http://www.loufisher.org>] I've got about ten categories there, a lot of them about war powers, executive privilege, and so forth. Then in each category, they can go in and there are links to my articles, to Congressional testimonies – a very handy, convenient thing. So, I've been sending it out to a lot of places for their convenience.

Baker: Excellent, excellent. I found that very useful preparing for this interview for sure. I think the Library of Congress online catalog has you down for fifty-eight books, having written fifty-eight books.

Fisher: With all those crazy editions, yes.

Baker: Lawrence Tribe at Harvard only has fourteen. [laughter] He must have editions too.

Fisher: He does.

Baker: Anyway, it's remarkable productivity for sure. The frustration of how do you shake people into realizing what's happening in terms of the destroyed balance between Congress and the Executive in particular, to say nothing of the Supreme Court, I think was part of the motivation that led Senator Byrd to write a book called *Losing America: Confronting A Reckless and Arrogant Presidency*, and this ended up on the *New York Times* bestseller list for a few weeks.

Fisher: It's a great, great book, and the motivation was wonderful. And I tell people in the simplest terms possible that if you're for democracy, you must be for a strong Congress. Without a strong Congress, you have some elitist governance, you've got two people elected in the Executive branch and no people elected in the Judiciary – that's nothing to do with democracy.

So here we are telling other countries, the Middle East and so forth, go for democracy.

Baker: Right. You want to get rid of the dictators. You want to get rid of the centralization.

Fisher: Yes! [laughter] I did work with the American Bar Association in the early '90s, and it was in Eastern Europe. I told them something and it had to get translated, but when they eventually got it translated, they understood it. I said that when I was in graduate school, I was taught that under capitalism, man exploits man, whereas under communism, it was precisely the opposite. Five or six minutes later, "Oh yeah, precisely the opposite, yes!" [laughter]

Baker: Precisely.

Fisher: Same thing.

Baker: The fact that Senator Byrd could pick up the phone, call you, you'd come over and sit down with him and go wherever his questions would lead you... Did you get any – do you perceive any irritation on the part of your CRS colleagues that you had such a wonderful and close relationship with the man who was the leader of the Senate, the chairman of the Appropriations committee, did that ever cause you a problem?

Fisher: No, because I was doing what a lot of my other colleagues did. They also had chairmen and subcommittee chairmen they were going over to see, and that's what we did and that was a natural part of our job. But then, as you know, somewhere in the early 1990s, CRS

management changed its model. We were very decentralized, and if you did your homework and your report and your testimony was good, you went up.

Then suddenly we got this top-down management where management didn't trust experts anymore. So, you know what I did was very natural – everyone liked it and thought it was strong, including management, who liked it very much. I had many colleagues who did exactly the same thing. The division I always had tension with – even after retirement, I still do – is the American Law Division, because they don't like, although they would read drafts done by other divisions to make sure it was okay, if a case was cited. When I got there in the early '70s, a lot of us were writing on court cases. The American Law Division said, "You can write on court cases, but at the end of the memo, you have to say the author of this memo is not an attorney." So we said that's a wonderful idea, and when you in your memos talk about foreign affairs and government you have to say, "The writer of this is not a political scientist or historian or an international affairs person. They dropped the idea.

Probably the biggest episode of that was when the Gramm-Rudman Act – the Deficit Control Act [Gramm-Rudman-Hollings Act/Balanced Budget and Emergency Deficit Control Act of 1985] the American Law Division was asked about the constitutionality, and in like a three or four page memo they said, "No problem with the constitutionality." And I had a friend in the American Law Division, he thought that memo was shallow and he wanted to write a memo showing there are big questions, but then the division says, "No, we can't have two attorneys coming to different conclusions." So I wrote and I said that the statute is unconstitutional – I testified before Jack Brooks's Committee on Government Operations in the House.

There was a Tom Kindness from Ohio, and he kept saying, "Mr. Fisher, you're not an attorney, are you?"

I said, "No, but I'm telling you why it is unconstitutional."

