

THE BROOKINGS INSTITUTION

LEGAL POLICY IN THE OBAMA ADMINISTRATION

Washington, D.C.

Wednesday, November 12, 2008

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## PROCEEDINGS

MR. WHEELER: We're competing this morning with the Foreign Minister of France and the Supreme Court argument in the case of Utah, so while there's a lot of interest in this panel, there will be interest in the panel itself as well as the transcript, which will be on our Web site.

I want to welcome you to this third Judicial Issues Forum for the 2008-2009 season, as it were. I'm Russell Wheeler from Brookings. We've discussed in earlier forums both the likely impact of the election on the Court of Appeals and the Supreme Court, and took a look at the Supreme Court term, OT '08.

Today, we're going to speculate and predict a bit on legal policy in the Obama Administration, and more particular what an Obama Justice Department might be doing and what it should be doing.

And to help us do that, we have A.B. Culvahouse, who is the chair of the Washington law firm of O'Melveny & Myers, who served President Reagan as his White House Counsel in the latter years of the Reagan Administration; has served and serves on many boards and commissions and is, I should mention, a member of the Board of Trustees of the Brookings Institution; and Robert Litt, who served in several positions in the Justice Department during the Clinton Administration; was an assistant U.S. Attorney. He clerked for Judge Edward Weinfeld in the Southern District of New York and then for Justice Stewart.

Now all the transition talk -- or almost all the transition talk since the election a week ago yesterday has been about the fiscal crisis and about foreign affairs -- the wars in Afghanistan and Iraq. And you have to look pretty hard to find much information about transition and legal policy or what the Justice Department may look like under the Obama Administration.

Now, obviously, policy groups have offered their own recommendations. The Constitution Project has a string of recommendations in the criminal procedure area, which are available if you wanted to pick them up outside.

And just today, we saw that OMB Watch and a coalition of groups issued a paper about secrecy, including recommendations about the Ashcroft memo on the Freedom of Information Act.

And also I should say by way of preliminaries, obviously the Justice Department is not the sole -- legal policy is not the sole province -- the Justice Department but, by the nature of the Justice Department, its advice giving and its litigation activities, it cuts across the other departments. So you've got a pretty good handle from looking at Justice on the main elements of the legal policy in any administration.

The Justice Department isn't the biggest of the Cabinet departments. In fact, in terms of budget, at \$25 billion, it ranks rather small.

But in terms of personnel, 107,000 people, it's fifth among the Cabinet departments. What that tells you is the Department does hands-on work rather than handing out a lot of money.

MR. LITT: I thought it tells you that Assistant U.S. Attorneys are underpaid.

MR. WHEELER: Well, and deserve some retroactive compensation perhaps.

And obviously, it's no secret that the Department has been in turmoil for the last several years. I'm sure Attorney General Gonzalez's tenure was not what he hoped it would be, and the Inspector General reports about the firing of U.S. Attorneys and the partisan hiring of immigration judges and other career officials is not a real happy mark.

I should mention also, of course, the Office of Legal Counsel, which is a key, but little known, office in the Justice Department, involved in a somewhat controversial way in some of the administration's national security policies.

But our purpose today, although we can't divorce ourselves from what's gone on for the last eight years, is to look prospectively. And so the plan is as follows: for the first hour or so, I will ask our panelists their speculation and their prescriptions in three broad areas: What are operational priorities of the Justice Department? What should the Justice Department be doing to run its own ship?

Secondly, what are likely to be legislative priorities -- legal policy legislative priorities in the Obama Administration and an Obama Administration Justice Department?

And finally, what might be litigation priorities and litigation preferences, as the Justice Department decides for the next four years how to allocate its litigation resources?

We talked yesterday, and we decided that we really don't have much to say about perhaps the hottest topic in this area, and that is who's going to fill the top posts at Justice? Who's going to be the new Attorney General, the new Solicitor General, Deputy, because we really don't have a clue. And what we know is what we read in the papers, which is to say we probably don't have much certain knowledge in any event.

So, and then the last 30 minutes obviously or perhaps a little sooner, we'll take questions that you may have and get your views and comments and questions on the topics we've been discussing.

So let me turn first to operational priorities in the Justice Department. Every year the Inspector General -- Justice Department Inspector General -- issues a report in November -- the last one was November 2007 -- on the 10 biggest management challenges facing the Department. And the list has been fairly consistent -- counterterrorism, grants management, computer management.

But last year up popped as number two an item we hadn't seen until last year, which the Inspector General characterized as restoring confidence in the Department of Justice, inside and outside.

Now that was a year ago, when some of the top spots in the Department were vacant. And so let me ask Bob Litt: has that confidence been restored? And if it hasn't been restored, what's the task for the incoming administration?

MR. LITT: Thanks. Let me start by making the usual kind of disclaimer here. I think anybody who knows anything about the two panelists here can hypothesize that I'm here sort of representing the Democratic wing.

But I don't purport to speak for the transition. I don't have any idea what the transition is thinking.

I mean, if you pickup the Washington Post this morning, you'll see people who are parts of policy groups were supposedly saying what the Obama Administration is planning on doing in a variety of areas. I don't have any insight to that. I'm giving my own views on this.

In answer to your question, I think that there has been an improvement in that area. I think that the people I speak to within the Department think that Attorney General Mukasey and the new Deputy Attorney General, Mark Filip, have improved internal morale and sort of an internal sense that the Department is functioning properly.

But I think there's a long way to go yet in a variety of areas. And I would just say that I don't know enough about the facts of the case involving Alabama governor, former Alabama Governor Siegelman, to know whether there is any merit or not to the accusations that there were - - there was partisan influence brought to bear on the prosecutorial decision there.

But I think it's a very, very damaging situation to be in, where those -- that sort of allegation can get traction. And I think that's probably, from the point of view of the Department, the most damaging thing that's happened over the last few years is that there has been an impression created that the Department has been manipulated for political purposes.

And I think that the top priority with respect to the Department of Justice for the new administration has to be to undo that. Part of that is going to be signaled by who is likely to be the new leadership of the Department.

I think it needs to be people who are perceived as strong and credentialed people in both law enforcement and national security, people who have -- I think it would not be a good idea to reach for people who have no experience in the Department of Justice.

I think it needs to be people who the career people within the Department believe will advocate for their interests and will listen to them, and somebody who can credibly present to the outside world the face that "I am of this administration, but I also have a degree of independence and

I will exercise professional judgment.” But that, to me, has to be the number one priority.

MR. WHEELER: Mr. Culvahouse, you have anything to add to that?

MR. CULVAHOUSE: I would just add -- obviously, I'm a member of the Republican wing of the Republican Party and really have no transition insights at all. I have -- I'm one of these people who came to Washington in 1973 to stay 18 months and have been here since. I do think General Mukasey, with whom I dealt fairly extensively -- I'm a member of the President's Foreign Intelligence Advisory Board-- he is one of the finest Attorney Generals that I have seen since 1973.

He is, I think, off to a fine start restoring confidence in the Department. He's fair. He's principled.

I don't know that he would have been asked to stay on for sure had John McCain been elected President. I think there's a fair chance of it. I believe the Department is in better shape than it was before he assumed the office.

