

THE BROOKINGS INSTITUTION

POLITICS AND THE JUSTICE DEPARTMENT: FINDING A

PATH TO ACCOUNTABILITY

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P R O C E E D I N G S

MR. TAYLOR: I think we'll start. Preliminarily, I might say my wife has become a fan of *The Daily Show* by Jon Stewart, and I have never seen Jon Stewart happier than he was last night except when the Vice President shot his friend in the face. He was ecstatic, and I think anybody who read this morning's papers knows why he was ecstatic, but I think without being too partisan about it, I can fairly say the Attorney General had a rough day yesterday. What we hope to do today is we've got an outstanding cast of people, and the Senate Judiciary Committee is shedding heat about issues like this, and we have some people here today who are very good at shedding light on issues like this, and I'm proud to introduce them. I think there are longer biographies out there so I'll be brief. I'll go in the order in which we are speaking, and you'll notice as we go across the row we've got representation at various levels of service in the Justice Department in Democratic and in Republican administrations which creates a great sampling of perspectives.

On my left, Bob Litt will go first, and he was in the Clinton Administration as an Associate Deputy Attorney General, and anybody who understands the Justice Department realizes that they are the people who run the place, or at least who have a lot to do with running the place. Bob was involved in his share of disputes over whether the Justice Department was being politicized during the Clinton Administration.

To my immediate left is George Terwilliger who was Deputy Attorney General, the number-two person, who really ran the Justice Department in the first Bush Administration, right?

MR. TERWILLIGER: Yes.

MR. TAYLOR: And is now a partner at White & Case.

On my first right, Neal Katyal. You worked for Bob initially at the Justice Department, right?

MR. KATYAL: Yes.

MR. TAYLOR: And is now a Professor of Law at Georgetown University.

MR. KATYAL: Still working for Bob.

MR. TAYLOR: Still working for Bob. And most recently in his spare time he won the biggest separation-of-powers dispute in the Supreme Court in a long time in the Hamdan case last June as counsel for Mr. Hamdan.

Next to the right is Tim Flanigan who was deputy to Mr. Gonzales as White House Counsel and before that was an Assistant Attorney General, and you were in charge of the Office of Legal Counsel weren't you? The Office of Legal Counsel is the brain trust of the Justice Department, together with the Solicitor General's Office, the two most elite offices in terms of intellectual clout.

And to my far right is former colleague at *Legal Times* Ben Wittes who recently stepped down as an associate deputy *Washington Post* editorial

writer on legal affairs and is now a guest scholar with The Brookings Institution to the great credit of The Brookings Institution.

We are going to talk about very recent events but also about less-recent events. We may talk a little bit about the flap over whether the tobacco litigation was politicized; we may talk about the Voting Rights Act enforcement and whether that was politicized and whether it was properly or improperly politicized. Then we will reach back into some prior flaps in prior administrations. I have asked each panelist to talk for 5 minutes about whichever aspect of this general subject area seems worth discussing to him, and then I will ask one round of questions inviting 3-minute answers without interruptions. Then I will ask couple other rounds of questions inviting shorter 1-minute answers hopefully with some interchange among the panelists, and then we'll turn to the floor for probably 40 minutes of more questions.

With that I would like to ask Bob Litt first to tell us what we should understand yesterday was all about and anything else that he thinks we need to understand.

MR. LITT: Actually, I'm not going to talk much about yesterday specifically. Thank you for inviting me on this.

I want to begin with three disclosures of interest for everybody here. The first is that I've spent about half of my professional career in the Department of Justice not only in the Clinton Administration in the Criminal Division and the Deputy Attorney General's Office, but also as an Assistant U.S.

Attorney in the Southern District of New York. It is an institution that I really revere and respect, and it is very painful for me to watch what it is going through these days.

The second point I want to make is that I am a lifelong and committed Democrat and fairly partisan in that regard. As one who lived through and was in part the target of really transparently false accusations that Janet Reno had politicized at the Department of Justice, I find what has happened in this administration to be sadly ironic.

The third point I want to make is that my current partner at Arnold & Porter, Irv Nathan, has been asked to serve as Senior Counsel to the House Judiciary Committee in connection with its investigations into the U.S. Attorney firings. I haven't had any contact with Irv about this, he is up there doing his thing, but I am of course here individually and not on behalf of either him or the law firm.

Because I have the privilege of going first, rather than throw out the red meat at this time, I thought I'd try to frame the issues a little bit. I would like to do that by setting up two dichotomies. The first is between what is legal and between what is appropriate. I believe that the President of the United States as the Chief Executive has very, very broad power over law enforcement, and I go pretty far in that regard. I think everybody understands at this point that the President has the legal right to fire U.S. Attorneys at will, and I think that under the provisions of the Patriot Act which I happen to think were ill advised, he now

pretty much has the power to hire U.S. Attorneys at will without having to go through Senate confirmation.

And the President also has the authority to set a law-enforcement agenda for the Department of Justice and the individual United States Attorneys. My own personal view which maybe we'll talk about more later on is that the U.S. Attorneys as the Department of Justice is currently set up have too much independence, that we have one Department of Justice and that there ought to be more standard policies and procedures and prosecutorial decision-making than we have now in the Department of Justice.

But I go beyond that. In my view, the President has considerable authority over the conduct of individual cases. I think that if he wanted to the President could call Pat Fitzgerald and say I direct you to drop the Scooter Libby case and that if Pat Fitzgerald refused, the President would be within his legal rights in firing him. I don't think that would violate any law even if the President acted for motives that if a private person had them would be corrupt and constitute an obstruction of justice because I think this is the President's legal and constitutional authority to do that.

But having said that, we are only talking here about what's legal, and I don't think that that is the same thing as what would be appropriate, and that is the other half of my first dichotomy. Our political system tolerates a fair amount of political action and political interference in the actions of the Legislative and Executive Branches. Ambassadors are appointed to reward

political contributors; military bases are closed to punish a political opponent. That may be hardball, but it's all part of the system that we accept and understand.

The Department of Justice needs to be different. The power of the department over individuals is so substantial and the actions of the department are so closely tied to the judicial system that there is a broadly accepted consensus that the department ought to be completely free of partisan influence and consideration.

When I worked in the department in the last administration, we had very elaborate and substantial procedures set up to try to ensure that partisan politics did not affect decision-making in the department. For example, all communications between the White House and the department having to do with cases were funneled through a single channel of communications, meetings between the Deputy Attorney General and the White House Counsel. All communications with Congress were channeled through the Office of Legislative Affairs. These were pretty effective procedures at insulating decision-making in the department from political influence, and one has the sense from recent revelations that those kinds of procedures are not in place today and are not being honored.

This leads to my second dichotomy which is between small "p" politics and big "P" Politics. By small "p" politics I mean what Walter Dellinger when he left the department and made some remarks at his going-away ceremony that impressed me a lot, as almost everything Walter says impresses me. Walter

talked about politics as being the way in which differences in society and differences over policy worked out in a democratic society without violence, and I think it is generally understood and accepted that that kind of politics has a role to play in the Department of Justice as it does everywhere else.

A President is elected to pursue certain policies and he has the right to reshape the entire Executive Branch in furtherance of those policies. He can emphasize or deemphasize child pornography, terrorism, drugs, guns, environmental enforcement. He can choose to focus civil rights enforcement on the rights of minorities or the rights of majorities. All of that is appropriate. But what the President should not do in my view is use the power of law enforcement to bring investigations and prosecutions for the purpose of influencing elections.

I understand that this is not a clear line. This is one of those judgment and balancing tests. Presumably, for example, the present administration emphasizes child pornography prosecutions not only because they think that child pornography is a bad thing and it needs to be deterred and punished, and I don't have any quarrel with the sincerity of that belief, but also because they think it helps them in elections, and I think that's okay.

On the other hand, I think that everybody probably agrees that what the U.S. Attorney in Maryland did crossed the line when he sent a memo to all of his Assistants saying he wanted to have some political corruption indictments of Democrats before the election. In fact, the Department of Justice

reprimanded him and took the step of saying that his office could not bring any such indictments without approval of the Department of Justice.

But I find troubling signs that this Department of Justice may not have the same view of the proper limitations on the use of its powers for partisan political ends that I do, and there are a wide variety of matters that have been talked about in the press in this regard. I want to focus on the issue of voter fraud prosecutions in particular in this regard.

In a couple of respects, the investigations and prosecutions of vote fraud that had been brought in this administration regardless of whether you think voter fraud is an appropriate priority or not, have departed from prior established written Department of Justice policy. For example, it was Department of Justice policy in the elections crimes manual that you do not prosecute individual voters, you prosecute people who run conspiracies, who enlist other people to vote illegally, but that the individual voter will not be prosecuted, and it appears that this administration has brought a number of cases against individual voters.

It was also the case in the Department of Justice elections crimes manual that the department should attempt to avoid influencing elections by its criminal investigations, and in particular should not bring criminal charges just in advance of an election, and in at least one instance that I'm aware of there was a voter fraud prosecution announced with great publicity just before the 2006 election.

It is also difficult for me to believe that any rational assessment of law-enforcement priorities today would assign a high priority to prosecuting individual voters for voter fraud, and as a result of that it is hard to escape the inference that the underlying motivation is to assist the election of Republicans. This sort perception is very damaging to the department because it casts doubt on the motivation for all prosecutions.

These are however fundamentally political and not legal issues and they should play out through the political process as they are. It is an appropriate area for congressional oversight of the department. When I was in the department I resisted along with the rest of the administration the idea that Congress has a right to oversee the conduct of ongoing individual cases by asking line attorneys to come up and talk about the decision-making they were making in cases as they go on. That is a different thing I think from calling the political leaders of the department to account for the priorities they set and what they have done in the past, and I think that Congress absolutely has a right to inquire into the reasons the U.S. Attorneys were fired.

