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**PANEL DISCUSSION: “PRINCIPLES TO GUIDE THE DEPARTMENT  
OF JUSTICE UNDER THE NEXT ATTORNEY GENERAL”**

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MS. LISA BROWN: Welcome, everyone. It's great to see all of you here. My name is Lisa Brown. I'm the executive director of ACS. And with hearings, nomination hearings, on an attorney general nominee right around the corner, and the prospect of new leadership in the Department of Justice, ACS could not be more pleased to be hosting this program about the principles and policies to guide the Department of Justice going forward. Like all the members of today's panel, I worked for the Justice - at the Department of Justice and had tremendous respect for both the political appointees and the career attorneys who took extraordinarily seriously the mission of the Department of Justice and so ably carried that mission into practice. And I think it sort of goes without saying that the Department's wonderful reputation for integrity has been tarnished, shall we say, over the past couple of years. And we have a stellar group of panelists to talk today about best practices to guide the department, help get it back on track, and hopefully to prevent some future missteps.

To offer their thoughts and recommendations, we have an impressive group of panelists who represent several different Department of Justice divisions and many years, indeed, many decades of collective experience, transcending a number of different administrations and we - and it was supposed to actually also be both political parties. And we - unfortunately, Bruce Fein got called into court - "summarily" was the word that he used this morning - and is going to try to join us before the end, but it did not sound overly promising.

We are fortunate to have Ron Klain with us to moderate today's discussion. Ron has held senior positions in all three branches of government, beginning as a clerk for Justice White on the Supreme Court, and then was chief counsel of the Senate Judiciary Committee, and most relevantly for today's discussion, served as chief of staff and counselor to Attorney General Janet Reno, associate counsel, and then later, assistant to President Clinton and both chief of staff and counselor to Vice President Gore.

I worked with Ron for several years in the White House, as well as on a small case you may have heard of - *Bush v. Gore* - and also turn to Ron now frequently for advice as a member of the ACS Board of Directors. And I - so I can personally attest to his amazing combination of intelligence, insightfulness, political savvy, and judgment.

I quite genuinely believe that legal policy political advisors really don't come any more sage than Ron Klain, which explains in part why he has been repeatedly named as one of the nation's top lawyers and most promising young or youngish leaders. (Laughter.) He'll give me grief because he is still younger than I am. So I want to turn things over to Ron to introduce our terrific group of panelists and begin what's sure to be a very thought provoking discussion, and just want to ask if people wouldn't mind turning off their cell phones, at least turn them to vibrate during the panel. Thanks very much.

MR. RONALD KLAIN: Thank you Lisa and thank you all for coming. I also want to thank Judy Appelbaum for arranging this. It's one of the things I think that ACS does. It's great. It's bringing people together and providing programs like this and that's why I'm proud to be an ACS board member and proud of all the growth and progress the organization has had during Lisa's leadership in the past few years. As Lisa mentioned, I bring to this the perspective of having been both a – or having been a junior White House aide, a chief of staff to the Justice Department, and then a senior White House aide, and three jobs I should mention I was able to do without ever once being the subject or target of a criminal investigation, an achievement that seemed a smaller achievement back then, but seems a little larger now, I guess. But with that perspective, I wanted to talk a little bit about White House-Justice Department relations as my perspective, and then I'm going to talk for just a few minutes and then introduce the panel members in turn and ask each of them, when it's their turn, to talk about what they think has gone most wrong in the past few years, and most importantly, what their specific recommendations for the incoming attorney general would be for how to set those things right.

But let me exercise the moderator's privilege and go first and talk a little about White House-DOJ relations. And I start with a piece of wisdom that comes to us actually not from anyone from the Justice Department, but actually from the secretary of education in the Clinton administration, Dick Riley. He had something he called "the Riley rule," and the Riley rule was, he told everyone who worked at the Education Department that if the phone rang and it was a White House staffer purporting to give some instruction on behalf of the president to the department, the Education Department official was supposed to ask that White House staffer one simple question. "How old are you?" (Laughter.)

