Oral History of
DAVID B. ISBELL
FIFTH SESSION - OCTOBER 7, 2008

Sinclair: This is session five of the David Isbell oral biography for the Historical Society of the D.C. Circuit. We are beginning today with the period when Mr. Isbell had become a partner at Covington & Burling and one thing we're going to start talking about is your family life at this time, the late 1960s. Let's talk about your parents first, during that period.

Isbell: Well, the most important event in my parents' lives in that time was my mother's death, on September 5, 1966, prematurely, since she was only 64. The cause was a cancer that had metastasized before it was detected. She'd had a cancer of a different kind some 15 years previously, which was timely detected and cured by surgery, but this time she was less fortunate, and when the cancer was discovered it was already in an advanced stage, so she died within a few months. The prevailing practice among doctors dealing with cancer in those days was not to tell the patient that it was cancer; and the doctor who was treating Mother managed to find a disease that had symptoms similar to what she was experiencing, and told her that that was what she had. So everyone in the family knew she was dying except her (and our small children). I suggested to my father that he get an extended leave from the architecture firm where he was working, but to tell Mother that he had retired, so he was able to be with her continuously to the end.

That was the first death of someone that close to me, and the first in which I had been in constant contact with the one who was dying and felt responsible for practical aspects of the process. I took it hard; although, rather curiously, watching her dying somehow eliminated a fear I'd long had of dying myself.

Sinclair: Why do you think that is the case?

Isbell: Well, I suppose I had vicariously experienced Mother's death, and come to recognize it as a natural end of life. We hope that it won't come to us prematurely, and we hope that when it comes it won't be too painful for us or our survivors, but it's a part of life that we'll all experience in due course.

Anyhow, I arranged a memorial service in the church in the Westville section of New Haven to which she and her family had gone in her childhood (and where I'd sung in the choir the year I lived with my Crabb grandparents), at which I had the minister read a remembrance of Mother that had been written by a college friend, Paul Welles, who was very close to her, a document that was set in beautiful type by another college friend and roommate, Roland Hoover, who was once the official Printer of Yale. That remembrance now hangs over the fireplace in the central ground floor room in our house in Chevy Chase.

Sinclair: Were your parents still living in Greenwich at that time?

Isbell: No; they had moved away from Greenwich at about the time they bought the summer place in Vermont, and by the time of Mother's death they had sold the Vermont place and acquired instead a summer cottage in Centerport, on Long Island, near a beach on the southern coast of Long Island Sound, a daily commute for my father, who was still working in New York City, and much less of a commute than his weekly trips to Vermont. They had an apartment in Bronxville, New York, where they spent the colder months. They were living in Centerport when my mother died.

My father then resumed work at his office, but within a couple of years he had to retire, for reasons of health, triggered by a bleeding gastric ulcer that required removal of half of his stomach. He spent a year or so with my sister and her family in Charlotte, North Carolina, recuperating from that operation, and then returned to his apartment in Bronxville, having sold

the beach cottage in Centerport. He had no family nearby, and few friends, since it was Mother and not Dad who did the finding and cultivation of friends, and he surely wasn't enjoying that lonely life, though I never heard him complain about that (or, for that matter, about anything else).

Michèle and I were then still married, and we had hit upon the idea of getting a country place where my father could live, but one near enough to Washington and spacious enough that we could use it also as a weekend place to take the children to. So I spent a fair amount of time on weekends driving around the countryside within an hour or two of Washington in every direction, sometimes with my father and sometimes without, looking for a fixer-up house with enough land for privacy, preferably with a view and preferably also with some water; a stream or a pond, or both.

Although I did most of the exploring, it was actually Michèle who found a place that fitted our specifications perfectly, in Berkeley Springs, West Virginia, just a hundred miles from our then-house in Chevy Chase. Michèle happened to find it in the course of a weekend she'd spent without me at some sort of weekend gathering at a resort named Coolfont in the Berkeley Springs area, where there was a real estate agent's office planted very noticeably opposite the entrance to the resort.