I think that effective law enforcement depends on the cooperation of the public and that cooperation I think depends on substantial part on people believing that law enforcement is being pursued in a nonpartisan and evenhanded way. I think if you ask Assistant U.S. Attorneys in the District of Columbia how important it is to have public support for prosecutions, I think they will tell you that it is very important, and I think that what has happened in this administration

has done a lot to undermine that and I think that the next Attorney General whether it be somebody who is appointed in the next few weeks or after the next election is going to have to do an awful lot to restore the credibility of the department in this regard.

MR. TAYLOR: Thank you, Bob. George Terwilliger will speak next, and I would point that our arrangement is that he may have decided to talk about something completely unrelated to what Bob just discussed or he may choose to respond in part to what Bob just said, and that is up to him.

MR. TERWILLIGER: Thank you, Stuart. Good morning.

It is difficult I think for anyone who has been in the Department of Justice for a long time and cares about it as an institution to see what is occurring now, and I am not here to either judge or fix blame for the situation. I do think however the department is a very, very resilient institution and a lot of the work that goes on day to day that is carried out by what are called somewhat inaccurately career professionals in the department, some come and stay for 3 or 4 years and leave, others like Jack Keeney and Dave Margolis come and never leave. But they are great people, they do a wonderful job, and the political turbulence sort of goes on above them and they keep noses to the grindstone and get the work done.

Sort of similar to Bob, I spent a long time in the Justice Department, 15 years. Eight of those were as a career professional, as an Assistant United States Attorney, and another 7 in two presidentially-appointed

positions. In addition to being a U.S. Attorney, I supervised all the U.S. Attorneys. So I hope I have a little bit of a perspective on how all that actually is supposed to work and ought to work.

One of the things that I think it is important in assessing the department and what is going on is to understand, and what I would like to do generally in this discussion is take some of the mythology that has developed through the premise for some of the questioning that has gone on in the Senate and the House about this, take that out of the mix or at least try to demystify it a little bit.

One of the things that I think it is important to understand about the department both in terms of its policies and its customers and usages, if you will, is there is a great oral tradition in the department. There is not a lot that is really written down in policy, and the policy itself if it is written down is usually the tip of the iceberg. In my experience at the department at main Justice, the headquarters level in Bush I, the policy concerning communications with the White House particularly about cases was much as Bob described it being in the Reno administration, although I am sure there are instances where there were informal communications, particularly when Web Hubble was there in the early days, that that line of communication was bypassed. I am sure there were instances in the administration I served in where that formal line was bypassed about one thing or another, and that is not like some mortal sin or something, that is just part of the way things work.

What is important though is the attitude that the President and his political advisers take about the department and the insulation that the Attorney General and the leadership of the department provide to prosecutors from partisan political influence in the handling of cases, and that is one of the myths that has really developed, that the words political and politicization have been thrown around I think frankly sometimes irresponsibly in all of this.

Cases should be decided on the facts and the law, and most importantly, the exercise of judgment about what cases to prosecute, what cases not to prosecute, what for, and to what extent. That is what prosecutors get paid to do; it is the most enjoyable part of the job, but also the most difficult part of the job. There are a lot of factors that can go into that, but one factor that should never ever under any circumstances go into that is that you are going to prosecute somebody for or on account of or because you want to help bring about some kind of a partisan political advantage or avoid a disadvantage.

I think in my time as Deputy Attorney General, and not to get unnecessarily specific about it at this point, I had three or four or five matters come in front of me as the number two person at the Justice Department that involved potential prosecutions of members of Congress. Some of those were prosecuted, some were not. Some were Democrats, some were Republicans. I am very proud of the decisions that were made in that case, and they were not always made, and this is sort of tip number two, in total concert with what the career professionals wanted to do.

A lot of people in the leadership of the Justice Department over the years have when the going gets tough reverted to saying, well, that's a decision to be made by the career professionals. I frankly think that is a dodge. The fact of the matter is, when someone is appointed by the President and confirmed by the Senate to be the Attorney General or an Assistant Attorney General, there is a level of responsibility for decision-making that comes with that. You can't deal with every case, of course, and 99 percent of the cases in the world are going to be decided by a front-line prosecutor and perhaps his or her supervisor. But there are some that for one reason or another deserve to be elevated or are elevated and the people who are in those appointed positions ought to make that decisions about that and they ought to be accountable for the decisions that are made.

I will give you an example of this that has not been in this controversy at all. Robert McCallum who I think is still the Associate Attorney General or maybe he's gone now. I guess he is an ambassador now.

SPEAKER: Ambassador of Australia.

MR. TERWILLIGER: But when he was the Associate Attorney General, he ordered a change in the government's position in a significant and controversial piece of legislation having to do with a civil case against a tobacco company, and he was pilloried in some quarters for having made that decision. There was no indication that I saw that it was a "partisan political decision." There was a difference in philosophy for certain and a difference in view about how that case ought to be handled. I admired him for stepping up and making

that decision, and people are free to disagree with it and criticize, and that happens all the time. If you want to be popular and now have enemies, don't be a prosecutor because in every case you usually make at least one. I think that kind of decision-making is important because otherwise the people that are running the department are not really in charge and they are accountable for what they do, should be held accountable for what they do, and they should make the decisions about what is being done in a broad stroke.

That being said and, again, I do not want to try to do an autopsy on what I think is still a live body about what is going on with these eight U.S. Attorneys, I am offended and I would have been offended had I been a U.S. Attorney by some of the discussion that is in those emails. It may be that that discussion would have gone on anyway and only got captured by email, but if that had gone on orally I would have been offended by it because people at the experiential level of some of the staffers who were involved there are in no position to be making judgments about presidentially appointed federal prosecutors around the country, and it showed in what was the subject matter of some of those emails as I saw them.

Just a couple of final points. There has been a beat deal of sort of beating of the drum on the Hill about the Patriot Act and this notion that the Attorney General should not get the authority to appoint interim U.S. Attorneys. I almost find that to be humorous. The Attorney General's subordinates are the U.S. Attorneys, the President, the U.S. Attorney, there is a box with the Deputy

Attorney General, U.S. Attorneys. It seems to me somewhat silly to say that if there is a vacancy in a position, the person who is responsible for supervising the activity of a given office should not appoint the head of that office. If that provision were put in as a way to bypass the normal advise and consent process of the Senate which exists by statute in terms of U.S. Attorneys, I have a problem with that because I think U.S. Attorneys are actually empowered substantially by the fact that not only are they presidential appointees but that they are confirmed to those positions by the Senate.

The easy way to deal with that would be to put a term limit on the temporary appointment that the Attorney General would make and have that term limit be expressed chronically in a period of time unless the nomination of a person for that position were pending before the Senate, and then the term could last as long as the matter were before the Senate because then the Senate would not be being bypassed.

The last point I want to make, I agree with much of what Bob said, I sort of disagree with his take perhaps on what went on here, but he did mention something I think it would be fair say to Bob critically as a departure from policy. We should not be offended by departures from policy. That is called change. Policies are written in a certain period of time to accomplish a certain purpose and should be constantly being reevaluated. The worst thing we can do is sort of have a slavish adherence to policy because that is the way we have always done things. Vote fraud is a huge problem in this country. I was counsel to the Senate Rules

Committee for a vote fraud investigation. It is very, very difficult to change the outcome of an election by proving vote fraud. You can prove vote fraud occurred, it is not hard in a lot of instances, it is very difficult to prove that it affected the outcome of an election, and it is much more important to deal with those issues on the front end.

I don't know whether any of the cases Bob is talking about on some objective basis where individuals who were prosecuted for vote fraud were meritorious or not, but I am not offended by a change in policy to address what is a problem that goes to the heart of the exercise of the franchise in a democratic society, and I will leave it there for now.

MR. TAYLOR: Thank you, George. Neal Katyal? Did I pronounce that right?

MR. KATYAL: That's perfect. Thank you. Thank you for having me here.

I want to affiliate myself with Bob's comments about the Justice Department being different in partisan politics being dropped out compared to other agencies or Energy or HUD or something like that. And also with George's comments about the role of oral tradition and the judgment in cases being brought not for political gain.

That said, I think I probably have a pretty strong disagreement with George about where the Justice Department is today. I think that the Justice Department has in many respects collapsed as an institution for reasons both of

too much political control, legal revolutionaries coming into the department and not remaking small policy changes but huge swaths of law, and to just basic competence problems.

Some of the stories are overblown. I agree with George. I think tobacco is one. I don't think that there was anything wrong in what happened in the tobacco case. But in other examples, and I'll talk about them, I think it is a very different matter and it is hard for me see as a place — I didn't work there nearly as long as these gentlemen, but I learned more in my time at the Justice Department than in any other place. One of the things I learned was when I came in with all these kind of credentials and so and you're told you can kind of remark the world as a young guy coming into the Justice Department. I get there and there are people like Litt shutting me down every single time I had an idea.

MR. LITT: And a damn good thing, too.

(Laughter)

MR. KATYAL: Yes, it was, actually. That's one of the most important things I learned there which is a lot of times you think you have a great idea, it makes sense, and then you have to talk to people and you need the wisdom who are older, who have done it before, who have that oral tradition that George is talking about, who know why we did it a different way. And sometimes of course you want the policies to change. I think George is right that the most important thing is that you want that made by people who are seasoned, who know the department well, who understand its traditions, and then to make that

fine calibration as circumstances dictate as opposed to frankly people like me who come in thinking we know it all, and that I think is one of the big changes in the way the department has operated over the few years.