MR. WHEELER: You mentioned the Siegelman prosecution and some question as to whether that was motivated in a partisan manner. And I referenced the controversy over the U.S. Attorneys in some of the hiring.

Is that the extent -- and, as I said, we don't want to look retrospectively all hour and a half, but just to get a handle on where the

Department is now. Are those the -- what -- three, four things that have caused the problem or does it go beyond that? Is it institutional in any sense, do you think? Or is it devoted solely to the fact that a few people got off on the wrong track?

MR. LITT: I think there is an institutional issue as well and that is that -- I believe in my partisan colors may show a little bit here. They may show a lot here. I think that this -- the Bush Administration came in with the perception that the Department of Justice was sort of a nest of liberals who were going to try to subvert their goals. And they came in with the intention of remaking the Department. And part of that was --

MR. WHEELER: The career attorneys?

MR. LITT: -- yeah, the career attorneys, not the political people, but that at the career level it was a group of people who were going to resist. And, you know, there's no doubt that a new administration has the right to set the policies and the priorities that it chooses and to enforce them on the Department, but that the new administration came in believing that the Department was going to resist these and determined to remake the Department.

And that, I think, was what led to some of the -- I guess the word that comes to mind is abuses -- the politicization of the process of hiring career attorneys.

But it also -- and I'm speaking of, you know, conversations I've had with people in the Department -- it led to a style of decision-making that was very top-down in the Department, where the career people felt that the process by which decisions were made was not from the bottom up, with people at the bottom gathering information, making policy recommendations up to the top, but coming top down: "you will do things this way."

And I think that that's a balance that needs to be redressed somewhat. Obviously, there are some areas where -- just to pick one example -- if an administration decides they want to make a priority of child pornography prosecutions, they are entitled to tell the United States Attorneys out there, you should make this a priority.

But I think that there were a lot of other decisions which people felt came from the top down but should have been worked from the bottom up. And I think that a new administration should try to give a little more weight and a little more respect to the career people in that regard.

MR. WHEELER: Do you have any sense of the degree to which the career ranks have been depleted over these years? I mean, is there a rebuilding effort necessary--? The Department of Justice has always been regarded, I think even is now, despite its problems, as a repository of very smart and dedicated lawyers for the most part. Has that taken a big hit or is that something you think can be fixed?

MR. LITT: I don't think that's taken a hit. I have a friend who applied for a job as an Assistant U.S. Attorney in Maryland a year and a half ago and was told that there were 400 applicants for one slot. I think that it's still a highly desirable job for young lawyers, and I don't think that there is that kind of problem at the input end.

I think there is a problem in restoring their sense that they have meaningful input into policy decisions.

MR. CULVAHOUSE: I agree with that. There were very few vacancies. I do think the right way, as Bob indicated, for individual cases to be decided, to be reviewed, to be brought or not brought is from the bottom up.

What priorities that resources should be allocated to is often top-down, and I think that's part of the frustration that my party has had at times and I think all presidents have had at times, in getting the Department to pursue their priorities, whether child pornography, immigration, national security issues. I think every president has been bedeviled by leaks, and I don't think that the Department has ever brought a leak investigation until the Special Prosecutor in the Scooter Libby case

MR. LITT: Tried a lot of them. Never was able to get anywhere.

MR. CULVAHOUSE: -- right. There is that frustration, but I agree with Bob that I think the quality is still there. It's a very well-qualified group of public servants who will serve this country well.

MR. WHEELER: Let's talk a little bit about the Office of Legal Counsel, which is, as I mentioned a little while ago, is not the best known of the Justice Department entities, but is arguably, if not the most important, one of the most important. Either one of you want to tell us a little bit about what that Office does and what challenges you see in particular for the Office of Legal Counsel?

This was the office -- I'll say this -- this was the office that produced the famous memo by John Yoo on defining permissible torture rather narrowly, to the point that Jack Goldsmith, who took over the office, withdrew that memorandum during his relatively short tenure in the Office of Legal Counsel.

It is known as the -- in a sense -- it is the lawyer for the executive branch. Could you say a little bit about what the administration may be facing as it prepares for the transition and for taking over the Department?

MR. CULVAHOUSE: Well, certainly, as White House Counsel, we viewed OLC as our equivalent, if you will, of outside counsel. We worked with them very closely. It is a group of lawyers that we trusted -- I think everyone in government trusts to call them like they see them.

It is a place, in my view, where an opinion rendered during the Reagan administration by Ted Olson should stand up to scrutiny by lawyers in the Obama Administration and certainly that is -- that was my experience.

I do think that the particular opinions in the interrogation area require a review, I think in part to restore public confidence. My law partner, Walter Dellinger, who was Assistant Attorney General for the Office of Legal Counsel in the Clinton Administration, has suggested that one way we might go about this is to invite leading and respected OLC veterans from both parties to come in, to receive the clearances necessary, and then to sit down and look at those opinions and consider the extent to which they should be modified, so that they could be relied upon by the administration, by the intelligence community, and by the Defense Department going forward.

MR. WHEELER: There's been some talk of --

MR. LITT: May I?

MR. WHEELER: -- surely, please, please.

MR. LITT: OLC is particularly important, because OLC's legal opinions are authoritative within the executive branch. They determine for the purpose of the executive branch what the law is.

And like any outside law firm, and I think the analogy is exactly right, it's appropriate for OLC to try to allow the client -- in this case the President -- to do what the client wants to do, but, as with any law firm, that you have to be bounded by the boundaries of appropriate legal interpretation and analysis.

I think part of the -- I think the objection to some of the opinions that Mr. Culvahouse referenced is that -- is the sense that these

were simply not legally sound, more so than the policy results that were achieved.

The choice of person to head OLC is going to be far more prominent than it ever has been in the past. I think it needs to be somebody like Walter Dellinger, of genuine stature, who will be perceived as bringing independent -- from the outside -- as bringing independence to the role and yet will also understand that you do have a client, and it is your job to serve the client.

MR. WHEELER: Several proposals about OLC have called for a greater release of the opinions, making more of the opinions public, and there's even some bills introduced that would do that statutorily.

Any thoughts on that?

MR. LITT: I think it's a good idea. Obviously, there's some stuff that's going to remain classified, and I think -- but I -- this is part of sort of a general phenomenon is not unique to this administration, but that's been accreting over the years, of overclassification. And I think one of the issues -- it's probably not specifically a Justice Department issue -- but I think a sort of serious review of the classification system is on the table, but that, as a rule, the presumption should be that OLC opinions are going to be made public.

MR. WHEELER: You disagree?

MR. CULVAHOUSE: Only to the extent that there's an OLC opinion that relates to a program--even if it's not classified--or a course of action that's then ongoing.

MR. WHEELER: Uh-huh.

MR. CULVAHOUSE: But since the opinions of the Office of Legal Counsel are binding on the United States from the executive branch point of view, I think it's just simply good government for those to be in the public domain as much as possible.

MR. WHEELER: Again, this discussion is not going to be totally retrospective, but let me ask -- I made reference to the Inspector General's reports. He's issued three reports so far.