The property was an old farmhouse, in quite poor repair, with no heating save that from one fireplace and possibly electric heaters, since it did have electricity (and telephone service). It also had running water, but only in the kitchen, and the toilet facilities were in an outhouse that happened to get blown over by a strong wind the day my father moved in. But it had 76 acres of land, mostly wooded but with one meadow with a splendid view, and not one but two spring-fed ponds. Something had been farmed there at one time but I don't know what. The

main crop that we found there was poison ivy. There was also a crop of abandoned automobiles on the property, which a state agency was glad to remove, without charge.

My father and I bought the place jointly, and took possession of it in February 1969. He moved in as soon as some basic improvements, like installation of a furnace and a bathroom, and considerable painting and patching, had been done. And soon afterward, I started a routine of bringing my children out there for the weekend, every other week.

Ironically (and rather sadly), although Michèle had found the place, and at a time when it was our shared intention not only that my father would spend his remaining years there but that we would take the children there together on weekends, by the time we actually took possession of the property, we had separated. We had, however, agreed that I would have custody of the children every other weekend, and my having this place where I could take the kids on the weekends when I had custody with me was an unexpected blessing for me, since I couldn't very well keep them overnight in the one room apartment where I was living. However, it also meant that Michèle never got the chance to enjoy the property she'd found for us.

Sinclair: A bit of good luck for you, and poor luck for her.

Isbell: Indeed. And it was certainly a great boon to my father, who lived there for almost ten years, until he finally was too mentally deteriorated to live by himself. When he reached that point, we brought him in to live with us, sold the West Virginia property, and used the proceeds to build an addition onto our house in Chevy Chase which served as his quite separate apartment. And then, when he had to be put in a nursing home, it became our large "West Wing" living room. Dad told me, at one point while he was still there on the West Virginia property, that it had been the happiest period of his life. He certainly loved being in the country, and he also

loved being alone, with his dog and a car with which he could freely roam. And I'm sure he also loved seeing, on our biweekly visits, his son and his grandchildren, too.

It was also a great boon to my children. Ideally, I think, every child ought to have the opportunity to spend some time in the countryside, to see and enjoy nature, and my kids certainly enjoyed the times we spent there. I bought the boys a trail motorbike, and with my daughter bought an interest in a horse, of which we took custody on each weekend when we were there. And, finally, it was a boon to me, not merely for the sheer pleasure of being in the countryside, but also in the chance to be in my children's company without the static that tended to accompany communications when Michèle and I were still together.

Sinclair: Switching gears, tell me about the separation from Michèle and meeting your new wife.

Isbell: Well, I'll try to make this brief. By the time we separated, Michèle and I had been married for 13 years, although it had become clear to me (and, I think, to her as well) after five or six years that we had made a mistake. Our marriage had been based on a reciprocal infatuation which didn't survive the realities of married life and parenthood, and as time went on it became increasingly clear that we really weren't well suited to each other. We kept trying to improve things, mainly by seeing a marriage counselor, but we were not making much headway. There came a time when Michèle decided, perhaps with the encouragement of the marriage counselor, that we should separate for a while—that is, that I should move out—the idea being that with such a separation we might get a different perspective on our differences and then be able to get back together and have a less stressful relationship. I resisted the idea of separating because I was afraid we would simply stop trying to make our relationship work; centrifugal forces would take over and the trial separation would become a permanent one. Michèle was

quite insistent that we give separation a trial, and I finally agreed, thinking that maybe, after all, she and the marriage counselor were right and I was just being unreasonably stubborn in my resistance.

So, after making sure that I would have access to our three children every other weekend, I did move out and took up residence in a one-room apartment in the boastfully named Imperial House, near Dupont Circle. And soon after taking that major step I realized that my apprehensions about a trial separation had been well founded. I felt liberated, and had no desire at all to resume that marital relationship, though I did want to keep in contact with our children. I told Michèle of my decision, and she eventually accepted the fact that my unwillingness to resume our marital relationship meant that we were going to get divorced, and that would require that we negotiate about a separation agreement that would govern the terms of the divorce. We quickly reached agreement on what amounted to joint custody, but an accord on the financial terms of the divorce was a harder nut to crack. That negotiation was a prolonged one, lasting well beyond the twelve months of mutually-agreed separation that would be sufficient for purposes of a consensual divorce in the District of Columbia, but we eventually reached agreement, and got divorced on July 20, 1971.