You can look at this in any number of respects. You could look at hiring decisions, for example. Before the Justice Department's honors program, the program by which people were brought into the department after they graduate from law school. That was run by career people. Now it's run by political actors. The lateral attorney program which was done when you bring in an attorney from practice again used to be run by career people and now it's run by political actors. I don't know if this is true or not, but there is now a letter floating around the Hill by concerned people who work at Justice Department saying that the summer program just for summer interns has now been transferred over to political control and that there are litmus tests being decided. I'm sure this isn't right, but that there are these allegations and there is at least this perception, and it's a damaging one.

And then there is the reality of who is being hired in various places at the Justice Department. If you look at for example the Civil Rights Division, for the first 2 years of Bush 43 when Mr. Ashcroft was the Attorney General there was something like 77 percent of the people in the Civil Rights Division who were hired there had former civil rights experience. Now it's down to 40 percent in the past 2 years, so time and time again you see these kinds of things that look worrisome. Voting Rights Act cases, not a single Voting Rights Act case brought

in 5 years on behalf of an African American. Maybe there are no voting rights allegations or cases that should be brought, I don't know, but I do think that when you have that kind of degree of political control that the current Attorney General has, it starts to look a little worrisome.

National Security Letters. The Inspector General at the Justice Department has issued a report finding 3,000 violations of people, American citizens' privacy, things like their bank records, their phone records and so on. This is deeply worrisome. And again, that may not be politics; it might just be simple incompetence, so there are a bunch of different pieces to the puzzle.

The one that concerns me the most frankly is the Office of Legal Counsel. Again, an institution that was dedicated essentially to shutting people like us young 20- and 30-year-olds who have great ideas down when we want to try and remake things either at the White House or the Justice Department, an institution that said, no, the law does not permit you to do that and an institution that was strong enough to say that to the President time and time again. This is one of I think the proudest institutions within the Justice Department, a kind of autonomous judge of legal issues outside of political control that has the fortitude to tell the President no on various things.

I think the Office of Legal Counsel has essentially collapsed as an independent check on the kind of political or policy ideas of the President. I do not mean to say that they are trying to benefit the President's standing in the polls or anything like that. What I am saying is that the Office of Legal Counsel now

does not say no to the President in obvious circumstances in which they should. There was a statute for example that prohibited torture, made it a federal felony, 18 U.S.C. 2348. The Justice Department in a secret memo at the Office of Legal Counsel comes along and says, no, that statute doesn't really mean that, or if it did it would interfere with the President's Commander in Chief Clause power. This is a really ludicrous interpretation of constitutional law.

The same thing with the Foreign Intelligence Surveillance Act of 1978 which says we're going to spy on Americans, there's to do it. You've got to go to the FISA Court, not the most onerous process in the world, and that is the exclusive way to spy on Americans. A secret memo from the Justice Department comes along and, no, that statute doesn't really mean that or if it did it would create a constitutional problem.

I think these views are well, well outside of the legal mainstream and that we are seeing an Office of Legal Counsel that does not feel comfortable saying no to the President, and that is a real problem particularly since a lot of this stuff will never and should never get to federal courts because actually the Justice Department, the Executive Branch, should be the judge a lot of this stuff. It is dangerous for it to get to courts. Courts are generalist institutions. But if we want that tradition to be maintained, then we really need to have a strong check within the Office of Legal Counsel.

So I think the question about how to rebuild the Justice Department, and I don't mean just now over the next year or something, I mean in

the long term no matter who is the President I think is very hard one. I think for the Office of Legal Counsel you're going to need to have put in place someone who has done it before, Mr. Flanigan, Walter Dellinger, someone like that who has the gravitas to say to the President no because the temptation for a President now is going to be to fill that position with a loyalist. It is so much better if you can basically handpick your judge and the judge is going to say you get to do whatever you want, and no matter who the President is, they are going to face that temptation. Madison predicted it in Federalist 51, "If men were angels, no government would be necessary, but men aren't," and that's what I expect to happen.

With respect to the Attorney General and who takes that post, I think it's incredibly important that that person be someone who has had prosecutorial experience and someone who is not seen as a loyalist to the President. I have no problem with Mr. Gonzales. I just think he like anyone else, any human being, cannot be in that position and perform his role with the degree of independence that you would expect in an Attorney General. I know I couldn't do it if I were asked to investigate my former bosses, including Litt. I just couldn't do it. We are loyal people and you don't want the Attorney General to be filled with that slot.

We used to have a different model, Robert Kennedy as the model of the Attorney General. I think as the politicization of law enforcement has changed and the growth in federal law and unwillingness post-Watergate to

tolerate kind of cozy arrangements, I think we need something different. So one suggestion may be that the next Attorney General be confirmed by 60 votes and not by 50 so that you have buy-in from both political parties, that you use the filibuster rules to make sure that the next Attorney General can't just be a presidential loyalist, but someone who has some of the support from the other party.

MR. TAYLOR: Thank you, Neal. We have been talking about the Office of Legal Counsel; Tim was head of the Office of Legal Counsel in the first Bush administration. I think he is the only panelist, correct me if I'm wrong, who has served a high levels of both the Justice Department and the White House and so he has seen this traffic from both sides and he will speak next.

MR. FLANIGAN: Let me start really out of personal necessity with a rebuttal to the premature political obituary of my good friend Al Gonzales. He is a very fine and decent man, he is a very able lawyer. If he has one failing that I can point to it is that he is not tough on his own staff. He needs to demand better from the people who work for him. But I just have to say for both personal and reasons of conscience that the portrayal of Al Gonzales as a dissembler, as someone who is willing to go into the tank for the President on any issue is completely at odds with the character of the man that experienced and have experienced in my association with him.

There has been sort of a thread that has run through our conversation that I will characterize as what's up with DOJ right now, and oh my

goodness, isn't it a terrible situation and prosecutors are either running amok or they're standing around the water cooler talking through issues and they're not out doing their jobs or something bad is going on within DOJ. I think that really sort of misapprehends the nature of the institution. Our experience with the exception of George is really sort of at main Justice. We don't really understand how even at main Justice but below the executive level how really things do continue to function very well and when we say there is sort of a forcing event of this crisis within the Justice Department, I think Senator Leahy yesterday referred to it as unparalleled in our history this crisis. He fails to recall a couple of instances involving the Justice Department which were much more significant for the department as a whole.

But I think one could fairly say that this is a serious situation for the department potentially, and the serious of the situation is I have to say partly a result of the failure of communication on the part of the department's leadership, and I will come back to that in just a moment. But it is also really a result of the glare of political scrutiny on the department. The administration of justice be it in the courts or in the Justice Department is a plant that has to flower in the light of public scrutiny, but it also like plants do, light stunts plant growth and can wither plant growth, and a too heavy focus on what the Attorney General knew and when he knew it can be a distraction for the department.

Neal referred to, and I think also Bob referred to, essentially these neural paths by which communication traditionally happens between the

department and the White House, and I agree that those are absolutely critical. In Bush 41 when I served in the Justice Department there was a strict observance as far as I knew of communications running really only to a few discrete places in the Justice Department. There was the Deputy Attorney General's office. The Deputy Attorney General was the catchall for communications. If somebody in the White House had a problem with what the department was doing, the deputy was supposed to be there to basically catch it and prevent bad things from happening using a little maturity and judgment.

If it was a legal issue, the Office of Legal Counsel was there as Neal mentioned to catch that legal issue and to give it a straight-up legal answer yes or no, and frankly, Neal, I think you and I profoundly disagree over whether or not the Office of Legal Counsel in this presidency has lost its way. I am less familiar with it during the most recent years than I was in the early years of this administration, but quite frankly, to say that the Office of Legal Counsel concluded in a memo that the President's constitutional authorities trumped a statute is not surprising, that's what OLC does on a fairly regular basis. Day in, day out, Democratic or Republican administration, it has a viewpoint of executive power that is informed by the President's constitutional role.

The challenges to these neural paths occur, and the erosion of them I think without commenting upon any particular situation, occur in various ways. They occur because people in the White House or on Capitol Hill lose the discipline of going to the Office of Legislative Affairs, the Deputy Attorney

General's office, or the Office of Legal Counsel for legal issues. It is also eroded by technology, by email. You have I think in this last and most recent issue at the department a graphic illustration of how anybody with an EOP, Executive Office of the President, email account can email somebody in the Justice Department and ask for assistance on something and that basically has to be stopped and it has to be filtered.

Then finally you have, and my apologies to those who are younger than I am in the room and to those who are older, you will understand what I am talking about, the problem of youth. We have alluded to it before. It is when someone takes an idea and just decides to run with it without maturity. Maybe youth is the wrong construct. Maybe it is simply maturity because young people can display extraordinarily good judgment on these issues, but it is a serious problem within the department and I will say within government as a whole, the shoot, ready, aim approach to issues of policy or issues of execution of policy.

Finally, I just want to say that this current state of affairs at the Justice Department is going to be dissected around lunch tables in Washington for whatever period of time it remains a current topic, at least 2 days, but there will be some lasting lessons to be drawn from this. They fall into many categories. Some of them I have alluded to. But one category I want to mention is the response to a crisis in government or outside of government, what do you do when all of a sudden, oh my goodness, something bad has happened. George and I used to practice law together and we used to do this type of law, and it is

amazing how these issues have evolved over time. I will tell you that candidly I have discussions with Al Gonzales when I was in the White House's counsel's office about how do you respond to a crisis, to something that has gone wrong. The recent learning informed by the experience of many in the previous presidency was that you go into the fetal position and you say nothing, you do nothing, but for goodness sake, you do not investigate. You never try to get the facts. You never try to find out what really happened because some steely eyed investigator is going to come along next Tuesday and say you were not just investigating, you were concealing the facts and you have interfered with my investigation. That is a serious problem for government and is a heck of a way to run the White House or a government department, and quite frankly, I think that is part of what happened here, that the Justice Department went into this see no evil, hear no evil mode of not really bothering to get the facts, to nail down the facts, and consequently you have the Attorney General out saying things which in the light of day were incorrect and undermined his credibility.