Now the folk wisdom behind the Riley rule suggests that sometimes many people act in the president's name, but don't really have the president's best interests or better judgment at heart - has really been a longstanding, more formal and developed policy with regard to White House-DOJ relations. And in the wake of Watergate, both the Ford White House, followed quickly thereafter by the Carter White House, and with increasing formality, the Reagan and the Bush White Houses, all adopted various policies to try to limit the kinds of contacts that could go on between the White House and the Department of Justice on matters of litigation, on particular criminal cases, civil cases, to try to constrain that and limit the possibility for abuse when those contacts go back and forth.

And as most specifically developed and formalized, the policy was put in writing in an exchange between White House Counsel Lloyd Cutler and Janet Reno in the Clinton administration, and that policy was that only four White House officials, the president, the vice president, the counsel to the president, and deputy counsel to the president, could be in contact with only three Justice Department officials, the attorney general, the deputy attorney general, and the associate attorney general about specific cases, litigation matters - be they criminal or civil - and that was a very, very tight limitation. I'll say as someone who was an associate counsel to the president, chief of staff to the vice president at the White House, chief of staff to the attorney general at the Justice Department, I was never inside that very small circle, which shows you how constrained it was.

Was the White House contacts policy a perfect policy? No, it certainly was not. It did constrain some perfectly legitimate exchanges between the White House and the Justice Department, such as when the White House economic advisor went to weigh in on the kind of damages that the Antitrust Division was seeking in *U.S. v. Microsoft*, a case of truly public import, and found it very awkward and difficult to try to jury-rig a process to have that input heard.

Was it perfect in terms of being perfectly protective of abuse? No, it left open the possibility that the president or the vice president or the counsel or the deputy counsel, him or herself, would weigh in in an inappropriate way. So it was not a perfect policy, both for being over-inclusive and under-inclusive, but – but - it was a way of taking the core folk wisdom of the Riley rule and making it a protective shield against abuses of power between the White House and the Justice Department.

What's happened since then? Well, when Judge Gonzales was White House counsel, the White House contacts policy was repealed and replaced with a policy that allowed 417 people at the White House to have contact with 42 people at the Department of Justice. And suffice it to say that by the time you get to person number 417 at the White House, you probably are not dealing with a person who was either very senior, very experienced, or for that matter, very old. If that wasn't bad enough, when Judge Gonzales became Attorney General, that policy was expanded further, believe it or not, to where an additional 478 other people inside the Executive Office of the President were authorized to have contact with those 42 people at the Justice Department. That meant that instead having seven people in the Clinton policy inside this loop, you had over 900 people in the Bush White House and the Bush Justice Department inside this loop, and the possibility for all sorts of bad things to happen, as they have happened, doubtless flowed from that.

And, indeed, ironically enough in his very last appearance before Congress, when Attorney General Gonzales was asked about this before the Senate Judiciary Committee, he said that he found the policy that he had put in place troubling - an interesting comment on his own policy, I suppose – and, not surprisingly, the Bush administration has now said that it's reconsidering it and there are certain vague assurances that this policy is going to be tightened up, but how tight remains to be seen.

And so to wrap up my contribution to this, I would say that if you asked me what my first, second, and third most important recommendation to an incoming attorney general would be, it would be on day one, to put in place a policy very similar to the policy we had in the Clinton administration, of severely constraining the sorts of contacts that can go back and forth between the White House and the Justice Department on specific matters of litigation, specific cases, specific – specific criminal cases, not because the president lacks the authority to do otherwise. He certainly does under Article II, but as we learned in this administration, merely because the president can do something, it doesn't mean a president should do something. And this is a case where I think a president, and his administration constraining themselves, works very much to the

president's advantage, to the country's advantage, and to the advantage of the Department of Justice.