Sinclair: You subsequently remarried?

Isbell: Yes. During the period of our separation, and negotiation of the terms of our divorce, I'd formed a close relationship with Florence Bachrach Robin, whom I'd first met through the ACLU, in 1968, when I was in New York for a meeting of the ACLU national board and looking for a replacement for the Executive Director of the ACLU of the National Capital Area. She had just moved from Atlanta, where she had founded and run the Georgia affiliate of the ACLU, to Baltimore, and was in New York looking for another ACLU job that she could

handle from Baltimore. I was impressed by both her ACLU background and her obvious competence, and tried to hire her as my affiliate's Executive Director, but the National organization had already hired her as an assistant to the organization's first full-time representative in Washington, a wonderful man named Larry Speiser. She later became the director of the Maryland affiliate, and then was lured to our local affiliate, not by me but by our legal director, Ralph Temple.

Florence's husband, Fred Robin, had died in August of 1969, and she, having no further reason to stay in Baltimore, which required commuting to her job with the ACLU affiliate in Washington, moved to Bethesda, to be closer to her job. And, as I've said, by the time my divorce from Michèle came through, we had formed a serious relationship; indeed, we had decided to get married. However, at the end of the week in which my divorce became effective, I was scheduled to leave on a five-week, five thousand mile tour of the West with my three children and my retired father, in a self-propelled motor home—a great big bus, with a shower, air conditioning, toilet, cooking facilities and space for six to sleep and lounge. That was something I had scheduled before I knew that my then marriage was going to break up. Now the breakup had occurred, and I was going to remarry, but I was also determined not to cancel or postpone that long-scheduled trip, so the question arose whether Florence and I would marry in haste and she would join my family on that western voyage, or we would postpone our marriage until after that trip, and then take a proper honeymoon trip by ourselves at some future time. I put the choice to Florence, and without hesitation she chose to make that trip, and let it serve as our honeymoon. So my divorce came through on Wednesday of that week, we were married by a justice of the peace in Virginia on Thursday, and we all left for the western jaunt on Saturday

of that week, on what was surely a honeymoon trip unique enough to deserve mention in Guinness's Book of Records.

Sinclair: You rented the vehicle?

Isbell: Yes, rented it, picked it up in Denver and returned it there. I had taken a trial-run, a shorter trip, just to Canada and back, with my kids and my father, the summer before. Michèle did not want to go on either the shorter experimental trip or the longer trip, most likely because I intended to take my father along, who had never been west of the Alleghenies, except for one visit to Detroit, as well as the children.

As it turned out, that trip went extremely well. It gave my children and Florence a chance to get to know each other without any interfering influence of their other parent. And Florence was very good at getting along with kids; she'd been a camp counselor. And it was a wonderful trip from the touristic point of view. Marvelous scenery, comfortable traveling and utter independence of movement. We generally stopped overnight at camp grounds designed for such vehicles, but there were a few times where we'd just stop in the woods somewhere. Florence and I generally slept outside the vehicle, in a two-person sleeping bag with an inflatable mattress, but sometimes all six of us slept within the bus, and sometimes we all spent the night in a motel, to get the benefit of a more hefty shower than was provided in the bus.

Sinclair: Now after you and Florence married, did her children live with you?

Isbell: Florence's son Richard was in college, at Georgetown, so he was out of the house. Her daughter Peggy was in her senior year of high school at Bethesda Chevy-Chase High School and was living with Florence, and then me as well, in an apartment on East-West Highway just across the street from her high school, where I joined them. The next year she went off to college.

Sinclair: So when you two married, it was just the two of you even though you had five kids?

Isbell: If you're asking about our living accommodations, that's right except for that first year when Peggy was finishing up at BCC, although when we finally found and bought the house that met our requirements, one of those requirements was that there be six bedrooms, so that all five of our collective children could be accommodated at the same time: mine during the times when I had custody, and Florence's when they needed a respite from college (or, in Richard's case, graduate school).

Sinclair: Well, I think that does a good job of covering your family life during the late 1960s, so let's talk about your law practice at that time. You became a partner at Covington and Burling.

Isbell: That's right; I became a partner in the summer of 1965.