You also have this terrible situation of isolating the principal from his or her staff, and in issues like this, this most recent issue, you have the Attorney General of the United States being told so I understand that he should not have conversations with the Deputy Attorney General about this, that they should be kept isolated. How is the department going to function if the Attorney General and the Deputy Attorney General can't talk? They are both, as George put it, share one box in the department's table of organization. They have to be

joined at the hip. It has not always been the best relationship as certainly any of us here might be able to attest. But it should be a very close, coordinated relationship, and when it comes to such basic issues as what the deputy knew and what Attorney General knew and when they knew it, that ought to be something that can be addressed without the panic-induced fear of wondering what is going to come along in the form of an investigation next week. I noticed that even on the Hill I think it was members of the Senate Judiciary Committee were warning the Attorney General and the Deputy Attorney General not to get together to talk about their stories. That is a well-placed warning but I think it is wrong for the Attorney General and the Deputy Attorney General and the other members of the Attorney General's staff not to feel that they have that freedom to communicate to give a cogent answer, and I think that that is what they owe to the American people.

MR. TAYLOR: Thank you, Tim. Ben Wittes is old enough to have covered probably 20 to 50 Justice Department flaps or scandals, or call them what you will, and unlike me, he is young enough to remember what they were about, and now he will tell us about them.

MR. WITTES: It is sort of a daunting thing to sit up here with four previous speakers all of whom actually know something about the Justice Department. My experience with it is both that I covered it as a reporter for *Legal Times* some years ago and more recently that I have been writing the *Post* editorials on legal affairs for the last decade or so and as such have watched it

fairly closely, but it is very much with an outsider's perspective and not the sort of insider's perspective of both parties and multiple administrations that you've just heard.

So a few broad observations, the first of which is that I very much agree with George's sense that we need to be careful when we talk about politicization of the Justice Department because in fact in every administration there are allegations very consistently; it's part of the opposition's trope, in every administration that the Justice Department is being politicized, this is the most political Justice Department since Watergate, every Attorney General gets compared to John Mitchell. By the way, no Attorney General since John Mitchell has warranted the comparison, but it is a part of the ritual of Washington rhetoric now.

There is a reason for this which quite simply is that the political echelon in the Justice Department, and here I am not using the word political pejoratively at all, political echelon meaning the people who come in as presidential appointees to oversee the ongoing day-to-day work of the Justice Department come in and may disagree on the merits of important questions with the career lawyers who manage them on a day-to-day basis. There is absolutely nothing in the world wrong with this. This is in fact why we have a political echelon. It is very similar to the principle of civilian control over the military. When that happens, there is a very common thread every time it happens which is that the career lawyer writes just reasonably so, they are arguing their position,

they write a memo saying we are not doing what the law requires, and the political echelon processes that memo and thinks about it and generally takes the arguments quite seriously and then proceeds on its way to do the thing that they think is appropriate. At which that memo—because the Hill tends to be interested in such disagreements—tends to find its way to the Hill immediately or over time generally not because it gets leaked, generally because it gets subpoenaed at some point or there is a document request and it finds its way there, and all of a sudden you have the political echelon at the department dictating the answer to the career officials at the department and this has a very distasteful sheen to it.

I would say that in almost every case in which these issues come up and these allegations are made, the allegations are quite unfair to the political people in question. The very first editorial I ever wrote for *The Washington Post* was about Bob Litt who was the subject of serial allegations that he was interfering with the career officials in the campaign finance investigation and this persisted for, I don't know, was it years, Bob, right? It went on for a really long time, until one day one of the committees got hold of a memo that Bob had written agreeing with the career officials.

MR. LITT: No, the career officials had not recommended and I did.

MR. WITTES: Sorry, so overturning the career officials in the opposite direction —

MR. TAYLOR: Are you betraying your own administration?

MR. WITTES: — that the Republicans sort of more wanted to see. And Bob went overnight on Capitol Hill from being the demon of the administration so that Orrin Hatch would make speeches about how he really thought Janet Reno was a fine woman but she was led on by the treachery of political officials, and he would say it with kind of spitting hatred like Bob Litt. Then overnight Bob became one of those career officials whose advice was being ignored, leaving aside for a minute the fact that in fact he was not a career official, he was a political official.

There are similar stories that you could tell just about every administration. The first Bush administration was the subject of just in retrospect laughably stupid allegations in connection with two so-called scandals, one involving a software company called InSLA, and the other involving Iraqgate which you probably do not remember, and it is a good thing. All of these gave rise to endless numbers of allegations of politicization of the Justice Department and was in every instance amounted to nothing really more than that the political echelon and the career echelon disagreed about the merits of something. To all of that stuff I would say basically that's why we have political control, that's why we have Senate confirmed officials, and I very much agree that it is correct that those officials should ultimately be the ones making the big decisions and it is because they have been through Senate confirmation that they do reflect the policies of an administration that was actually elected, unlike the bureaucracy.

So that is one level of politicization of the Justice Department. I have no problem with it. The Justice Department is politicized; it should be politicized in that sense. Whenever I hear the phrase politicization of the Justice Department I am always suspicious of it because I tend to think that it is putting a negative cast on judgments like that.

There is a second category which is as Bob said in opening that a situation in which the tools and powers of the department are deployed for an openly political, that is partisan political end, or even more nefariously for a personal political end. These situations are very, very rare. They do come up, and the question to be perfectly frank about it is which the current situation now is. I think there is a lot of it you can sort of sweep off the table. For example, the tobacco stuff. There is a clear example of a situation where an administration with a different set of policy priorities from the people who were litigating a case before they came into office disagreed about what the proper remedy of the case was and they enforced their own judgment in a sort of heavy-handed fashion. Not pretty, nothing wrong with that.

I feel the same way frankly about the civil rights stuff. Nobody voted for George W. Bush thinking that he was going to take the same approach to civil rights enforcement that Al Gore was. These are laws that state neutral principles, they are laws that give the government a lot of discretion, and the idea that this administration would have a different view of the proper exercise of that discretion and would be more concerned about enforcement to ensure religious

free exercise than they are about what we tend to think of as convention civil rights enforcement may be a very good reason to vote against them, but there is nothing nefarious about it even if it makes certain Justice Department officials very uncomfortable.

The U.S. Attorney thing is different. The allegations in the U.S. Attorney situation, and unfortunately, the more the Attorney General has talked about them the more the inference seems to have staying power rather than go away. Particularly in the case of David Iglesias, the U.S. Attorney in New Mexico, he is somebody who seemed to have no enforcement priorities different from the administration, was on no list of people who should be anything other than retained and honored, and in the immediate proximity of an election told a senator who was very heavy-handedly leaning on him to bring cases in a particular area that they wouldn't happen before the election and suddenly finds himself on a list of people to be fired.

There are innocent possible explanations of this that I can think of, as far as I can see, none has been proffered, and the most that the Attorney General has been willing to say is a series of nonrecollections, very nonspecific. I have known the Attorney General for some time. He is a likable and genial guy and it does not give me any pleasure to say this. I can't see how somebody who cannot answer that question in a way that is convincing, and leave aside the merits of it, whether the worst possible construction is true, I am actually willing to believe that it isn't. The fact that in a 5-hour hearing he can't make a coherent and

cogent case that it isn't gives rise to a really indelible inference on the part of reasonable people that there is something to it, and that is a level of politicization of the department that the institution cannot sustain over any long period of time.

Finally, I would stop there except that I want to say one word, an intermediate word about OLC. This is probably a subject we might want to return to, but OLC has actually been one of the most interesting offices in the department in connection with this whole pantheon of issues over the last 7 years in the sense that as Neal suggests, in the early days of the administration it was either rightly or wrongly very much an enabler of many things that the administration wanted to do. It subsequently became precisely the opposite which is to say it began saying no to the administration quite aggressively in ways that actually Stuart has written about in *Newsweek* and caused major internal Executive Branch crises. So the story of OLC is actually very complicated and whether it is ultimately an example of politicization of the department in either the pejorative way that Neal means it or some less nefarious sense, or whether it is ultimately an example of the institutional resilience of the department I think is very much an open question.

MR. TAYLOR: Thank you, Ben. Some of you may have noticed that your moderator is not very good at enforcing time limits, so I will ask, now that we are going to questions from me for a while and then from you for a while, each panelist to keep the answers as short as possible and I will invite other

panelists to jump in if they think it's time to respond in some way to what's been said, and I will ask questions in the same order in which the speakers have gone.

Bob, I will ask you a hypothetical question. President Bush calls you and says, As you know —

MR. LITT: Calls me in?

MR. TAYLOR: You, yes, As you know, I greatly value independent advice and I don't have one of these loyalty fetishes that some people have, therefore I would like you as a nonmember of my administration to first tell me, first, what is all this nonsense about with U.S. Attorney firings? Did anybody do anything wrong or are they just having trouble explaining themselves? I don't want you to investigate it; I just want you to give me your best judgment based on what you've read in the newspapers. Second, how do we get out of this? How do we get this behind us?

MR. LITT: And you want me to answer this in 1 minute?

MR. TAYLOR: I'll give you three.

MR. LITT: The answer to the first question I think is that, yes, a number of people did things wrong in connection with the U.S. Attorney firings. It is a little difficult at this point as I think Ben indicated to understand exactly what happened. There is a pretty clear sense that we do not have the full set of facts here, but there is certainly an indication that U.S. Attorneys were fired and perhaps retained for a partisan political reason. There is also even more importantly in my view, I think Tim said that it pains him to see the Attorney

General being called the dissembler. It pains me to think that the Attorney General is telling the truth because if it is, he is a man who delegated to completely unqualified people very, very significant decisions with great implications for law enforcement in the United States. If you give a 35-year-old ideologue with no law-enforcement experience to make decisions to which U.S. Attorneys are going to be retained, you are going to get an ideological decision and not a law-enforcement decision. So that to me is the most egregious bit of information that has come out of this whole thing.