Evidently, there's a fourth report in the works about the Civil Rights Division and which has been the source of some contention. Are either one of you familiar with that enough to comment on what the issues are there, a variety of allegations having to do with the division's conduct in terms of voting rights and other matters?

MR. LITT: I know only that there -- that there were allegations made both as to hiring, as to promotion and staffing within the division, and as to decision-making, particularly in voting rights cases, but also I think in some other areas that there were -- that the decisions were driven by partisanship and that there were substantial complaints from within the division about that.

I don't know much more about that than that.

MR. WHEELER: Okay. Let me ask you a few wrap up questions just to get them on the table. We discussed briefly in our pre-event conference call there's been some talk of even prosecuting some Bush Administration officials in this whole area of policy on torture. You seemed quite dismissive of that idea. Would you care to comment on that at all?

MR. LITT: And again, I just want to reiterate this is -- these are my own personal views here, because this is an extremely volatile subject. I think they both for policy and political reasons, it would be -- it would not be beneficial to spend a lot of time hauling people up before Congress or before grand juries or whatever, and going over what went on in the last administration in the area of surveillance, interrogation, and detention and so on.

I think that the important thing from a policy point of view is let's figure out what we want the policy to be going forward. And let's get that right. And, from a political point of view, in my view, it would really spend a lot of the sort of bipartisanship capital that a candidate Obama managed to build up, if you are perceived as vindictively going after people from the last administration, so this is obviously a decision that will not be made solely within the Department of Justice, because it involves Congress as well. There are a lot of decisions that the White House is going to have to make on things like to what extent are we going to assert executive privilege. But I think to as great an extent as we can say the

last eight years is over, now we're going to move forward, that that would be beneficial both to the country and to the President politically.

MR. WHEELER: And I take it you wouldn't disagree with that?

MR. CULVAHOUSE: Well said.

MR. WHEELER: I have one big question and one small question. Let me take the smaller question first. You made reference to the Scooter Libby commutation. It wasn't a pardon.

The Offices of Pardon Attorney in the Justice Department is another one of these relatively unknown offices, and, as I understand it, the current administration has exercised its pardon authority relatively rarely.

Do either of you see -- if that's true, if you can comment on that. And do you see a restored role for the Office of the Pardon Attorney in the next administration?

MR. CULVAHOUSE: Well, I was for 22 months, I was on the other end of the Pardon Attorney process, and we would get --

MR. WHEELER: In the White House?

MR. CULVAHOUSE: -- in the White House, and my office would advise the President on pardon applications. Many of the more interesting cases where a President might be urged to exercise his constitutional authority just don't go through the Pardon Attorney. It's pretty bureaucratic -- with published regulatory requirements. It requires

consultation with the prosecutors, if they're available, the sentencing judge if he or she is still alive, and that sort of thing.

I think the policy at the time I was in the White House was that the person's sentence, if you were looking at a pardon, had to be seven years in the past. And so it was a process that not many of the more famous people who sought a pardon went through. We pardoned George Steinbrenner, but he went through the process.

We established a government rule at the end or really at the beginning of my service -- which President Reagan agreed with-- that we would not recommend and he would not consider anyone who didn't go through the Pardon Attorney process.

But --even so, we had some really tough --pardon requests, such as Oliver North, John Poindexter, Bud McFarland. A number of their allies on the Hill and in this community urged that they be pardoned. Other pretty famous people, some of which have since been pardoned -- Patricia Hearst, Dr. Armand Hammer, sought pardons.

It's an absolute power. There's nothing that says that the pardon attorney process has to be used. My own experience is that if a President at the end of a term decides that he or she want to consider a pardon, it's not a friendly process for a one-month decision or a one-week decision. Perhaps some of the problems that occurred at the end of the Clinton Administration might be avoided if we had a more thoughtful,

speedy, nimble process for advising the President in a more formal way on the exercise of that formidable power.

MR. LITT: I think there are two separate issues here. On the one hand, you have the sort of executive presidential decision, which is a policy decision, which is to what extent am I going to exercise my pardon power. And that is absolutely a completely presidential power, and the process has been set up to involve the Justice Department and so on. But there's a policy decision from the top.

This administration has been very, very stingy with pardons, and that has nothing to do with the Pardon Attorney. That's a policy decision.

The second part of it is the Pardon Attorney process, and I understand that there has been some sense that the Pardon Attorney -- the Office of Pardon Attorney has not been functioning well in the last few years. And to the extent you have a President who makes a determination that he wants to have -- he wants to use his pardon power more effectively, you might want to look at, as a management issue, do you want to streamline and make that office more effective.

MR. WHEELER: You wanted to say something about the budget?

MR. LITT: Yeah. It's not an issue I think that people are thinking about right now, but I would hope that the new leadership team that comes in in the Department of Justice thinks about the fact that, over

the next few years, there's unquestionably going to be at some point some substantial tightening in the federal budget.

And the Justice Department is not and probably should not be immune in that regard. And I think somebody's going to have to take -- somebody should at the very outset of the administration be taking a good look at the budget and figuring out where can we find a few billion dollars here. And I would offer as one suggestion, which has some obvious political implications, that a huge amount of money spent on our prison system and on the amount -- the number of people that we incarcerate, which is vastly higher than most other countries in the world.

And it may be that what a lot of academics have been arguing for policy reasons, which is to say we should be incarcerating fewer people may ultimately prove to be accomplished for budgetary reasons, which is to say we can't afford to continue to incarcerate the number of people we've been incarcerating.

But I -- you know, that's one set of preferences, but I think that whoever comes in has got to take a look at the budget and say, we may be hit by a truck in a year or two years, and we'd better start thinking about that.

MR. WHEELER: That's been an observation not restricted to the federal government, the view that all the talk about sentencing leniency or tough sentencing is going to fall aside because "how are we going to pay for these things, you know, these prisons." And, of course,

the Sentencing Reform Act, and its longer prison sentences in the federal system does not help.

Let me ask one final question, and this -- again, this is in the area of speculation, and I think it will lapse into our discussion of legislative and litigation priorities.

As I mentioned earlier that the Justice Department, including the Office of Legal Counsel, some of its opinions lent support to this vigorous view of executive authority that the current administration has announced and has acted on, building obviously on the precedents set by its previous administrations, Democratic and Republican, reaching a crescendo in the so-called unitary executive theory with the use of signing statements, for example, and other matters.

--Senator Obama, questioned in the Boston Globe about a year ago, renounced the use of some of the more vigorous exercises of executive authority that the current President has embraced. And the question becomes whether or not once the new administration gets in office, the attractiveness of these tools is such that the earlier view that we're going to ramp this stuff back is not going to hold. As Bruce Fein said, was quoted in the New York Times Sunday Magazine, he'll use all the tools at his disposal. Fein, a Reagan Administration Justice Department official, has been rather critical of the current administration.

Do you have any take on that, because this is not a matter that's exclusive to the Justice Department? On the other hand, the Justice

Department is hardly out of the loop when it comes to this whole question of concept of executive authority.

MR. LITT: I don't have any sense for what the administration is going to do. The comment about the seductiveness of the executive power is exactly right. People often -- these issues often look different from the inside than they do from the outside.