Sinclair: Was there a junior/senior system back then?

Isbell: Yes; when associates were elected to the partnership, they were initially junior partners.

Sinclair: What did that mean? Or what does that mean?

Isbell: It didn't mean much as a practical matter. You had the rights of a partner, you got copied on reports to the partnership, you attended partners meetings and voted on partnership matters, including elevation of others to the partnership, and you didn't have to attach the label junior when dealing with clients or third parties, and it didn't appear on your business cards. But there was still a certain implied tentativeness in the label *partner* being modified by the term *junior*. The junior status lasted two years, I think; it may have been three. In any event, after I had done my standard period of qualified partnership and felt free to speak up about it at a

partners meeting, I started campaigning against having this fictional period of, in effect, probation. Nobody had ever failed to graduate from junior to senior, so it was just a sort of tentative reservation about you which really wasn't serving any useful purpose. And I can't say that my agitation on the subject was responsible, but in due course, that feature was dropped from the partnership process.

Sinclair: So as a young partner, what kind of work were you doing? Were you litigating?

Isbell: I'm trying to think what I did at that time. One of the things I did was serving as outside counsel to the American Institute of Certified Professional Accountants (AICPA), which was a long-standing client of the firm, with the lowest (and therefore earliest) client number I ever saw—that number, I remember, was 630. Up until the time I took on that role, it hadn't been a major client at all. The AICPA was headquartered in New York. And what the firm was currently doing for them before I got involved was merely to provide an associate who from time to time helped to conduct a disciplinary proceeding. Individual members of the AICPA would occasionally get charged with some sort of misconduct that violated the organization's code of ethical conduct. There would be an investigation and then a possible disciplinary hearing at which the heaviest penalty available would be expulsion from the AICPA, which would likely be followed by a state regulatory office that could revoke the miscreant's license as an accountant.

But at the time that I got involved with the AICPA, the accounting profession was facing a growing problem of third-party liability—exposure not merely to suits by clients but also by people who had made use of or relied upon audited financials. Such suits, against both small and, with more publicity, large accounting firms, were becoming a major feature of the world of certified public accountants. The Institute's management decided that they needed to have a firm devoting attention to the problem of accountants' legal liability. Covington was then their

only outside counsel—they had an inside counsel too—and they asked Covington if it would take this on. Gerry Gesell, who was the partner responsible for that client, said the firm would undertake that responsibility and he designated me as the lawyer who would be principally responsible. I'm pretty sure that happened while I was still a senior associate, but when I became a partner that was the principal client for whom I worked, and I was the partner in charge of it, reporting to no one else.

I found it a very interesting representation. I advised the governing board of directors from time to time, worked with the committees at AICPA that were dealing with professional standards of various kinds, gave talks about developments in the law affecting CPAs at annual meetings of the membership, prepared and filed amicus briefs on the Institute's behalf in cases involving possible changes in the law affecting the legal responsibilities of CPAs, and I became quite widely known in the accounting profession, as a result of which I started getting asked by individual accounting firms to represent them in litigation involving claims of accounting malpractice.

Sinclair: So you had a mix of counseling and litigation work for accountants?

Isbell: That's right. It's a very satisfactory mix and I enjoyed the counseling although my first love was still litigation. There was an aspect to the representation that I think of as having a sort of academic quality since it involved projects sponsored by the American Law Institute (ALI). Because of my representation of the Institute I got involved in a project of the ALI involving a comprehensive revision of all of the federal laws dealing with securities. I have mentioned that project in connection with my experience with Louis Loss, the Harvard Law professor who was the reigning expert on securities laws at the time, in connection with the first book review I handled as Article and Book Review Editor of the Yale Law Journal.

Sinclair: You're talking about, for example, the Securities Act of 1933 and the Securities and Exchange Act of 1934?

Isbell: Yes, those two were the principal statutes, but there were and still are a number of others. My interest in it—more fundamentally, my client's interest in it which occasioned my participation in the ALI project—had to do with the liability provisions of the proposed revised securities law.

Sinclair: Now, was that paid work?

Isbell: The firm was paid by the AICPA for the time I spent on that work, yes. And I'm sure Loss knew I was acting on behalf of the AICPA.