"Mr. Fisher, the American Law Division says that there's no constitutional problems – have you read the memo?"

"I did, and I disagree with it for these reasons." I said, "Congress cannot give to legislative officers, the comptroller general, and the GAO [Government Accountability Office], and at that time even the Director of CBO [Congressional Budget Office], you cannot give to the legislative offices executive duties on what to cut – you cannot do that."

And of course it got litigated and the Supreme Court said exactly that. I made a point of showing up in the American Law Division when the Supreme Court case came down. [laughter]

Baker: Who brought the champagne?

Now, you were, just structurally, was there a separate Senior Specialist Division, or were you part of the Government Division?

Fisher: That's another huge change. When I became a Senior Specialist, I think in 1988, we had an office of Senior Specialists, totally independent. That was one of the first moves that management did – to take us, disband it, and put us in divisions. Now they said, “Oh, you'll have your customary independence,” but of course not. Now you have a chief of a division who's going to do evaluations of you each year.

There were about five Senior Specialists in the Foreign Affairs Division – really strong people. Within one year, all five just walked out. When I became a Senior Specialist, there were about eighteen of us, and at the current time, I believe there are four – they're all, as you can imagine, near retirement. Over that period of time, management has given that title and salary of Senior Specialist to I think probably ten administrators, who have never done research in their lives. To me, that's a violation of the Legislative Reorganization Act of 1970, where Congress said we want those people to protect *us* against the Executive branch.

Baker: Right. So, none of those people – it's not typical for those people to go over and sit down with Senator Byrd or his counterparts.

Fisher: They couldn't – it'd be humiliating.

Baker: Right.

Fisher: No, they don't do that. They're all busy with administrative work – so no substantive capacity at all.

Baker: So then I guess the big and obvious question is why? What made the difference? Is it personality of the Director of CRS?

Fisher: Yes, I think it was the personality. He's retired now, but I think he was someone who.... All the directors before trusted experts. Maybe something would go wrong now and then, but they trusted experts, and we were all professional. You know, once you have a director who doesn't trust experts and is afraid of their independence, this is what you get. And the thing that still surprises me – I talk to so many members of Congress about this, so many staffers, I said, “You wrote a statute for a purpose, and that purpose is being undermined by CRS management.”

I could never get anybody to say, “That's revolting. Oh, this is an outrage!” I could never get anyone to react that way.

Baker: How about Senator Byrd? I mean, the paragraph I read earlier –

Fisher: Yes. He was, of all the members – I reached out to a lot of members I testified for, only one person came through – Robert Byrd. One person. Publicly.

Baker: Did it help your case?

Fisher: Yes. And it helped a lot of other things. I, at a certain point, when I saw I was being aimed at to either be fired or downgraded, I threw the whole thing out onto the Internet. POGO [Project On Government Oversight], if you know the other project of government accountability oversight, and the GAP – Government Accountability Project – they supported me and spread the word. Suddenly, from Australia and England and France are coming letters to the Librarian of Congress, saying, “What in the world is going on over there?” So all that helped. It infuriated CRS management, but I think that and the Office of General Counsel in the Library of Congress looked into whether CRS could punish me. I went up there for a meeting, and one of the attorneys said, “Are you Lou Fisher?” I said “Yes,” and he put his hand out.

Baker: We’ve been waiting for you. [laughter]

Fisher: So they supported me one hundred percent.

Baker: Amazing.

Fisher: It’s very sad, and it still is today. The analysts in CRS are first-rate, professional people, and they are all just kind of strangling on knowing that any independent finding or discovery or contribution they make is a risk.

Baker: But from your perspective, are there still people in Congress who sort of play the role of Senator Byrd, who demand, in a polite, cordial way that the analysts come over, that the specialists come over and sit down and give them their opinions? I mean, that would seem to lift a lot of boats if there were a lot of people demanding that kind of service?