And with respect to the particular issue of signing statements, I know that Walter Dellinger did a very, very persuasive article in which he said that signing statements should not be --

MR. WHEELER: These are statements the President issues at the time he signing a bill. And the most controversial aspect of it is at times, both presidents, I think perhaps the current President more than others, I said I'm signing this bill into law, but I'm going to interpret provisions X, Y, and Z in a manner consistent with my view of executive power and basically I'm not going to implement them.

MR. LITT: And Walter's argument, which, as with what most of what Walter says I found very persuasive, was signing statements are basically a good thing if appropriately used, because they -- because there is this constant tension between Congress and the White House as to the extent of executive power, and the White House is entitled to assert its interpretation and that frequently rather than veto an entire huge bill, send it back to Congress and start all over again, the President can say, look, you have put upon me a requirement that I hire a certain kind of person for

this job. In my view, that is an inappropriate infringement upon executive authority, and I will -- and I will interpret this as consistent with my view of my constitutional powers.

I don't think -- I don't see anything wrong with that in principle. I think, however, it is a power that should be exercised cautiously and that your view of the power also depends upon the extent to which you believe that it is being used to assert executive authority beyond what is appropriate to assert executive authority.

MR. WHEELER: Anything to add -- either speculation, Mr. Culvahouse, or comments on this?

MR. CULVAHOUSE: Well, the incoming administration doesn't have to renounce the assertions of executive privilege, but under the Office of Legal Counsel view of executive privilege, the custodian of that privilege is the current President.

MR. LITT: Right.

MR. CULVAHOUSE: So President Obama could make the decision to waive privilege and release documents to Congress or to the public or whomever. There are -- I think the OLC opinion suggests that the consultation be made with the President or the representatives of President who asserted the privilege, but ultimately the decision will be the current President.

Indeed, President George H.W. Bush waived the privilege with respect to some advice that I gave President Reagan on POW/MIA

affairs, gee, within six months of me leaving office with President Reagan. And I think there was consultation with President Reagan but Senator Kerry and Senator John McCain were having hearings on the Hill and wanted to see the discussions that we had with Ross Perot.

And so that's -- I think that's the way that you might see the privilege issue handled. President Obama would not say, I suspect, that the privilege was inappropriately asserted, but that he just decides to waive the privilege in terms of the current need to know.

MR. LITT: This is one of the areas where the administration is going to be driven by events, because there is a fair amount of litigation out there in which there have been broad assertions of privilege. The sort of most prominent one is the lawsuit brought by the House of Representatives to compel testimony from Karl Rove and Harriet Myers, and I'm reasonably certain that I can predict that Speaker Pelosi is going to, at a relatively early stage, ask the White House to reconsider the assertion of executive privilege in that area, and there is -- there's litigation about FOIA issues having to do with the surveillance programs. There are -- there may still be litigation is going back to the Cheney Energy Task Force. I don't know if that's still alive.

But there are a whole host of litigation issues where the Department of Justice is going to have to take positions in court that is going to require the new administration at a very early stage to determine how aggressively are we going to assert these privileges.

MR. WHEELER: Let's turn to legislative priorities.

Obviously, the Justice Department has a legislative program in consultation with the White House. And I would be willing to bet that some bills that stall -- have stalled -- I'm thinking, for example, the legislation to overturn the Supreme Court decision in the Ledbetter case are likely to see more support in the Senate and the House and obviously at the White House.

Can you think of -- let me ask you first, can you think of other pieces of legislation that had jammed up at that you think are going to be - - if you agree with me about the Ledbetter legislation and others that are likely to go through very quickly, and then let's talk about what perhaps some other legislative priorities will be or should be.

MR. LITT: I don't know how much there is that is specifically Department of Justice related that --

MR. WHEELER: Right.

MR. LITT: -- I mean, even the Ledbetter case, you know, it's -- it overlaps. There's obviously a lot of labor-related stuff --

MR. WHEELER: Right.

MR. LITT: -- that's been talked about. Obviously, one of the issues is there are a lot of people, thoughtful people out there, who think that the Foreign Intelligence Surveillance Act should be taken apart and put back together again; that a law that was -- that rather than accrete amendments to a bill that was created in 1978 for a very different

telecommunications environment there should be a sort of serious attempt to rewrite it, whether there's any political will to revisit that after what's happened in the last administration.

The Patriot Act I think comes up for renewal again this year, the provisions that were sunseting. So that's going to have to be addressed.

I had another thought, and I lost it, but if A.B. talks for a while, maybe it will come back to me.

MR. CULVAHOUSE: I really think those were the two obvious ones.

MR. WHEELER: How about the antitrust area?

MR. LITT: Beyond my knowledge. I wouldn't purport to offer any thoughts on antitrust.

MR. CULVAHOUSE: I predict you'll see more allocation of resources for antitrust. The conventional wisdom used to be that Republican administrations would pursue more cases civilly, Democratic more criminal, but there's been an outbreak, so to speak, of criminal antitrust investigations under this Justice Department. And I think that will only continue. But I'm not aware of any particular concern that the current laws aren't adequate to the task.

MR. LITT: I did remember what my other thought was. I have no idea whether this is something that the administration is going to make a priority or not, but certainly there's still a sense that we could do

more to tune up the electoral -- the voting system, both the process of registration and the process of voting. And I think that if people approach this in a thoughtful manner, nonpartisan, and in that regard, I would probably -- there are probably people on both sides of the table who -- both sides of the issue whom I would not bring to the table because they're too partisan.

But I think that there is probably room for some statutory changes that would both ease the process of participation and increase security and make everybody happy.

And whether that's going to be a priority or not, I don't know. But I think there are a lot of people who feel it should be.

MR. CULVAHOUSE: Well, certainly the Shield Law I think - - is viewed as both a Department of Justice and intelligence --

MR. WHEELER: The Reporter Shield Law.

MR. CULVAHOUSE: -- the Reporter Shield Law. And I don't think there's substantial sentiment for that law either at the Justice Department or the intelligence community in this administration, the current administration.

MR. WHEELER: Yeah. Since this is a judicial issues forum, let me ask you about two bills that, again, are not solely the province of the Justice Department, but they affect it that were passed in the last administration had been the object of some grumbling.

Any -- and you may not have any thoughts about this. Let me just throw it out. Any thoughts either some revision to the so-called Bankruptcy Reform Act, which made it harder for people to declare bankruptcy, especially given the looming fiscal crisis, and also the Class Action Reform Act, which tried to put -- and did -- put more class actions into federal court under the diversity of citizenship jurisdiction.

Any thoughts about either one of those?

MR. CULVAHOUSE: Class Action Reform Act is -- was I think a bipartisan act. It's -- it would be unfortunate if that is undone. I haven't heard anything suggesting otherwise, although the plaintiffs' trial bar clearly opposed it vigorously, and I think if they could see their way clear to get it repealed, they would push for repeal. It would require the, I think, the affirmative support of the President, because I think there would be substantial opposition to repeal, even in some Democratic quarters.

The Bankruptcy Reform Act --

MR. LITT: Which is also bipartisan.

MR. CULVAHOUSE: -- which is also bipartisan. The justification for making it more difficult for people to declare was access to credit; that people -- some people of lower means who would not have access to credit cards if it were so easy for them to default and declare bankruptcy. You know, that might be revisited as part of the economic downturn which will continue for a while.