Isbell: A somewhat similar project of the American Law Institute that I was briefly involved in was the *Restatement (Second) of Torts*. The AICPA's particular interest there was in a single provision that addressed liability to third persons for negligent misrepresentations, which is to say liability for misrepresentations not made directly to the third person but rather made to a second person but foreseeably relied upon by a third person. Of course the accounting profession's interest—and therefore the AICPA's interest—arose from the circumstance that accountants, in their capacity as auditors of corporations, issue opinions on the financial statements of publicly-owned companies which make representations about the accuracy of the financial statements that are foreseeably relied upon by persons who are considering whether to acquire or dispose of securities of the audited company.

Because of the Institute's interest as just explained, I arranged a meeting, along with my-then associate Jim Strother, with William Prosser, the premier figure in the field of Torts, who was the reporter for that project, to discuss the language of section 552 of the *Restatement*, dealing with liability to third parties for negligent misrepresentation. (Professor Prosser, too,

was well aware that we were representing the AICPA.) The granddaddy case in this area was a decision written by Cardozo in 1931, when he was Chief Judge of the New York Court of Appeals, holding that the maker of a negligent misrepresentation is liable only to a person to whom the representation is addressed, or to a third person if that person is one specifically contemplated as the one who would rely on the representation—the *primary beneficiary* of the representation.[14] This doctrine had been gradually eroded by the courts' recognition that a larger class of third-party users of erroneous professional representations could be injured, and not only those for whom the representations were primarily intended.

The burning issue in this area, with respect to liability of accountants, was whether their liability for merely negligent misrepresentations with respect to an audit report on erroneous financial statements could extend not merely to those persons who were specifically expected to rely on the auditors' assurances with respect to the financial statements (such as a bank that, as a condition of a loan, had required audited financials of the borrower), but also to the much larger group of potential claimants, such as stockholders of the audited company, who could well be considered foreseeably to rely on the audit reports, rather than intended ones. The federal securities laws made a distinction between the standards of care applicable to auditors in cases where their audit reports related to financial statements in an offering of securities (where the standard was negligence),[15] and in routine periodic public filings by companies subject to the federal laws (where the standard was intentional or reckless misstatement).[16]

The issue the ALI was addressing at this point was whether the court-made common law that the *Restatement* was trying both to encapsulate and to shape, as applicable in common law cases—that is, ones not governed by the federal securities laws—would draw a line, with respect

[14] *Ultramares v. Touche*, 255 N.Y. 170 (1931).
[15] Securities Act of 1933, sec. 11 (15 U.S.C. §77k).
[16] Securities Exchange Act of 1934, sec.10 (15 U.S.C. §78j and SEC Rule 10b-5).

to third-party responsibility for negligent misrepresentations, that extended to a smaller group of foreseeable reliant stockholders than the federal securities laws, yet to a somewhat larger group than would result from Cardozo's *primary beneficiary* formulation. Our effort to suggest language for the ALI's *Restatement* in this regard was successful. The black letter provision of section 552, as recommended by Prosser as reporter and adopted by the ALI, reads as follows; the key language, suggested by Jim Strother and me, is italicized:

> § 552. Information Negligently Supplied for the Guidance of Others
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> (1) One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining of communication the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person *or one of the limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it*; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

The key word in our formulation, of course, was the word "limited." We also suggested several hypothetical illustrations involving accountants that were included in the *Restatement*, showing how the key language would apply in circumstances of particular concern for accountants. Realistically speaking, I have no idea to what extent we changed what would otherwise have been the shape of the *Restatement,* and in consequence of the case law, but I remember thinking at the time that we had performed a valuable service for the accounting profession, although I'm confident that Prosser adopted our proposed language because he thought it had merit—as did, presumably, the ALI members who voted to adopt it as well as the many other changes to the *Restatement (Second) of Torts* that Prosser recommended.

Sinclair: Is it a foreseeability test? If you could you foresee a third-party's reliance, then you could become liable?

Isbell: Well, it was sort of a limit on the foreseeability, where the representation at issue was only negligent. Anyhow, it's a good formulation and Prosser adopted it, and the ALI adopted it. My little contribution to posterity.