So that's my view, and more importantly, though I'm here to introduce and promote an exchange between the outstanding individuals to my left and, hopefully, if Bruce shows up, one person to my right, both physically and in other respects. (Laughter.)

The first person I want to call on here is Dawn Johnsen. Dawn is someone I've known for a very, very long time and I should say as someone who is a Hoosier by birth, I'm always pleased to be with Dawn who is a Hoosier by marriage. But before becoming a Hoosier, Dawn actually had a very distinguished career here in Washington as a real pioneer in the area of reproductive freedom, as legal director at the National Abortion Rights Action League and then as a colleague in the Clinton administration, as both deputy assistant attorney general and, ultimately, acting assistant attorney general in the Office of Legal Counsel. Dawn is an accomplished scholar and litigator and a legal thinker and we are very lucky to hear her thoughts today about the Justice Department, its future under new leadership. Dawn?

MS. DAWN JOHNSEN: Thank you, Ron. I'm going to focus on the Department of Justice's core function of advising the president and others in the executive branch on the legality of governmental action because that's what I did in the Clinton administration at the Office of Legal Counsel. I'm going to focus on counterterrorism and other national security issues because those pose the greatest challenges.

So here's my bottom line to Ron's question regarding "What's the problem?" The Department of Justice, DOJ, is in crisis and its advice giving function has been terribly corrupted. The ultimate problem, though, lies not at Justice, but at the very top with the president and we really have to thoroughly appreciate that fact in order to have any hope of coming up with ways to make progress during this administration. So first, just a little background - the president, of course, is not above the law. In our system, the president clearly has the obligation to ensure that he and his administration comply with the laws. The constitutional text states that the president must take care that the laws be faithfully executed.

So one of DOJ's chief responsibilities is to give the president the legal advice he needs and that job falls to the Office of Legal Counsel and that's where I worked for five years, and all these legal determinations are binding on the executive branch unless they are overruled by the attorney general or the president, which is a very rare occurrence. So now, as I said the root cause of the current crisis at DOJ is President Bush's utter failure to honor this most basic constitutional obligation to faithfully execute the laws. President Bush, and you have to also mention his Vice President Cheney on this, they've set a tone of disregard for the rule of law and especially disregard for statutes enacted by Congress and Congress' role generally in our system.

As many of you, I hope, know former head of the Office of Legal Counsel, Jack Goldsmith recently published a must-read book called *The Terror Presidency*. So

Goldsmith's book and also another excellent book, Charlie Savage's book, *Takeover*, and many other reports as well, confirm that President Bush, Vice President Cheney, and their top advisors, they have been deeply hostile to any checks on their counterterrorism policies. And so that's not only external checks from the courts and from Congress or from public advocacy groups or the press, even legal checks from within the executive branch, from the president's own lawyers. So rather than respecting DOJ's traditional independence, they've made clear that what they want are "forward leaning," - and that's in quotes - "forward leaning" legal opinions that would justify preferred policies. And that's in order to immunize government officials from prosecution. And Goldsmith in his book, he aptly describes an OLC opinion as akin to a 'Get out of jail free' card for government officials who violate laws.

Quickly, just two prominent examples that hopefully everyone's familiar with. First, for years you'll remember Bush - the Bush administration engaged in spying here in the United States without complying with the FISA statutes warrant requirements and you'll recall this was the context for the White House's unsuccessful hospital visit to then Attorney General Ashcroft when he was in intensive care. The second issue, I just want to remind you of his coercive interrogations. In 2004, we learned that - about the infamous 2002 OLC Torture Memo, an opinion that Jack Goldsmith described as so deeply flawed and sloppily reasoned that he had to - he felt he had to either withdraw it or resign from OLC. So Congress subsequently outlawed not only torture, but also cruel, inhuman and degrading treatment of detainees anywhere in the world by the U.S. And last week, came the truly astounding news that OLC once again issued secret interrogation memos and this time, they found that all of the most extreme CIA interrogation techniques are lawful. And incredibly, OLC found reportedly - we don't have the opinion, but *New York Times* reports that they found even simulated drowning through water boarding is not cruel, inhuman, or degrading. Now, that's their legal interpretation.