But it's -- whether that's an appropriate response to trying to get credit restored to small businesses and the average American, I would suggest that you might tread carefully there.

MR. LITT: I think the problem -- I think -- I would hope that the Department of Justice will not be a principal player other than from a sort of technocratic sense in these, because I think both of these in the current economic environment have substantial potential economic implications that I certainly don't understand, and I would hope that the decisions would be made on these from the viewpoint of what's the effect that this is going to have on the economic system rather than what's the effect it's going to have on the legal system.

MR. WHEELER: Obviously, some of these questions I'm asking, though, have to do with the fact that all of us recognize that the trial bar has felt left out of discussions for while, and, you know, wants to get back in, and it has its priorities.

Another one that -- when I heard about this, a couple of years ago, I thought this is going nowhere, but it's getting a little amount of steam, and maybe you're not really -- don't want to talk about it in great length -- it's this legislation to restrict the use of mandatory arbitration, arbitration in connection with the purchase of, you know, cell phone plans and utensils and other matters. Senator Feingold and others have been quite upset about what they see as an uneven balance in removing individuals' ability to go to court over that because they're bound by the

arbitration agreement when they buy their cell phone or their refrigerator or take a job.

Do you have any thoughts about whether that might get some speed?

MR. LITT: I think you have a practical political problem here, and that is that Congress can only do so much. And there is going to be an awful lot that is very important and very complex that's going to be on their plate. And I think that unless something sort of arises -- rises to the level of this is a major drag on the economy -- this is something we need to fix -- I think it's good to be hard for issues like that to get traction.

Now I say this with very little knowledge of how Congress actually works, because I've never been there. But I would think there's going to have to be some limits put on what people try to get accomplished.

MR. WHEELER: Finally, you do criminal defense work. Do you -- and subject to the caveat you just mentioned that this may have low priority just because of the importance of other matters--There are a lot of criminal procedure recommendations--the Constitution Project proposal we put out as an illustration of many of them

Do you see any big criminal procedure issues, criminal process issues? You mentioned, you know, prison de-institutionalization, but do you see other things in that area?

MR. LITT: I think there are two -- three substantial issues. The one that I think is most likely to get accomplished and I think we will finally do something about the crack powder sentencing disparity. I think there's a strong chance that something will happen in that area.

MR. CULVAHOUSE: Yes.

MR. LITT: The second problem is budgetary. It's defender services. There was an article -- it was in the New York Times the other day that in at least seven states, public defenders are declining to take any more cases because they don't have the money. They can't staff the cases. I think --

MR. WHEELER: This is federal?

MR. LITT: -- I believe these were state defender services, but they get federal funding as well. I think -- but it's also a problem at the federal level. The defenders don't have the resources they need.

And the third problem is that I think there's going to be pressure to deal with -- whether anything happens or not, I don't know -- is habeas corpus and death penalty cases. You know, I think those are kind of the three major criminal procedure areas that I see.

MR. WHEELER: Do you see -- we were going to talk a little bit about litigation priorities and this rather bridges the gap -- do you see any effort either by litigation tactics of the Justice Department or by legislation in the area of some other Supreme Court decisions? I mentioned Ledbetter. There's the case the court decided last year -- I

never can pronounce it right, Medellin--involving the alien from Mexico who was denied access under the Counselor Treaties to talk to the Mexican consulate. And the Supreme Court didn't want to get involved in that.

There's also been, as we know from recent cases and the case last year, an emphasis on federal preemption of health warnings involving pharmaceuticals and medical equipment.

Again, I guess this could affect litigation priorities since the Justice Department could file as amicus curiae, but just in terms of legislation or anything else, do you see those as areas that the Justice Department might get re-interested in?

MR. LITT: I think preemption is an issue that's going to come to the fore. When you talk about the trial bar, that's one that's of --

MR. WHEELER: Right.

MR. LITT: -- great importance to them. And it's also -- there -- the business interests, and in particular the pharmaceutical companies are also extremely active in it. There is a pending case -- I think maybe there are two pending cases in the Supreme Court --

MR. WHEELER: They've been argued, as a matter of fact.

MR. LITT: -- dealing with this, but I think that there may well be -- and it's a difficult -- it's a very difficult policy question how you deal with it.

MR. WHEELER: This is the matter of whether or not federal regulations preempt states from imposing more stringent regulations, and, administration of drugs is one of the cases before the court recently.

MR. LITT: And to the extent you're talking about litigation and sliding into that, obviously one of the really pressing issues is going to be what position they're going to take with respect to detainee litigation. That's also a decision not going to be solely made by the Department of Justice, but the Department would obviously have substantial input into it.

MR. WHEELER: Mr. Culvahouse --

MR. CULVAHOUSE: If you look at the preemption issue also, as it comes up in market regulation, in the Schumer-Bloomberg report in New York, as well as the Chamber of Commerce Capital Markets Commission Report, and, I think the Treasury Department blueprint, all indicated that the multiplicity of regulatory bodies in this country in the financial market sector makes -- is making the U.S. financial markets less attractive. And so the economic advisers to the President, I suspect wearing that hat, will have a very different view of the desirability of federal preemption in the financial institution and financial market sector than would the trial bar and the states attorneys general.

MR. LITT: Right. Yeah, right.

MR. WHEELER: You mentioned yesterday when we were talking, if you want to say anymore about it -- stepped-up enforcement

under the Foreign Corrupt Practices Act and also the administration's -- the current administration's administration of the export control statutes.

Do you want to comment on that briefly?

MR. CULVAHOUSE: Well, certainly the Foreign Corrupt Practices Act, it seemed that there was not very much done in the first term. I practice a lot in that area, but you're seeing a lot more interest now and I think -- if you look at the Obama campaign statements, anti-corruption initiatives in foreign countries, both in terms of our -- of who we support in terms of foreign aid, what we expect of our allies, I think it will go hand in glove with increased FCPA enforcement.

The Justice Department launched an export control initiative last year, and --

MR. WHEELER: Now this has to do with military products and other matters you don't want to get into the hands of terrorists?

MR. CULVAHOUSE: -- and sensitive technology. And I suspect that that will -- would continue under this administration, even though resources are limited.

Part of the resource problem at the Justice Department is that in the 9/11 Commission Report and the WMD Silverman-Robb Commission Report, the FBI was criticized for ignoring its national security mandate. The FBI is devoting a lot of resources now to its national security branch, and yet the number of agents has not materially changed; the budget has not materially changed.

Congress has already mandated in the health care area, which is an area that in my experience healthcare fraud gets more resource allocation in Democratic administrations than in Republican. But you have already FBI agents that are dedicated to that area.

But, you know, who's going to staff all of these white-collar investigations going forward, if not out of the national security branch?

MR. LITT: Yeah, on the white-collar thing, that's obviously of necessity, and when I say necessity, I mean the result of political pressure. That's going to be a priority in the early part of the administration.

I confess to having a little unease when I read articles in the paper about 200 FBI agents nationwide being assigned to look at various financial institutions to see whether any crimes have been committed, because, in my experience, when you have 200 FBI agents looking for crimes, the FBI is not very good at not finding crimes.