So, yes, there were mistakes that were made, and how do you get out of this? Number one, you get rid of the Attorney General and probably the Deputy Attorney General as well. Number two, you find people to put in there who are experienced in law enforcement, will be independent of you with the ability to stand up to you and say no, and you give them that authority. You reestablish these procedures. You say there will be no contact between the political people at the White House and people at the Department of Justice on case matters.

It's a different thing when you're saying are we going to set up, going back to the Clinton Administration, the COPS program, the program to put 100,000 cops on the street? That is essentially a political type of program and it is okay for there to be more contact between the White House and the department on that sort of thing. But when you're talking about individual cases, nobody at the White House talks to anybody at the department except for this one authorized

lawyer-to-lawyer channel of communication and you the President make a speech that says this is the way it's going to be, then you get people in there who will do it and you enforce it.

MR. TAYLOR: Thank you. George, I would like you to address the same question, and I will throw in a little footnote to it. Dahlia Lithwick is the most amusing legal writer in the country and wrote the following about yesterday's hearing, "One of the finest moments comes when Senator Sheldon Whitehouse, Democrat of Rhode Island, busts out a big, big chart which happens after almost everyone has gone home. The chart compares the Clinton protocol for appropriate contacts between the White House and the DOJ on pending criminal cases with the Bush protocol. According to Senator Whitehouse, the Clinton protocol authorized just four folks at the White House to chat with three folks at Justice. The chart had four boxes talking to three boxes. Out comes the Bush protocol, and now 417 different people at the White House have contacts about pending criminal cases with 30-some people at the Justice Department." I expect she exaggerated slightly, but you get the drift of it. I throw that in as sort of part of the question, do we have a systemic problem here and you're advising the President on how to get past it.

MR. TERWILLIGER: I don't give hypothetical advice to the sitting President in public, Stuart.

MR. TAYLOR: Advise us.

MR. TERWILLIGER: Let me answer it this way. I don't know what the state of affairs is in terms of what the current protocol is, or regardless of the protocol, what the practice is. I agree that it ought to be something like what was described.

I recall an incident and I actually have been surprised that it hasn't gotten much play. In early 1993 before the Clinton Administration rightfully, and I've never taken great offense at this, told the 93 or 92 Republican holdover U.S. Attorneys to resign. There was an incident that occurred right before that, in fact before Janet Reno was even confirmed as Attorney General, but Web Hubble was at the department and there was a Republican holdover Acting AG. It was not me. There was a prosecution going on in Tennessee about a member of Congress, very prominent, and his defense team wanted the venue of his trial moved because it was perceived that he had a better shot at acquittal in one place rather than the other.

I'm just going on published reports, Hubble told Stuart Gerson who was the holdover to call the U.S. Attorney and tell him to move the trial. The U.S. Attorney resigned in protest over that. His name was Ed Bryant. He later went on and spent a couple to three terms as an elected member of Congress. I remember talking to Ed that night. When he resigned he called to tell me about it and being tremendously offended by what had happened not because I didn't like Web Hubble or I was upset because Bill Clinton was President and all of that sort of thing, but because it was tremendously out of kilter with the way the Justice

Department should operate and I hoped that I was not a harbinger of things to come. I don't know how the Justice Department is operating today, but if it is trending toward the end of the continuum, that is not a good thing and that should be fixed.

That being said, I think members of Congress particularly on the Judiciary Committees as they are conducting these inquiries need to be very, very careful to draw the kinds of distinctions that Ben articulated so well and far better than I can I think about the difference between making decisions that you are in fact accountable for such as whether you rush a facility at Waco or you send the hostage rescue team into a prison or you prosecute the policemen in the Rodney King case and all those other very controversial decisions, that at the end of the day the buck does stop at the leadership position. I got written up I think in the "Legal Times" maybe when you were there, Ben, I don't know, being very heavily criticized for having reached down and affected how a particular case was handled that involved a political figure. I am not in the last apologetic about having done that because there was a vacuum in supervision of the case and what was going on in the case was in my judgment wrong, and I was getting paid to make those judgments.

MR. LITT: How is that different from what you said Web Hubble did?

MR. TAYLOR: Hubble is getting paid more.

MR. TERWILLIGER: Nobody at the White House called me and said this guy wants his trial moved so he can get a better outcome.

MR. LITT: Did somebody at the White House call Web?

MR. TERWILLIGER: The judgment that I was making, Bob, is a big difference. The judgment that I was making was about whether or not a case should get prosecuted. That's what I get paid to do. I don't get paid to decide which venue a case ought to be tried in.

MR. TAYLOR: Thank you. I'd like to ask you a different kind of question, Neal. There is an interesting but very civil disagreement you and Tim about OLC, the Office of Legal Counsel, its role in saying no to the President, when it should and when it shouldn't, and with particular aspect to the famous torture memo in which the Office of Legal Counsel advised the President that he didn't need to abide by a federal law making torture a crime, that he can nullify that essentially if he wanted to unilaterally. Then as Ben pointed out I think Goldsmith comes along later and reverses that. But I wonder whether the disagreement between you and Tim reflects a larger difference in the DNA of White House and Justice Department lawyers of the different parties.

We seem to have come to a situation where Republicans have a fairly expansive maybe a very expansive view of executive presidential power vis-à-vis Congress and Democrats perhaps because they have had more luck in Congress than in presidential elections lately tend to have a very different view. I guess part of my question is whether there are any clear lines in the sand of what

the law is or whether these are just good-faith disagreements between people coming from very different philosophical premises.

MR. KATYAL: Yes, I do think that there is obviously some difference in philosophy in general between the two parties on presidential power issues, but I think it would be hard pressed; Tim said that on a daily basis the Office of Legal Counsel trumps congressional statutes with the President's Commander in Chief power. I would think that would be shocking if you looked at Republican administrations over the past 30 or 40 years if they did that.

Obviously a lot of this stuff is secret so it's hard to know. But I worked there for 2 years and worked with OLC every day on national security matters and read many of the old opinions. I do not think that it would be fair to say that that is what was going on on a daily basis or anything even close. To say that you're going to set aside a statute as unconstitutional is a dramatic thing to do. And for someone like me, I'm a unitary executive person, I believe in a strong presidency, but the idea that you set it aside in a secret memo as unconstitutional, that should be your last option if you're the Office of Legal Counsel. That's the way I traditionally read these things. You try and avoid the constitutional problem; you don't create it by having an expansive view of the Commander in Chief Clause and then a narrow view of the statute. It's not just a matter of I think dangerous law making or dangerous interpretation of law, it's also just bad policy.

You see time and time again the administration advancing these claims in ways that ultimately hurt our national security. They said this about

military trials. They said, don't worry, the President has the Commander in Chief Clause power to set up these trials on his own. Obviously that didn't work out and the result is that we're 5 years later and no one has been brought to trial. Lots of people, Republicans and Democrats, said 5 years ago here is the way to do it, get a law in Congress, don't have these expansive views of presidential power. So I do think it's dangerous.

Then one corrective to Ben. I think he is right to say that the Office of Legal Counsel changed its DNA a bit more from the extreme Republican version to something in which the Office of Legal Counsel was saying no in 2004, but the gentleman who did that as I understand it from the news reports wound up having to leave his position at the Office of Legal Counsel precisely because he said no. I understand the temptation if you're the White House, it's good to have a judge who says yes to you, and I think no matter who the next President is, we need to think about how dangerous that is for government functioning.

MR. TAYLOR: Thank you. Tim, could you address that and also more specifically, I believe that the switch, the change in policy, the rejection of the original torture memorandum which was done by Jack Goldsmith now at Harvard Law School when he was head of the Office of Legal Counsel, there was a huge internal fight about that. He did get driven out of the government, more or less. But as far as I recall, his decision stuck. The policy of the Executive Branch now is not the original Gonzales/John Yoo policy, it is the very different Jack

Goldsmith policy in terms of the interpretation of what the law is. What does that whole episode tell us do you think?

MR. FLANIGAN: Let me take that one first since it's the most immediate. My understanding is that the legal analysis of the Department of Justice which Jack among others signed off on is in terms of legal result and outcome on all fours with the outcome that was the Office of Legal Counsel's previous opinion, but the legal analysis, the pathway to get there, has changed but only slightly and that it is really sort of a continuation of the department's original interpretation. The President's policy has remained the same throughout, and the policy of the United States government in Democratic and Republican administrations, is that we do not torture. The question is what is torture and what is defined as conduct that is torture.

Let me just say whenever what I will refer to as old OLCers get together, whether it's Walter and I getting together or Ted Olsen getting together with some of the previous OLCers, everyone says, well, OLC changed. OLC went into the tank on this one, or OLC bent to pressure on this, and everybody has their story about what happened after they left, the good, the halcyon days of the Flanigan OLC were just absolutely corrupted when Walter Dellinger came into office. That's all nonsense. There is much more continuity in the interpretation in the legal theories of that office than Neal gives the office credit for.

I will say too that I don't have an extensive through this administration, it's limited to those first 2 years of the administration, but I recall a

couple of things. First of all, that all of our communications on legal issues, what is the law on this, happened between the counsel to the President and whoever was the head of the Office of Legal Counsel at that point in time. And I also recall being told no, that the answer came back, no, you can't do this. So it was not as if you had some immature lawyer. John Yoo is not an immature young lawyer. He is a very, very skilled, able lawyer and when he gave an answer that was no, we obviously respected it, just as we respected his answer when it was yes.