All right, so that's the problem, very depressing. What should be done, what can be done in the next 18 months? Clearly, what we need to do is restore OLC's tradition of independence and integrity. And a few years ago, I worked with 18 other former OLC lawyers to try to do just that. We were appalled at the first torture memo, and so we sought to develop a set of principles that could help prevent that sort of terribly corrupted legal advice giving in the future. It's clear from the news last week that - of the new torture memos - that we haven't yet been successful in convincing this administration. Time's too short to describe all of the principles, but they are available outside on the table and I urge you to pick up a copy.

I'm just going to mention quickly a few highlights. All of these principles are drawn, as the introduction says, from longstanding practices of the attorney general and Office of Legal Counsel across time and administration, so very much a bipartisan set of principles. First and foremost, and I quote, "[w]hen providing legal advice to guide contemplated executive branch action, OLC should provide an accurate and honest appraisal of applicable law, even if that advice will constrain the pursuit of desired administration policies." So in short, OLC and the attorney general have to be prepared to tell the president "No," and that's what the law requires, and other principles elaborate

on this. For example, OLC is not supposed to simply determine how a court would rule, whether a court is likely to say a proposed governmental action is unlawful. To the contrary, on issues such as national security, where the courts are unlikely to closely scrutinize the action, the guidelines say the president and OLC have a special obligation to ensure compliance with the law, and we certainly practiced that when I was there. The guidelines also recognize OLC's legal advice should not end with saying "No, your role is also to help the president and others craft lawful alternatives to accomplish the president's objectives."

Other principles speak of the president's constitutional responsibility to respect Congress and the courts, and also of the need for internal procedures - for example, to guarantee that there's input from other knowledgeable and affected agencies in the government.

Last, but very far from least, avoid secret law. And here I quote, "OLC should publicly disclose its written legal opinions in a timely manner, absent strong reasons for delay or disclosure." Of course, there are situations where secrecy is needed, such as to protect the identity of a covert agent, but public disclosure is - it's especially critical whenever the executive branch does not fully comply with a federal statute. And recent reports say, for example, that's the case with the recently enacted McCain sponsored ban on cruel, inhuman and degrading treatment. So at a minimum, the President must tell Congress and the public when he does not comply with a statute exactly as written. And this administration has clearly not been doing that.

So these are the principles that once again should guide the Department of Justice. As we've seen though, the president and vice president can - and their advisors - can exert great pressure on DOJ lawyers and they have. Jack Goldsmith reports that he prepared three letters of resignation in his just nine months as head of OLC because of pressure to sanction illegal action. So the next AG certainly must possess the integrity and strength of will to tell the president, "No, no more of this," and he'll need the backing of Congress and the courts and the public and the press to be effective at that.

Finally, the next AG's bottom line must be to say to the president: If you disagree with a statute, the right thing to do is go to Congress and change it, not violate it in secret.

MR. KLAIN: Thank you, Dawn. When I arrived at the Justice Department in 1994, I was told that there were two vaunted, respected institutions in the place. One was a set of murals outside the office of the attorney general, and the other was Joe Rich. (Laughter.) Unlike the rest of us up here who were relative short timers at the Justice Department, Mr. Rich spent almost 40 years in the Civil Rights Division at the Justice Department and was chief of the Voting Section from 1999 to 2005, and previous to that, served in the Housing and Civil Enforcement Section of the Civil Rights Division. He is now the director of Fair Housing and Community Development at the Lawyers' Committee of Civil Rights in the Law, and we are very honored to have someone with his longstanding and passionate devotion to the department here with us today. Joe?