And I think there is some sort of substantial policy issues about the extent to which the Department of Justice and the FBI should be regulator of first refuge in this sort of activity.

But that's clearly going to occupy a lot of attention from the Department of Justice. I think it's going to be a challenge for the Department to ensure that they -- that the prosecutions they bring are, in fact, meritorious.

There's one other issue that I think is more forward looking, and this, again, falls in the category of things of things that might not pop up on the radar screen, but that I think the Department should be thinking about.

And I think that the -- we are going to find over the next four to eight years that the biggest enforcement challenge is going to be in the sort of link areas of computer crime and economic espionage. I was meeting yesterday with a client who has an industrial company whose computers were hacked from China, basically trying to get their trade secrets -- how they manufacture their products.

I think that it's going to be a major enforcement problem over the next few years in ensuring the security of our networks. I think it's going to be a bread and butter issue as well, and I think it's something that the new administration will be thinking about, what are we going to do in this area.

MR. WHEELER: We want to go to questions, questions you may have.

But before we do, let me ask one last question. We've been talking about -- fairly frequently -- about the failings and problems in the Justice Department over the last eight years. Tell me, if you will, one thing you think stands out as a real accomplishment of the Department of Justice over the last eight years that you -- and you've alluded to some of

these -- that you think it would well behoove the Obama Administration to maintain.

MR. LITT: Yes, I would, from an institutional point of view, but I think that this current administration has been more forward I think in trying to achieve a degree of uniformity and of reining in a little bit the independence of the United States Attorneys on policy issues, which I think is a good thing. I would hope that the new admin -- it's a very difficult thing, because 94 U.S. Attorneys, and the one thing they all have in common is that they each know a senator.

And so it's -- they come into office thinking I am the chief law enforcement officer for the northern district in Mississippi, and I have the right to do what I want within this district.

In my view, there is a lot of room for more uniformity in decision-making -- silly little things like why isn't there a standard federal plea agreement? Why does each district have their own plea agreement, you know? And that causes legal problems, because you get people interpreting these things a different way. I think this administration has taken some steps in that regard, and I think a new administration should build on that.

MR. CULVAHOUSE: I would cite the national security area. I think in the last three years, after a slow start and I think some of you may have read the suggestion from Judge Posner and others that you

should take the national security mandate away from the FBI and create an independent equivalent of MI-5.

But I think under Bob Mueller and the Attorney General's leadership that the bureau has made significant efforts to step up to its national security mission -- counterterrorism, counterintelligence proliferation within the United States, which includes cyber security, the area that Bob mentioned. The bureau and the Justice Department have been -- has been very, very wary of this mission since the Church-Pike abuses that were investigated and reported in the '70s, where the authorities were abused by the bureau itself by various White Houses and others.

I particularly commend the AG for the amendments to his guidelines, which become effective December 1st, which will allow -- expand the authority of the bureau to pursue counterterrorism threats and leads more closely aligned with constitutional limits, trusting the bureau to do the right thing, with checks and balances, but not assuming that that authority will be abused for improper purposes. We've had this upside down world, where the bureau had more authority to pursue the threats and leads against the KKK or against organized crime than against a potential terrorist. The bureau has got to be -- and the Justice Department and Mueller and the AG would agree with this -- needs to be trained and watched and monitored. But this -- these are capabilities that we should not lose.

MR. WHEELER: Okay. Thanks. Let's open it to questions. Wait for the microphone, if you will, and if you have an institutional affiliation, if you could identify it. Go ahead, sir.

MR. MIKKELSEN: Hi, Randall Mikkelsen with Reuters.

And I'm wondering if in the white-collar prosecutions, following up on your earlier discussion, in the sub-prime, the financial investigations going on now, do you see a different approach under an Obama Administration? What kind of prosecution philosophy might they adopt? And, as you know, after the Arthur Andersen, Enron prosecution, the Department backed away from going after companies and institutions and rather focused on individuals. Do you see that balance being revisited under an Obama Administration?

MR. LITT: I don't think there's any basis to answer that question at this point. I don't think they have been -- you don't know who the leadership is in the Department and perhaps fortunately for the Democrats, there was no real discussion of this during the course of the campaign. Crime is rarely a politically winning issue for Democrats.

So I don't know that there's any basis to assess whether they're going to change that balance at all. As I said, I would hope that there is a restraint from pursuing innovative theories of criminal prosecution. But that's my own personal hope. I have no idea what the administration's view is going to be coming in.

MR. WHEELER: You have anything to add?

MR. CULVAHOUSE: When the -- as Bob can attest as well, I mean, there's a lot already going on. There's grand juries empanelled in New Hampshire I think just because there's good courts up there and good juries from the government's point of view, in both the Eastern District and Southern District of New York, and down here. So there's already task forces convened.

MR. LITT: There's some out West as well.

MR. CULVAHOUSE: So it's really -- it's really -- I mean, the momentum has already started. And, as Bob said, when you have a task force focus on a particular set of facts only with no other -- nothing else to do, they often find crimes.

Dick Thornburgh, when he became President Reagan's last Attorney General, you know, took a very strident view as a former United States Attorney against strike forces of any type, because he felt that that really results often in cases being pursued that a line prosecutor would not have pursued if he or she had other things to do. But I expect we will have plenty of indictments coming out of this cycle.

MR. LITT: And I just want to just add a slight perhaps different spin on that going back to the point I made before I made about uniformity. While I think there is a difference between saying we want to have a national task force looking at this, which I think has some substantial issues and saying, which I think is a good idea, we don't want

individual United States Attorneys making decisions about these sorts of things in a vacuum.

I don't want the Middle District of Tennessee applying its own standards to whether they're going to indict AIG people as opposed to the Southern District of New York. I think there needs to be some national decision-making in the process.

MR. CULVAHOUSE: One of the issues we dealt with when I was White House Counsel was that really without much consultation with the Justice Department apparently, or at least in any that I could find, a U.S. Attorney indicted Noriega, the leader of Panama, on drug crimes, and we went through a spate where every United States Attorney in the Southeast wanted to indict a foreign leader for complicity with drug crimes.

MR. LITT: Target-rich environment.

MR. CULVAHOUSE: Yes. And so the -- and that was considered quite legitimately by State and Defense and others to be -- and also a national security issue. So we -- coordination is a good thing.

MR. WHEELER: Let me just say, mark your calendars. Our next judicial issues forum, on December 1st, is going to take up the broad question of what are the judicial implications of all the financial bailout activity and other investigations that are going on.

Next question? Oh, you had your hand up. Go ahead, and then we'll go into the back.

MS. JORDAN: I'm Laura Jaakes Jordan. I'm from the Associated Press.

I have two questions. One, do you all think it would be better for the next Attorney General to have a background that's more prosecutorial based or more civil litigation based?

And two, going back to what you were discussing earlier about executive privilege, do you think that it would behoove the Obama Administration to go forward with the subpoenas of Myers and Bolton and Rove, balancing out, setting precedents with what the Democrats would say is a public interest? Thanks.

MR. LITT: Well, on your first question, I may be betraying my own prejudices here. I absolutely think that you should have somebody as Attorney General who and extensive, credible law enforcement experience.