As a former head of the Office of Legal Counsel, I had to be very careful because I didn't want to dictate the outcome. That would be the worst possible situation having to do with someone in the White House dictate an OLC outcome or opinion. One of the basic truths of law in government is that you cannot practice law in the West Wing of the White House. The velocity and volume of issues there is too great. The policy whirlwinds are too strong. You have to have that Office of Legal Counsel set aside and enjoying some form of isolation so that they can give it. If that isolation is breached, and I obviously can't speak for times after I left, it is a very unfortunate thing. It would be just as unfortunate, perhaps more so, if OLC were to say to the President, no, not for legal reasons, but for policy reasons. The Office of Legal Counsel is to answer the question for which there are several types of possible answers. One is, yes, it's legal, the other is, no, it's illegal, the third is it's legal but stupid. Sometimes OLC gives the legal but stupid answer, but they can never give the answer that it's

illegal because we think it's stupid. That's wrong. That's violating the lawyer's basic role.

MR. TAYLOR: Thank you. By the way, when the answer is legal but stupid, does the White House say, oh good, it's legal, let's do it?

SPEAKER: Yes.

MR. FLANIGAN: Not the White House that I associated with, no.

MR. TAYLOR: Ben, if the current Attorney General decides to go do something else, because a lot of people are suggesting he should do that, who would be a good selection to fill the job and who would take it?

MR. WITTES: The short answer to that the pickings are slim and I don't know.

MR. TAYLOR: Present company excluded.

MR. WITTES: Of course. The basic problem, and I think it's actually one of the reasons that there has been such reluctance on the part of the administration to replace the Attorney General is that it's actually a very difficult squeeze now to find somebody who is both acceptable to the administration and not only confirmable but the nature of whose personality doesn't lock in exactly the type of confrontation with Congress that the administration presumably wants to avoid in choosing a new Attorney General in the first place.

If you just focus on the most commonly floated names you have people like Ted Olsen and Judge Larry Silverman who are people who have very distinguished and honorable service in the Executive Branch and in Silverman's

case in the Judicial Branch as well who I think as a practical matter in reality would be very independent-minded Attorneys General, but you will never convince Democrats on the Hill of that, so I think both of them, if you're sort of thinking about nominating them, you really have to think about what the confirmation picture looks like.

You also have people who would greatly excite Democrats in the sort of way that Robert Gates did for DOD, people who Democrats would look at and say this is a moderate and conciliatory gesture. I'm thinking here of Jim Comey who was Deputy Attorney General earlier in the administration. This is not going to happen, and it's not going to happen precisely because the behavior that he demonstrated that made a lot of Hill Democrats respect him a great deal infuriated a lot of people in the administration and so he has the sort of reciprocal problem.

I'm not sure I have ever seen a situation in which threading that needle is more difficult which leads you to sort of a few possibilities. One is people who have served as AG before like William Barr. I suppose we could talk about present company included as well. And the other possibility is sitting Senators. It is very hard to Senators to vote against their colleagues.

SPEAKER: John Ashcroft?

MR. WITTES: On the other hand, if John Ashcroft had not been a member of the Judiciary Committee at the time, he wouldn't have been confirmed at all. So that I agree with the effect that you're describing, on the other hand I

think the two effects dovetail fairly considerably. And there are members of the Judiciary Committee who may be able to thread that needle, particularly the former Chairman, Orrin Hatch. My own personal favorite idea for the administration which I have thought about writing for them is that there is a stroke of brilliance they could do that would, A, be very hard for Democrats to oppose them on, and allow Republicans to retake the Senate which would be to nominate Joe Lieberman to Attorney General and thereby allow the Republican Governor of Connecticut to replace him. That's a joke.

SPEAKER: And it's not funny.

MR. TAYLOR: Bob, one thing that seems to have become clear in this very confusing flap about firing U.S. Attorneys is why the U.S. Attorney in Arkansas was fired, Bud Cummings. Initially I believe, correct me if I'm wrong, Paul McNulty, the current Deputy Attorney General, testified in Congress he was fired to make room for Karl Rove's friend Timothy Griffin. He was in the way. We got him out of the way. And Attorney General Gonzales told people he was very, very upset that Paul McNulty had testified in this way, it wasn't true at all, it was terrible. Yesterday he basically said Paul McNulty was right, that's why we got rid of him, he was in the way. Taking that as established, is this a scandalous thing to fire a U.S. Attorney to make room for somebody's buddy?

MR. LITT: No, as long as the buddy is qualified. I don't have a problem with that. There is some question as to whether Griffin had appropriate qualifications or not and that is why it is important to have these people

nominated and go through the confirmation process, but there is nothing wrong with that.

If I can just go back a little in that regard to George's point about the Patriot Act, the fact of the matter is that the system that George said would be ideal is exactly the system that was in place before the Patriot Act was passed which is to say if you think back to the Clinton Administration, the Republicans in the Clinton Administration got very upset when people served as acting in presidentially confirmed positions for an extended period of time because their successors were not confirmed, and I'm thinking of Bill Lan Lee in the Civil Rights Division. As a result of that, they passed amendments to the Vacancies Act that I think an acting could serve only for 120 days unless there was somebody whose confirmation was pending. That's exactly what the law was and that's a reasonable compromise.

I think what is disturbing is the fact that you can now put people in sort of permanently on that basis. I will say that with respect to Mr. Griffin, while we keep hearing from the Attorney General that he wasn't using the Patriot Act authority to appoint Mr. Griffin, I think he is still there and there doesn't seem to be a successor nominated. I don't know enough about him to know whether he's qualified or not, but I think that the idea that says we want you out because we have somebody else we want in, if that person is qualified that is not a problem.

MR. TAYLOR: George, you were talking about voter fraud earlier, and I think voter fraud cases are in an interesting category because that is

one area where aggressive prosecution is something that Republicans seem to do and voter fraud is perhaps because most of the cases tend to be about Democratic voter fraud, and then Democrats aren't as enthusiastic about prosecuting those cases, plus they are very politically sensitive. So you've got something where there are very good reasons why Democrats and Republicans might disagree politically about how to prioritize this, is it big or should we spend our resources on immigration or something, on the other hand you can see, and in fact we have seen cases where it looks as though somebody wants to get a big headline right in front of an election by saying do that voter fraud case now, not after the election. How as a Republican who thinks voter fraud ought to be prosecuted do you navigate through that territory to avoid an appearance that somehow you're being political?

MR. TERWILLIGER: That's a good question, and the last thing you said I think is the most important aspect of my attempt to answer, Stuart. It's not what you do, it's how you do it and the appearances that that creates because somewhere on the Justice Building, I forget exactly in the various descriptions where it is, there is a statement that at least ends in "Liberty is Secured through Justice," and the perception of justice is important to securing the people's liberty. It's important that people think not only that you are doing the right thing, but you're doing the right things for the right reasons.

I can't imagine anybody except the most partisan hacks frankly that would object to curbing fraud in the election process. It is a fundamental attack

on one of the most elemental aspects of the exercise in citizenship in a democracy. Look at what we went through in 2000 in trying to sort out what actually counted as a validly voted ballot. So it seems to me that is the right thing to do.

I wouldn't say across the board that bringing an election fraud case in the months before an election is necessarily just standing alone a bad thing. You will notice, and I think probably you have seen in the paper in the last 3 or 4 weeks, a number of tax fraud cases that got quite a bit of play. That always happens right before April 15th. The IRS and a couple of U.S. Attorneys' offices or the Tax Division will trot out some tax fraud cases to remind people who are in the process of filing their returns that there are consequences for doing bad things in this process. So I'm not sure that bringing vote fraud cases in September or October or something of an election year would be bad. Bringing vote fraud cases because you want to intimidate people who are in the process of exercising partisan political campaign activities, get out the vote, registration, whatever it might be, that would be wrong. So I think you really have to strike the balance.

I will go back to something Tim said before, the exuberance of youth. The older I get the more important maturity is in making these decisions, but I do think there is a lot of truth to that. One of the great traditions of the Justice Department has been, and one of the reasons that I never thought that the concept of the independent counsel law made much sense particularly where you bring people in to serve in those positions who are not prosecutors, just like a

policeman who stops somebody for speeding makes a judgment about whether or not to issue a ticket based on a whole bunch of circumstances including the thousand speeders he has seen over the last 3 or 5 or 10 years, good prosecutors make a decision not just with tunnel vision to the facts and circumstances of a particular case, but to a wider tableau of their experience in dealing with cases in general and I think the value that a prosecutor brings with experience in making those kinds of decisions whether it's a vote fraud case or some other case is absolutely invaluable.

And if I can use that as a convenient segue to just make one other point which we haven't discussed and that I think is very important, there has been an ebb and flow of the trend toward making U.S. Attorney positions more professionalized. I became a U.S. Attorney because there was a studied effort when Ed Meese was the AG who himself was a former prosecutor to elevate people who were Assistant U.S. Attorneys in various offices to the U.S. Attorney position. At the time, the Hatch Act barred federal employees including Assistant U.S. Attorneys completely from partisan political activity. The only reason my partisan leanings were known was I have a big mouth at cocktail parties, some people knew where I stood on perhaps some key issues. But the fact of the matter is that there has been a trend to push the U.S. Attorney position more toward having somebody in the job with a professional background.

There are always exceptions to that. When Strom Thurmond was the senior Senator from South Carolina, the Chairman of the Judiciary Committee

and there was a Republican President, he could put anybody he wanted into the U.S. Attorney position.

SPEAKER: And did.

MR. TERWILLIGER: And did on a regular basis.

SPEAKER: Including his son, right?

MR. TERWILLIGER: That may have been after he left. I'm not sure.