Fisher: I agree. Staffers will do it; I don’t know how many members.... I somehow sensed...I think the Internet made a change, because a lot of us when we did our memos for committees and for members, we’d get a phone call, “Do you have something on this?” I’d listen to the phone call and say, “You know, I have a memo that does a lot of it, but you’re bringing up something else, so let me write a memo on that.” There’s something about the way the Hill has worked in the last ten or fifteen years where they – we all said the phone’s not ringing because they’d go online.

So that kind of tailor-made product that we all did and we loved to do largely stopped.

Baker: Right.

Fisher: I know what you want and let me do it for you – suddenly they’re just going online and getting it from Heritage – they’re getting it from all these places, so that really weakened CRS and the analysts.

Baker: It sort of mirrors the problem public libraries and university libraries have around the country, that they’re not getting the reference calls anymore because people are their own reference librarians. You know, they’re digging it up from wherever. But at least you were providing a focused filter of that kind of information.

Fisher: My last five years at the library I was at the Law Library, and there’s been a dramatic change. The Law Library has a nice, public – it’s a public library, and huge numbers of attorneys would go and use it. But then, as you’re suggesting, they’re back in their law firm and they go online and stuff like that.

Baker: Right.

Fisher: So, a lot of these public facilities are not being used.

Baker: I was out at the University of Maryland’s McKeldin Library the other day doing some footnote checking in the stacks, and I heard a librarian walk by with a visitor. The visitor commented on how all the books were nicely arranged on the shelves, and she said “People don’t use them anymore.” So there they are.

Fisher: Yeah, if they are in order it means no one is using them.

Baker: Yeah, exactly right. Exactly right. [laughter] Amazing.

People used to refer to Senator Byrd as a senator who could have been at home as comfortably in the eighteenth-century Senate, the nineteenth-century Senate, twentieth, twenty-first-century – you know, sort of a senator for all seasons. In his deliberative style, his wanting to get the fundamental issues.... Maybe it’s the old image of a Senator going over to the Library of Congress Members Reading Room and actually reading a book to prepare for legislative decisions. That obviously has changed, there aren’t many senators around who do that anymore.

Fisher: No.

Baker: Because we’re focusing on Senator Byrd, are we likely to see another Senator Byrd? Now he sometimes was called the dean of the Senate, as Richard Russell was called the dean of the Senate. There are any number of senators going back to the beginning who were known as singular senators.

Fisher: There are books written on Richard Russell. He is such a strong person chairing the Armed Services Committee, and how could he let Vietnam get as bad as it did, because

Lyndon Johnson, everybody knew – don't go into Indochina – just don't do that. Russell, as strong as he was, never seemed to understand that as a senator from a separate branch he has a constitutional duty – now maybe privately he might have said something – but he didn't protect the institution the way that Senator Byrd [did]. That was in his bones, he knew that was his duty. So he never said, "Oh, I have a friend in the White House," he never did that.

Baker: So then who is the next Senator Byrd? Is there likely to be [another]?

Fisher: We're not going to get it because of what we said a little bit while back: that unless this country and academics and the press and the media and constituents and students understand the value of a system that's based on separation of powers because power gets abused and the need for checks and balances. I was at an American University Law School function and on the panel was someone who, I suppose he feels like he's a conservative and he was looking at the audience, and he said "I'm probably the only conservative in the room."

And I said, "I've been at the Library of Congress for forty years talking about separation of powers and checks and balances – what would be more conservative than that?" So, that, as you know, those values, those conservative values, [that gets dismissed as] sort of eighteenth-century, [seen as] just not up to par, "that just doesn't work anymore." So how well does it work when you put all the power in the president? He can go to war wherever he wants to. That doesn't work either.

Baker: That's right, that's right.

Fisher: And for those who think to be a good president you have to be a war president, just look what happened to Harry Truman with Korea. He got crushed, and so did the Democratic party. Lyndon Johnson – Vietnam – total disaster. George W. Bush was riding fine until Iraq, and then not only do you not have reliable information going in, once you get in.... You probably remember the cartoon where someone says, "Well, it's time to switch to Plan B," and someone replies, "Did we have a Plan A?" [laughter]

Baker: Exactly.