I don't think any objective person looking at the Department of Justice and what needs to be done would say what we really need here is a civil litigator.

On your second point, I think that's a policy decision that's going to be made in the White House as to how they want to deal with this executive privilege issue. I think Judge Bates, who is, by no means, a liberal, but was obviously, if you read his opinion, extremely unhappy with the notion that a member of the executive branch can simply ignore a subpoena from Congress.

Where you draw the line is much more difficult, but that's clearly an issue they're going to revisit. And, as I said, I'm reasonably certain that decision will be made at the White House with input from the Department of Justice.

MS. JORDAN: Can I just follow up? I mean, what do you think would be best for -- assuming you're -- did you say you're not advising the Obama Administration right now?

MR. LITT: I certainly have no insight into how they're going to address these issues.

MS. JORDAN: Okay. So, from a legal point of view, what do you think would be best?

MR. LITT: I -- well, personally, I don't see how you can off a subpoena. I think you have to assert a privilege on a question by question basis. What the exact contours of that privilege are is going to depend on what the questions are.

I think that there is a certainly a plausible argument that says that there are going to be conversations between Karl Rove or the White House Counsel and the President that are going to be subject to executive privilege. And exactly how far that goes -- historically, those sorts of issues get worked up by negotiation between the White House and Congress. There's a lot of -- it's sort of like a sumo match. You have people stomping around the ring and making loud noise, and then but at

the end, they sit down and they work out some kind of unsatisfactory compromise.

And hopefully, with a Democratic President and a Democratic administration, they'll be able to reach some kind of resolution of that.

MR. WHEELER: You must have a view on that, Mr. Culvahouse? You might have a view on that?

MR. CULVAHOUSE: On Attorneys General, I -- if you look at the ones that I admire, that I've gotten to know or observe -- Elliot Richardson, Professor Levi, Judge Bell, Judge Mukasey, they all had different backgrounds. And I'm not sure that you should -- it's just like a Director of National Intelligence or the Director of Central Intelligence agency--say there's any particular set of qualifications other than someone who is -- you know, has the right view of their role in government and their role vis-à-vis the White House -- the special mission and trust to honor the President's priorities, but also to set the appropriate boundaries.

The -- this current White House did not turn over all the documents on Mrs. Clinton's healthcare program that the Congress requested, but I do think the assertion of attorney-client privilege is a very weak one. So, if -- I don't think that that is one that I would advise this White House to rest its case on if it decided not to send them up.

And I think Bob is right. It'll probably be worked out by compromise.

MR. WHEELER: There's no doubt that the next House of Representatives is going to renew the litigation on it, I would think.

Mr. Coleman, let's go back here -- and then we'll come back to you, okay?

MS. JOHNSON: Hi. I'm Carrie Johnson from the Washington Post. One of the more sensitive recommendations coming from interest groups is for the new Attorney General to expand the mandate and the discretion of a couple of prosecutors who are looking at potential criminal allegations of the destruction of CIA tapes, and then, in the second part, whether crimes may have been committed with respect to the firing of these U.S. Attorneys or statements made therein.

How do you think a new team at Justice is going to balance those demands against precedent and its stated desire to be more bipartisan and inclusive?

MR. LITT: Well, again, I -- there are a couple of different ways to answer that question. I have no idea what they're going to do.

You've articulated the issue, as I think I had done earlier, that there is a balance here between moving forward and looking backwards. I don't know how they're going to do it. You've got two independent -- and I use independent not in the legal sense, but in the sense of knowing who these people are -- people who are looking at areas, but there's a tension between the sort of New York Times view of the world, which is we need to get special prosecutors to find out what

happened, and my view, which is the job of the special prosecutor, is to determine whether a crime was committed and if a crime was committed, prosecute somebody.

I don't think that you necessarily want to use a criminal investigation to find out what happened with respect to interrogation of detainees.

If John Durham, in the course of his investigation, believes that he's uncovered evidence of criminal activity, I'm pretty confident that he'll come back to the Department and he'll say, here's more criminal activity that should be investigated. He's a very, very solid capable, nonpartisan prosecutor. Now the same is true of Nora Dennehy, who's looking out at the other matter (inaudible)

But, you know, the job of the Department of Justice is in this area is to look at crimes, not to look at decisions.

MR. WHEELER: Mr. Coleman.

MR. COLEMAN: Well, thank you all for being so informative. But have you ever thought that perhaps the President should have his lawyer and that lawyer is independent even of the Attorney General?

I mean, for example, I think the Office of Legal Counsel grew out of the fact when President Roosevelt wanted to -- who was asked to give those 50 battleships over to the British that he was told by Justice that was illegal. You just couldn't do it. But fortunately, Paul Thorn got drafted to come over, and they worked it out and they did it, although, at

that time, and I'm not -- I don't understand the court, but I just think one of the problems in this country is that people criticize officials whenever they do something.

And it seems to me that if the President says I have a counsel, and we talked about this, and this is what he recommended to me or she recommended to me that, at least with respect to the public, should mean that he's doing it for good reasons rather than in fact he's doing it because he's just an evil guy.

MR. CULVAHOUSE: Bill, in a way it -- the incident you cite I guess is maybe the best justification for the role of White House Counsel. I've appeared on at least two different panels with former Attorneys Generals and former White House Counsels and the press, and Walter Dellinger moderated one, on the subject of, should there be a White House Counsel.

And most former Attorneys General say no, "I should be the President's lawyer." And most former White House Counsels can cite instances where, because of the institutional and physical separation, it doesn't work very well.

But, in effect, the White House Counsel, no government lawyer can be the President's lawyer. Every government lawyer takes an oath to uphold the Constitution of the United States. And every one of us - - I was subject to the requirements of the United States Code that if I became aware of a commission of a crime, that I was obligated to report it

to the Attorney General or the Justice Department, which is why both the Eighth Circuit in the United States Court of Appeals and the D.C. Circuit -- that's one reason they've ruled there is no attorney-client privilege between the President and the White House Counsel.

So it's-- advising the President in terms of practical ways of doing things. In the October '87 stock crash, where the Justice Department was very able in telling us what authorities the President did not have. We could not force the New York Stock Exchange to stay open. We could close it, but we didn't want to close. We wanted it to stay open.

But having able lawyers whether at the Justice Department or the White House or some other place to provide the kind of practical counseling type of advice as opposed to just the hyper-technical -- you can do this, but you can't do that -- is what is often missing in government.

MR. COLEMAN: (Off mike) because during the Civil War, the Attorney General told President Lincoln that he could free blacks who joined the army, but he couldn't free the rest of them. But I think a good lawyer would've told him he could have freed everybody once the South declared war on the North.

MR. LITT: I think the problem that I see, and your question is not something that I've thought about a lot, but I think there would be a risky that you would have to figure out how to guard against, that a person who is the President's lawyer would not be able to step back in all cases and exercise the kind of independent judgment and say to the President,

you know, I know you really want to do this, but you really can't. That's the problem that I would foresee, and the advantage of having an OLC that is institutionalized, and, as you know, has fabulous lawyers in it.

I do think that, as I said earlier, I think that OLC does have to recognize that part of its job is to, to the greatest extent they can, consistent with the law, tell the President yes.