Sinclair: Now at this time as a young lawyer did you feel a great pressure to bring in new business to the firm?

Isbell: No. The firm didn't make a big point of bringing in business at that time. It was obvious that if you brought in business that would be helpful and you would be rewarded for it along with other contributions you made to the firm's welfare, including building up the business from an existing client. It was not an eat-what-you-kill arrangement, however. Some firms have a very clear arrangement like that, under which the only profits that you get to share are those generated by a client that you brought in. That was not, never has been, I hope never will be the view of the firm.

Sinclair: Tell me about the Metropolitan Club and the Cosmos Club. How do they fit into your life story?

Isbell: Well, not long after I became a partner, I decided I ought to belong to some club to which I could take my hopefully many visiting clients, though I didn't actually have any out-of-town clients that I dealt with face-to-face in my office; that kind of meeting would more often occur in the client's offices. In fact, I think the typical Washington practice such as Covington's didn't generally involve much entertaining of clients here. You wouldn't be dealing with them here, you'd typically be dealing with them where they are located. But just the same, it seemed to me that all the senior partners as well as some of the younger ones belonged to some club that

served lunch and dinner, and most of them seemed to belong to the Metropolitan Club, which was then and I think still is the preeminent "power" club. It has a pleasant ambience that smells of establishment, power, importance and money; all, of course, in a genteel, understated way. Have you ever been there?

Sinclair: I never have.

Isbell: Well, go there sometime if you have the opportunity. I think you'd share that impression. It's a very pleasant impression, one that makes you feel you'd rather be in the club than out; at least I found it so. Moreover, the partners had an informal lunch together at the Metropolitan Club every week.

However, at that time the Metropolitan Club did not have any black members. Moreover, it did not even allow black guests brought by members of the Club, believe it or not! This was in the 1970's, mind you, and not all that long after the *Brown v. Board of Education* decision and the civil rights legislation of the Johnson era.

Let me take a slight detour here. There were two major partners of the firm who at that time were carrying on a campaign to get the Metropolitan Club to drop its racial barrier.

Sinclair: Who were those partners?

Isbell: Howard Westwood and Charlie Horsky, both very liberal guys who nonetheless belonged to this racist club. They were doing what they thought they should do in those circumstances, rather than noisily resign; namely, bore from within. And what their campaign consisted of was from time to time to invite, as a luncheon guest, some very distinguished black person, like an ambassador or a cabinet member. They wouldn't be physically barred at the door, but they would get a note from the Metropolitan Club management afterwards drawing their attention to the fact that they had recently disregarded the Club's rules with regard to

guests. They'd write back, asking "What rule was that?" and knowing that there was no written rule or bylaw requiring the exclusion of blacks. So they were gradually wearing away at the Club's racial exclusionary practice.

Although I figured that if I did apply to the Metropolitan Club, then probably by the time I got to the head of the waiting list, this racial barrier would be no longer operative, but I couldn't bring myself to apply to a club that was still discriminating at the time I applied. So I asked Gerry Gesell whether there were any reasonably respectable clubs that didn't have a racial exclusion policy, and he pointed me to the Cosmos Club, which had quite proudly admitted a distinguished black journalist as a member a few years previously. So I decided to apply to the Cosmos Club. That Club, which had been founded in 1878 by John Wesley Powell and a group of men who were "distinguished in science, literature and the arts," had a reputation as a club of intellectuals. It was located at the time I applied for membership (and still is) in a quite large and beautiful mansion on Massachusetts Avenue at its intersection with Florida Avenue and 23rd Street. One of the walls on the way to the dining room displays photographs of Nobel Prize winners who were Club members, and a room opposite that spot similarly displayed photos of Pulitzer Prize winners who were Club members

So I got a friend from law school, Stephen Schwebel, whom I've mentioned in connection with my tour of India (for which he'd recommended me to USIA), and who was already distinguished enough to have gotten admitted to the Cosmos Club, to sponsor me for membership in the Cosmos Club. To be considered for membership, one had to "have done meritorious original work in science, literature or the arts," or "though not professionally occupied in science, literature or the arts, [be] well known to be cultivated in some field thereof," or be "recognized as distinguished in a learned profession or in public service." My application

sought to fit me into that final category of eligibility, although my claim to be recognized as distinguished as a lawyer was a rather tenuous one at that time, for the truth was that I was not yet recognized at all by very many people. I managed to get letters of support from some quite distinguished people including Erwin Griswold, the former Harvard Law School Dean whom I had known from the Civil Rights Commission, and who, in his letter of support, said that if I had stayed at the Commission, I would have become its staff director, and the then-Executive Director of the AICPA, who said that I was the most distinguished lawyer he'd known.