SPEAKER: After he departed.

MR. TERWILLIGER: There are examples of that on the other side. When I was Deputy AG I had Senators, I can remember a couple, call me up and say I really need your help to get the incumbent out of there. I want you to talk him or her into leaving because there is somebody else that I want to put in the job, and our first question was, who is it and what's their background and that sort of thing, and some we went along with and some we didn't. That's part of the political process. U.S. Attorneys are replaced, Bob. I'm sure you didn't mean what you might have implied before that these firings or hirings are for a partisan political reason. They are. They are partisan political positions. But that doesn't mean those decisions should be made entirely on the basis of partisan political characteristics.

My point here, and I'm sorry to go on about this but it's something I feel strong about, the ideal candidate is someone who is politically and

philosophically compatible with the administration that appoints him or her and also is extremely professionally competent.

MR. TAYLOR: Thank you. Neal, the one thing that I should made more clear in my question to George, and I think he covered some of it anyway, as I understand the way a lot of Democrats think about voter fraud cases, there's a fine line between preventing voter fraud and the evil of voter intimidation, i.e., you've got to show a photo ID. Is that going to mean that people who are poor who don't have photo IDs in the same incidence are not going to be able to vote and is aggressive prosecution of voter fraud going to have a chilling effect on legitimate voting activity and registration. My question is, is there a clear line through all that or do you think that the Republicans are making too much of voter fraud, the Democrats making to little of it, or what?

MR. KATYAL: I think it's maybe best for me to refer this one to Litt. I don't know that much about it. From what I read I do think there is some problem here and that George is right to prosecute some of this stuff, so there may be intimidation.

MR. TAYLOR: Just take his last 30 seconds.

MR. LITT: I'm going to put on my partisan hat here. There has been a lot of talk about voter fraud and if it existed it would in fact be a serious problem. There is precious little evidence that it in fact exists on anything other than an individual and isolated basis. I think part of the problem that many people have with the firings of the United States Attorneys is that it appears that what

may have happened is that a number of these people were pressured for partisan political reasons to try to bring voter fraud investigations and prosecutions, I'm thinking of the U.S. Attorney in Washington who people offended because he did not get involved in the very close gubernatorial election there, and that when they didn't bring these prosecutions they got fired, there have been very, very few prosecutions that have actually succeeded. So while I agree with George that if this were a real wide-scale problem it merit law-enforcement attention, there is really no evidence that it is.

MR. TAYLOR: Tim, address that voter fraud question if you care to, and if you don't, I'd be curious to know looking back through history disregarding the current administration which Attorneys General in the last 50 years do you think were the most successful or the most admirable, did the best job? When does it work well and what makes it work well?

MR. FLANIGAN: I know nothing about current voter fraud prosecutions, so I'll skip that one.

MR. TAYLOR: That never stopped me.

MR. FLANIGAN: And I will try to pick a safe example for a very successful Attorney General. I think Herb Brownell, Eisenhower's first Attorney General, was a marvelous leader for the department. He brought the department out of some fairly difficult times on the heels of the criminal prosecution of the head of the Tax Division and the head of the Criminal Division, and the Truman Justice Department brought the department into I guess a modern era and posture

with respect to a lot of different issues. Whether Herb faced the same things that Al Gonzales has faced recently in terms of U.S. Attorney hirings and firings, I just don't know, but I had the pleasure of spending some time with Mr. Brownell and was tremendously impressed with his record at the department.

MR. TAYLOR: I'm curious, correct me if I'm forgotten, he brought *Brown v. Board of Education*, he supported the NAACP and the Supreme Court as I recall, and Eisenhower later complained about what a terrible thing that was. Wasn't Brownell taking a position that his President didn't like in the most important Supreme Court case in history?

MR. FLANIGAN: It rings a bell. He was cross-wise with President Eisenhower on a few issues, but I don't recall this one.

MR. TAYLOR: Ben, what do you think? And after Ben's 1-minute answer we'll go to any questions that you all may have. How would you evaluate Attorneys General through history, and particularly more recent history?

MR. WITTES: I guess the one who I really think is a name largely forgotten by American political history and who really warrants a central place in it is Ed Levi. I was interested in all of Gerald Ford's many very long obituaries that how little reference there was in them to his choice of Attorney General and how central that choice was to the rehabilitation of the Justice Department and the FBI most particularly in the post-Watergate era. It was a small subset of the reforms that Levi started within the department that time has chipped away at a bit both for good and not so good reasons. But the amazing thing about Levi's tenure

which was I believe very brief, it was something under 2 years, is how persistent those changes have been, specifically the genesis of the Foreign Intelligence Surveillance Act took place under his tenure although it was not finally passed until the Carter Administration, and the Levi guidelines which regulate the initiation of investigations against Americans in one form or another still exist. So I think there he really exercised an enormous influence over what every single one of us has talked about, what Bob started with, the sort of difference between what's legally allowable and what's normatively acceptable, our sense of what is normatively acceptable in the Justice Department is largely conditioned by his work over a very brief period of time in the mid-1970s.

MR. TAYLOR: I will invite one audience answer before I invite audience questions, if the gentleman cares to answer it.

MR. COLEMAN: (inaudible) investigate the charge that something (inaudible) had done something wrong is why we lost the election.

MR. TAYLOR: This is Bill Coleman speaking. Could you say that again? I didn't catch it.

MR. COLEMAN: I said that Levi was a great person and he was a great Attorney General, but having said that, one, when you remember right after Ford got nominated there was some charge that he had done something wrong with respect to some union people. Levi being a good scholar, it took him until a week before the election to finally say there is nothing to the charge. I think that's the reason why they lost the election.

Secondly, I sat in a cabinet meeting where Levi wanted to do two things. One was to let New York go into bankruptcy, and two, to let Bob Bork prevail in representing those white parents in the Boston school case. I spoke up and prevented both of them, but he was a great guy, but don't be too charmed by what happened. Can I make a comment?

MR. TAYLOR: Yes, and we had a question.

MR. COLEMAN: In the first place, I hope the record would show that I accepted this invitation long before. Secondly, it so happens that I know Gonzales. We went to the same law school though at a different time. Thirdly, I met him shortly after he came up here, and the night before he got sworn in as Attorney General I sat next to his mother at a dinner, and so I really know him. I think that the bar and the newspapers and people have been very unfair to him. If you really understand the background, right after the election the recommendation was made that you ought to get rid of all of these Attorneys General. Gonzales was the one that opposed that and prevented it from happening. Thereafter it was suggested you have to look at all 93 and you ought to determine if any of them ought to be replaced. He delegated that to someone and that person went and asked everybody in the department about it.

People say Gonzales is lying because he said he didn't have much to do with it, but what he was saying was, having delegated it, he relied upon that and when it came back to him, and that document which says there was a meeting is intriguing because that document was issued 3 weeks before there would be a

meeting. So he goes to the meeting, how long he stays nobody can say. He is a gentleman and he doesn't go and ask the other people what happened and who said what and who did what, and there are very few documents about that meeting.

The other charge is that somehow he's lying about that lady in California. The issue is simple. She says under oath that nobody ever told her that, one, she was doing certain things they wanted corrected, and two, if she didn't do them she would be fired. I ask all of you when you check your associates or you talk to your associates, you tell them they — make a mistake, but you don't say if you don't do that you're going to be fired.

But anyway, what happened was there's a document which they sent to her and they said with respect to this and this and that your number of prosecutions are way down, you should do more about that, and it didn't say if you don't do it you'll be fired. So therefore you have a contest. There's a guy lying when he said I know she got a document. Even more intriguing, even though Senator Feinstein was up there giving him hell, the fact is she was the one who wrote him the letter and said there are some complaints about this lady, will you look into it? And those are the things that happened.

Now talking about politics, I thought I lived in a democratic society, and one thing you do is you have politics. To say that the Justice Department has to be cured, I ask you to back and read *Simple Justice*. The Legal Defense Fund lost the Townsend on the grounds that the Fourteenth Amendment

didn't apply to primaries. Then along came the "Krassic". At that point after that, Thurgood Marshall and Bill Hasty went in to see Wexler and said will you join us in that? He said no. Why did he say no? Not because they weren't right, he said no because we depend too much upon those Southern Senators, the chairmen of those committees, and we're not going to do it. So the idea that you don't do that is just irresponsible. That's what happens. There is no charge, there is no thing that Gonzales ever stopped any type of prosecutions or did anything. I really think the bar ought to look at the whole thing and not let a good man be crucified the way he's being crucified.

MR. TAYLOR: Thank you. I might suggest that he would have been crucified less if you would have prepared him for his testimony yesterday. Are there any other audience questions or comments?

MS. MULLEN: My name is Mary Mullen. I was wondering if the U.S. Attorneys are chosen by the administration and they can change midstream, if there are some U.S. Attorneys left from the previous administration. Aren't they less likely to prosecute someone in their administration that might be doing something wrong? I just don't understand that. You were talking about friends; I have a friend who wants to be a U.S. Attorney. He has very good qualifications, he would make a fine U.S. Attorney, and then you try to get rid of a U.S. Attorney who's already there. I guess I never understood that.

MR. TAYLOR: Let me just clarify, is the point that U.S. Attorneys should never be fired? I'm not sure what the point of your question is.

MS. MULLEN: The point is I don't understand if the U.S. Attorneys are all part of the administration, if someone in the administration is doing something wrong, aren't they less likely to prosecute the people within their own administration? And if there is someone from a previous administration that still remains a U.S. Attorney and then there's a friend of someone who is just as qualified, I find that very hard to accept.

MR. TAYLOR: George, why don't you answer that?