MR. WHEELER: Other questions? Sir?

MR. MILLE: Franz Mille from the European Commission Delegation in Washington.

I would be interested to -- how you see the future of legal cooperation with other countries internationally, perhaps also with multilateral institutions when it comes to the fight against terrorism or serious crime.

Perhaps a second question: to what extent do you see the Obama Administration feeling bound by international law? There has been a mention of the Medellin case, and I think there's still some question marks around on that.

MR. LITT: If I understood your question, on the first point, I think there's little doubt that the Obama Administration is going to come in and attempt to work more extensively with and more cooperatively with countries in the fight against terrorism and in a variety of other areas. I mean, this is one of the things that they've said, that the United States can't go it alone.

This is one of those areas, however, where, as the saying goes, the devil is in the detail. How that's going to work out on a practical matter is -- we'll just have to see.

Part of it is also going to be on the -- I think the attitude that the European countries take towards the United States in this regard, which, you, I mean, we can go into a long disquisition about American exceptionalism, but it's a very real feature of our country. And we do kind of have a tendency to feel that we're right most of the time, and it's going to have to be a -- there's going to have to be a working relationship developed.

Your second question, I had something to say, but it's escaped me for a second?

MR. MILLE: About international law.

MR. LITT: Oh, yes, international law.

MR. MILLE: (Off mike)

MR. LITT: Yeah. Yeah, and really the same principles apply there, which is I think the administration is going to come in with a greater openness towards international law, and then the question is how is that going to play out in a variety of circumstances, because I think it's pretty much a bedrock few of the American legal system that international law can't tell us to do things that we aren't already willing to do.

And I doubt that that kind of bedrock principle is going to change.

MR. WHEELER: Any comments?

MR. CULVAHOUSE: Well, certainly I -- you can see increased reliance on M-LAT Agreements, extradition agreements.

Part of the -- on the other hand, if judges in some of the civil law jurisdictions self start and want to prosecute generals or Secretaries of Defense for war crimes they committed in Iraq, that tends to shape the going forward debate.

One of Bob's late partners, Bill Rogers represented Dr. Kissinger for years in efforts of French and Spanish judges to pursue Dr. Kissinger for matters that occurred in Chile and Argentina while Dr. Kissinger was National Security Advisor.

MR. LITT: But people overseas should not mistake the new administration coming in and rejecting the actions of the last administration for an openness on the part of the new administration to allowing former government officials to be extradited to Europe to face war crimes charges. That will not happen.

MR. WHEELER: Other questions? In the back?

SPEAKER: If we've touched on this, pass over it. But I wonder -- we've explored the question of judicial appointments, both at the Supreme Court and the lesser federal levels. Do you believe that some of the campaign statements that President-elect Obama has made that there's got to be a justice committed, social justice and the other requirements that he's laid down. Are we going to have a contentious

involvement in judicial appointments or will be ministration really try to pursue some kind of more collaborative approach with the Republicans in the Senate?

MR. LITT: I think this is a good area to take what the President-elect says at face value. He's -- he is -- he has taught constitutional law. He's very interested. He's thought a lot about these issues, and I suspect he knows what he wants. And he's going to appoint judges who -- the kind of judge that he wants to have.

He's blessed with a substantial Democratic majority in the Senate. I think that the Republicans are going to be extremely uncomfortable if they attempt to invoke the filibuster weapon against nominees of this administration. And I think he's going to go in and appoint the kind of judges he wants.

MR. WHEELER: One other hand, over there.

SPEAKER: Hi. What was the difference between -- in your view, what was the difference between the firings of the lawyers under the Bush Administration, which was a relatively few number, and those of the Clinton Administration, which, I understand, was a relatively large number in comparison?

And having said --

MR. WHEELER: The lawyers, you mean the U.S. Attorneys?

SPEAKER: -- right. Having said the -- that there's a difference between a legal infraction and a bad decision, then what requirements are there, if any, for the President to provide justification for those kind of firings?

And that being said, the Obama Administration then, if they decide to, you know, remove some U.S. Attorneys as well, what kind of justification would be a legitimate one, if they have to provide any at all?

MR. LITT: So you start from the proposition and in my view the President has the absolute authority to fire United States Attorneys as he wishes.

In my view, as a matter of constitutional authority, the President has the power to call up a United States Attorney and say, drop that case. I don't want you to bring that case. I'm speaking solely constitutionally.

I think that as a political and a practical matter, I think there is a very clear difference between what the Clinton Administration did, which was essentially to ask for the resignation of every United States Attorney, and what the Bush Administration did, which was to say, we don't like the way you're handling these cases. We want to fire you because you're not advancing our political agenda enough.

I think it's entirely appropriate for a new administration coming in to say we want our personnel in these, and it would not surprise

me if the Obama Administration did the same thing. It would not surprise me if they didn't do the same thing.

But that is an entirely different matter from saying to -- and I'm speaking here based on my reading of the joint report of the Inspector General and the Office of Professional Responsibility, but to say to the U.S. Attorney in New Mexico, you are -- there are some individual cases that we think you're not handling in a manner that advances our political agenda, and, therefore, you're out of here.

I think that's -- while it may be within the President's constitutional authority to do it, I think that it is an extremely troubling thing and an extraordinarily bad way to manage an institution that relies critically on the perception of the American people that its awesome powers are being exercised in a fair and nonpartisan manner.

MR. WHEELER: You have anything?

MR. CULVAHOUSE: Well, I'm a strong proponent of executive power. The U.S. Attorneys serve at the pleasure of the President full stop. The mistake that the Bush Administration made was, you know, giving reasons for their dismissal, and indeed allowing complaints to be unaddressed one way or the other for too long. If people in a particular state or district -- U.S. Marshals, judges were unhappy, you know, the decision should have been made either keep the person or not.

But it was just not effective. It undermines confidence in the administration of justice the way it was done. We probably replaced a

United States Attorney once a month for 22 months that I was in the White House-- but it was people who served too long or the careerists at the Department, the bureau, the Marshal Service, whatever felt that the person was no longer doing a good job or just that they had had it long enough.

But right now, it's created this atmosphere that anytime a United States attorney is relieved, that there's got to be something more to the story.

MR. LITT: Yeah, I think this also goes back to the question you asked earlier, which is another aspect of the problem with the U.S. Attorneys was the level at which it was handled, that the Attorney General and the Deputy Attorney General basically were divorced from the process, and that as a management issue is very poor.

MR. WHEELER: And the Inspector General report has a line. It takes a little while to get your head around it, but once you do it makes sense, which is you can fire them for no reason, but you can't fire them for a bad reason. And then you've got to define what a bad reason is.

Okay. We have time for one short question, and I see no hands up, so I will thank both of our panelists. Thank you for coming. I'll remind you that, as I said, on December 1st, we'll have a forum on the judicial and legal implications of the financial crisis. In February, we'll deal

with the courts and immigration. In January, I'm not sure what we'll do,  
but thanks very much for coming.

\* \* \* \* \*

## CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

/s/Carleton J. Anderson, III

Notary Public # 351998

in and for the  
Commonwealth of Virginia  
My Commission Expires:  
November 30, 2008

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