In my initial effort to get elected to the Cosmos Club I was interviewed by a member of the Admissions Committee, a very conservative fellow whose name I have mercifully forgotten, but who seemed to be shocked that someone seeking to be a member of the Cosmos Club should have been as involved in the ACLU as I had been. He was also not at all impressed by the fact that I had been an assistant director of the Civil Rights Commission or that I was editor-in-chief of its five-volume 1961 Report and the author of a portion of that Report dealing with civil rights in the Black Belt, which the *New Republic* had judged to be "brilliant." So I suspect he blackballed me.

Steve Schwebel, however, is not one to give up easily. He tried again and re-submitted my application, perhaps this time with some additional back-up letters. This time I had evidently had the good fortune of being considered by a somewhat more enlightened member of the Admissions Committee. So I did get admitted.

Let me hasten to confess that when I applied for membership in the Club, I was well aware that the Cosmos Club did not admit women as members. They did give widows of members most of the benefits of membership, but they weren't members, entitled to vote as such. Moreover, the Club's old-fashioned sexism had been carried to the point where they had a

separate entrance through which women had to arrive. At the time I got admitted to the Club, in March of 1970, there was just beginning to be a rising tide of public consciousness, a really striking phenomenon of increasing recognition that discrimination against women is akin to racism, a phenomenon that I believe was kicked off by the inclusion of sex as a forbidden ground of discrimination in the Civil Rights Act of 1964, a wholly unintended consequence of a proposed amendment to the Administration's bill that became that Act that Congressman Smith of Virginia had proposed in the belief that that would doom the legislation as a whole. Anyhow, I found myself in the awkward position of having joined the Club because it wasn't racist, only to come to the realization that it was almost equally bad for being sexist. Florence refused to go through the separate entrance for women, and pretty soon, she refused to go to the Club at all, and I found that some other people that I invited also were not willing to go to there because of its official policies toward women.

Not long after those first rumblings, an effort was made by a group of members of the Cosmos Club to get the by-laws amended to eliminate the men-only provision. The by-laws could only be amended by a vote of the membership, which vote had to be taken at a meeting in which the vote was by those members who were physically present. Since a large portion of the Club's membership live elsewhere in the country, this meant that they could only vote if they traveled to Washington, which few were likely to do. There was a meeting called to consider the proposed by-laws amendment. I went to that meeting. I can't say I contributed to the debate but I listened to the debate and was appalled by some of the things the opponents of the change said—not quite articulating the proposition, but effectively expressing the view that women are simply not intellectually equal to men, and so not fit for membership in the Cosmos Club. There was also a sort of sub-theme to the effect that men of distinction wouldn't be comfortable in the

company of women—other than their own wives, of course, whom they had to put up with. The proposed by-laws amendment failed to be adopted.

The proponents of change tried again a couple of years later, and this time failed by an even larger margin. I think there was then a third effort, that was equally ineffective, and that, for me, finally broke the camel's back, and I resigned from the Club, with a long letter explaining my decision—a good letter, but one that would have been better if sent a good deal earlier. The date of that letter was January 20, 1984.

A few years later, however, the Cosmos Club, the Metropolitan Club, the Sulgrave Club (an elegant and exclusive women's club) and, I suppose, a lot of other private clubs in Washington dropped their sex-based exclusionary rules—not by reason of a sudden burst of enlightenment, but under the threat of losing their liquor licenses. Not long after that, I received a charming letter (doubtless sent to all those who had resigned for the same reasons as I had) from some official of the Cosmos Club inviting me to rejoin the reformed Club, and stating that I would not have to re-establish my eligibility to become a member. I found that letter so charming that I decided to rejoin the Club, and I have been a member ever since.