MR. TERWILLIGER: In very sort of short order, the U.S. Attorney position, the top position in the U.S. Attorney's Office, has for a long time been by statute a presidential appointment by tradition on the recommendation of the senior Senator or senior political figure from the President's party, so it is a partisan political position. The Assistant U.S. Attorneys at least after the Roosevelt Administration remain from one administration to another and are among the cadre of career professionals who do the bulk of the work in the Justice Department on a day-to-day basis. So there is nothing surprising in a Republican or Democrat administration about changing U.S. Attorneys with a change in administration. I would also say there is nothing particularly amazing about changing U.S. Attorneys during an administration. Some are better than others and if somebody is not getting the job done for one reason or another, it seems to me entirely appropriate to suggest that they move on and look for a replacement who can do a better job. That's called good management.

In terms of if somebody in the administration has done something wrong, there are a number of options. The first option is the Public Integrity Section of the Criminal Division of Justice Department in Washington which is run by a career professional. All political corruption cases are referred at least initially for handling or co-handling by the Public Integrity Section. The section has over time built up an enviable reputation as an independent, independent of the political process, arbiter and examiner of wrongdoing by political figures whether they're Republicans or Democrats.

The next line of option there is what happened in the Libby case where the Justice Department, either the Attorney General or the Deputy Attorney General, appoints somebody to really exercise all the prosecutorial authority. That can be somebody from within the Justice Department such as Mr. Fitzgerald the U.S. Attorney in Chicago who was appointed, or it could be somebody from outside the Justice Department who is appointed to perform that. So there are a number of checks and balances that guard against the syndrome that I think you were concerned about.

MR. TAYLOR: Bob?

MR. LITT: I just want to say in my experience in the Department of Justice, if anything, you have the opposite problem. Assistant United States Attorneys frequently tend to be, particularly in the large urban areas, young, aggressive people who want to make a name for themselves. They are rarely hesitant to try to make cases against prominent political figures, and to the extent

there's an issue, it's more with reining them in than a problem with getting them willing to investigate and bring cases against prominent political figures even of the administration's party.

MR. TAYLOR: And of course, reining them in would generate headlines.

MR. LITT: And that's where the Public Integrity Section is so important because they have a history and a tradition of nonpartisan, fair analysis of the cases and serve as a check to ensure that on the one hand nobody is being protected for political reasons, and on the other hand nobody is trophy seeking for political reasons.

MR. TAYLOR: I think there was a question toward the back. We've only got 4 minutes or so and we've got about four questions, so let's move as fast as we can.

QUESTION: I have a question for Mr. Katyal, but anyone can answer it. It's about the Scooter Libby issue. I was wondering why more hasn't been done to prosecute the people who linked the name of the CIA agent. What are the laws on this? Is it in fact illegal and why hasn't Cheney been subpoenaed. That's a subquestion.

MR. KATYAL: The quick answer is that the statute has never been used for a criminal prosecution says that you have to have intentionally leaked the name knowing that the person was an undercover operative. By many

people's accounts, that level of criminal intent has not been shown. There's a lot of hogwash about that case, but I think that's a pretty strong defense.

MR. BACON: My name is Don Bacon and I'm a private lawyer and I'm in the private sector, and I have encouraged my kids who are lawyers too to go into government work. One of them tried recently to get a job in the Civil Rights Division and he said he was interviewed by someone who was a couple of years younger than he was who asked him a lot of questions about Supreme Court cases that he didn't like very much. So I'm wondering how significant is it that hiring of career people in the Justice Department has been handed over to political appointees? Is that a real fundamental change that we should be worried about?

MR. TAYLOR: Tim, do you want to address that?

MR. FLANIGAN: That's a very, very good question. It has always been the case that obviously if you have political people running an organization like the Civil Rights Division you are obviously going to have, and I think appropriate, political input on the hiring. When I was in charge of hiring at the Office of Legal Counsel I tried to keep the focus on, first of all, professional abilities, and then I didn't want to bring anyone into the Office of Legal Counsel who was a foe of executive power since OLC's docket tended to run in that direction. I can see how that could be abused under some circumstances.

MR. TAYLOR: Over here, the gentleman there.

MR. HURLEY: I'm Lawrence Hurley from "The Los Angeles Daily Journal." I wanted to ask about the experience levels of the people who

made the firing recommendations. For those who worked in previous administrations, how do they compare in terms of their resumes, their experience level, and just their basic sort of level of competence if you like to people who held those same positions in pervious administrations? And is it the problem that they were just not being supervised properly or is it the problem that they just weren't any good in the first place and shouldn't have been in those jobs?

SPEAKER: I would say just one quick thing on that which I don't think it's just the title, it's what they operationally were to do. I was around the same age as these folks and I would never have any operational control, never be able to make those types of decisions, and it wasn't just that I wasn't a good lawyer or something, it's the older folks who know the process, know the department, and they are the ones who would make those calls and I would just implement those calls that were made by others.

SPEAKER: I think the problem is a little bit of both. I think it's partly that the people who were put in there were not qualified for the level of responsibility and the types of decisions they were being asked to make, and I think it's partly that they weren't supervised adequately by people with the right kinds of experience and judgment.

MR. TAYLOR: Ben?

MR. WITTES: I actually think in addition to both of those factors there is an interesting cultural dimension of this which is that if you look at, for example, the average age of certain judicial nominations in Republican versus

Democratic administrations, it's much lower. If you look at the average age of certain people who have positions of extraordinary responsibility it's actually a lot lower particularly in the legal arena actually. I think the reason for that is very simply that the comparative size of the legal elites of the conservative movement and the Democratic establishment are dramatically different. If you go to your average elite law school and you kind of poke around, there is a subculture of conservative would-be lawyers mentored by a subculture of conservative professors, and this is a channel and it's a distinct culture within the sort of elite law school world and people often caricature it as the sort of Federalist Society culture. I actually think there's absolutely nothing wrong with it.

QUESTION: Are you saying that the Republicans have smaller groups?

MR. WITTES: Yes, it's a smaller group and the result is that you have people coming out and they go to their clerkships, and then they come out of their clerkships and they're very young. So in Democratic circles, they tend to go into lower-level positions in the government or to firms for a while, season for a while, and then go into government. Neal would be actually the exception I think in his cadre in Clinton Administration. You were probably much younger than a lot of your colleagues. In a conservative administration, by the time people were Neal's age, they are getting judicial appointments, and that's not an exaggeration. Brent Kavanaugh is sitting on the D.C. Circuit now and he's our age, Neal and my age.

MR. TAYLOR: Us? What do you mean, kemo sabe?

MR. WITTES: Well, I was talking about Neal and me.

QUESTION: (inaudible) Secretary of the Treasury (inaudible)

MR. WITTES: I'm not saying there's anything wrong with it. I'm just saying that it is a difference in culture.

MR. TAYLOR: We are out of time, and therefore any panelist who needs to rush out, rush out. I'll take one more question from Mr. Mitchell.

MR. MITCHELL: Thanks, Gary Mitchell from *The Mitchell Report*, and to the best of my knowledge no relationship to an Attorney General by that same name. It seems to me that we've sort of dodged the 500-pound gorilla at the Department of Justice and I gather that's by design, but it is a critical issue. Mr. Terwilliger has spoken to the importance about the perception of justice and whether it's being handled well. I would really appreciate it if each of the panelists would give a quick response to whether in their view the Attorney General should resign, should be asked to leave, or should stay and maybe just a comment on the basis upon which that judgment is made.

MR. TAYLOR: Let's be very quick so we're not way out of time, and why don't we go the other direction this time right down the line?

MR. WITTES: I think he should resign and I think he should not wait to be asked. I think that because the most-generous construction I know how to put on what happened was a management blunder of sufficient proportions that reasonable people of both parties question whether political interference in the

bad sense of the world happened here, and I think the Justice Department can sustain many things, but it can't sustain that inference among reasonable people.

MR. FLANIGAN: I frankly find the question as posed just too odd for a Washington quick response, should this person's career be ended in this particular way. I would say if you want a quick response, no, he shouldn't resign.

MR. KATYAL: I would associate myself with Ben I think. It's not his capabilities, it sounds like he came in in a very difficult position. Owing so much to the President and being formerly White House counsel, it is kind of like Web Hubble in that sense, kind of like Frank Hunger. These are tough appointments to make in today's Justice Department. I think we shouldn't do them in the future. I think we need more structural independence of the person.

MR. TAYLOR: George?

MR. TERWILLIGER: You're not going to answer?

MR. TAYLOR: I'll answer, but I'm not supposed to. I haven't given it much thought. I have been critical of the current Attorney General for a long time and I think he should probably resign for the good of his President, although there is a case to be made, and I think someone made it earlier, that given the situation that people are going to keep shooting at the President, maybe having this Attorney General take most of the bullets makes a certain amount of sense if you're the President. So my normative answer is he should resign, my political answer is I'll leave that to the experts.

MR. TERWILLIGER: I'm not going to answer the question, respectfully. I think it's a bit of a Washington parlor game that I just don't care to play.

MR. LITT: I'm not going to answer the question either, but I think that the right framework for the question was set by one of the Senators yesterday and it may have been Lindsey Graham who asked the Attorney General to apply to himself the same standards that he claimed he use in determining whether the U.S. Attorneys should be fired or not. It's an open question whether those standards were in fact used, but the standards seem to be appropriate. I think the Attorney General needs to sit down, spend some time thinking about do I meet that standard.

MR. TAYLOR: I think we're done. Two last observations. One, that was a good question but if I were someone of the panelists here I wouldn't have answered it either because we're talking about personal relationships and close political relationships and at some point your private thoughts may not be what you want to say in a public forum, and so I understand that.

Second, I'd just like to say I think that we've had a wonderful panel, I think we've had great contributions from everybody, and I want to thank them all for coming, and thank you all for coming.

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