Fisher: You talk about incompetence....

Baker: Right, right. To the level where he won't even be invited to the Republican Convention. [laughter] They won't even begin to associate with him....

Fisher: Unfortunately, I see that a little bit with Barack Obama – I'm sure a lot of people say, "You know, you look weak if you don't do something on Libya."

Baker: Right, right, right.

Fisher: And now, heaven knows what's going on in Syria, but I thought the arguments for going into Libya were absurd, and I wrote an article on that as well. [Available at <http://www.loufisher.org/docs/wplibya/Libya.Fisher.PSQ.2012.pdf>] I testified on it, and Harold Koh, legal adviser in the State Department, testified that same day. I watched him – he was invited by the American Constitutional Society, as sort of the liberal counterpart to the Federal Society –

Baker: This is the former dean of the Yale Law School?

Fisher: Yes, a champion of human rights in international law. After being invited to talk before the American Constitutional Society, a progressive group, he said that there are no hostilities in Libya. So they weren't happy about that at all. He's a very charming person and I'm watching him give his talk. He said at one point, "I've never said anything I do not believe." He said it in a way that came across as integrity, came across very nice, very, very impressive. I'm listening, and then I hear this sentence: "Government lawyers are team players." I said okay. Alright, and you've just taken thirty years of your wonderful career and put it down the toilet. [laughter]

Baker: Right, right, in that one sentence. Take note!

I mentioned your book – anybody listening to this interview or reading this interview certainly needs to read your book *Defending Congress* for chapter and verse of some of these fundamental issues about what's happened to the checks and the balances, the separation of powers.

Fisher: I partly wrote it because I think a lot of people don't appreciate what Congress has done, and I say in there how Congress after the Civil War protected women to practice law – courts wouldn't do it. Congress did it. Congress was the one after the Civil War to have blacks given access, equal accommodations – struck down by the court. So, then you ask in 1878 when they passed legislation that women can practice law – it was an all-male body, and you have to say, "What possibility is there for an all-male body to pass legislation?" To pass within one year, within one year, and the Supreme Court had a rule saying that women can't practice here because of separation of powers. Members of Congress objected: "We decide national policy."

Baker: Exactly so.

Fisher: So they have done so many things that anyone who says, "Oh, the courts are the ones to protect individual rights." No, no. I can give so many good examples where Congress did it.

[laughter]

Baker: Your treatment of the conventional claim that the Supreme Court decides finally what the law is is so thorough and so well documented that anyone who reads what you've

written will never again even entertain that thought. Have you received any feedback from this book in particular, particularly from the Hill community?

Fisher: Not from the Hill community. I don't even know who on the Hill reads anymore. I mean, I've got a couple of friends there who are really wonderful, and I stay in touch with them. It's got some nice reviews, and one review I particularly liked said, "The last chapter is Orwellian." Orwellian...what in the world? [laughter]

Baker: At least he didn't say normative. [laughter] Orwellian – oh my goodness. The writing is so smooth, it's so engaging for sure – recommended highly, and for it to be dedicated to Senator Byrd is an honor that he certainly would have appreciated, and seems to be very appropriate. Are there any other points that you'd like to make about Senator Byrd or your association with him, things that we haven't covered? I know that's a big topic.

Fisher: There was really just a lovely decency about him and his approachability and no arrogance. No, "I know everything and I'm going to lecture to you." No, it's open discussion, it's "I'm trying to learn, I want to learn [to be] better than I am, I always want to get better." That radiated out to the staff. The staff were probably as good a staff as I've ever seen anywhere. They all mirrored his hunger for understanding and giving you full freedom to go and come up with things. I'm sure my memo that, "You're not going to get standing" was disappointing, but, "You asked me!" [laughter]

Baker: Exactly. That's what he expected of you. Well, that's a very nice note I think on which to conclude our conversation.

Fisher: It's been a pleasure talking about this.

Baker: Thank you, thank you for your time, thank you for doing it.

Fisher: Great.

[END INTERVIEW]