MR. JOSEPH RICH: Thank you, Ron. Let me start by saying my service keeps going up and up, started at 35, has gotten up to 40 now. I was actually 36 plus. (Laughter.) And I started in 1968. It was my only job that I ever held until two years ago.

I want to talk more from the perspective of an insider and somebody who was in the department when all these things happened and particularly in the Civil Rights Division, of course. The – what’s happened to the career lawyers in particular, I think I wanted to focus on, and I think that the next attorney general really owes it to the staff to make some serious changes, which I’ll get to. But I wanted to start out because, as Ron said, I’ve devoted my career to the Department of Justice. It’s a wonderful institution. It’s the best place to work in the government. And the Civil Rights Division, in my judgment, is even better. Just about ten days ago –

MR. JAMES ROBINSON: What about the Criminal Division? (Laughter.)

MR. RICH: About 10 days ago, we had our 50<sup>th</sup> anniversary of the Civil Rights Division. It was founded in 1957 and there were 250 alumni there, mostly from the real old days. And I can tell you, it was an incredibly moving and inspiring event to see this group of people and be reminded of what they did in the 1960s. Brian Landsberg, who’s part of that group and just wrote a book about voting cases, pre-Voting Rights Act, testified before Congress back in July, and I just wanted to read one part of his testimony because I think it captures what the Civil Rights Division and the Department of Justice are to people who are career lawyers.

He wrote that “The work of the Division has been marked by several characteristics that have contributed to its mission of securing equal justice under the law. First, the Division staff and leaders have been sensitive to the fact that it is a law enforcement agency. It is not an administrative agency and it does not exist to serve special interest groups. Its job is to pursue the public interest as set forth in the laws Congress has given the Division to enforce, and to do so in an appropriate manner.” John Doar, the legendary John Doar who was and is a Republican, incidentally, “taught that the Division lawyers must be the epitome of rectangular rectitude. He turned around the famous Holmes phrase,” quote “Men must turn square corners when they deal with the Government,” end quote, and “insisted that Civil Rights Division attorneys always turn square corners. Central to turning square corners is following fair and established procedures. As Justice Frankfurter noted, procedural regularity generates the feeling so important to a popular government, that justice has been done. Equally important is honest evaluation of the law and the facts, and the courage to say no to political pressures. If the judges and the public believe that the Division turns square corners, that its lawyers are fairly chosen public servants, that the positions and cases depend upon an objective analysis of the law and the facts, its lawyers will have credibility. Without those characteristics, credibility will be lost, and it will be far more difficult for the Division to do its job of enforcing civil rights laws.” And that, obviously, goes to the whole department.

And that is what I think the biggest loss has been in the years of the Bush administration. There was, as I've testified and written endlessly, a terrible politicization of the department both in its decision making on voting cases, which were unprecedented to inject politics into those decisions, as well as a – into the hiring process, which I think many of you have read about. And I think worst of all for career lawyers, there was just a very strong tone of hostility to career lawyers. There were people removed, transferred. It was made clear that if you disagreed with political appointee decisions, you would be punished. And as a result, there was a wall built up almost from the beginning between career people and the political appointees, something that clearly just breaks down the system.

Landsberg wrote in his book the following, which I think is very important, “The vertical separation of powers between career and political appointees was designed to enable both civil service attorneys and the political appointees to influence policy. This design, as well as wise policy, requires cooperation between the two groups to achieve the proper balance between carrying out administration policy and carrying out core law enforcement duties. Where one group shuts itself out from the influence by the other, the Department's effectiveness suffers.” And Civil Rights Division has always been a controversial place to work. Issues are very passionately held, both sides, but there's never been a breakdown in the give and take between political and career people like we've seen.

So I think that my first recommendation to the new attorney general is a clear policy direction that decision making include input from career managers at a minimum. The typical line is that the career managers get their recommendations and work out positions with the line attorneys and act as a buffer between the quote “front office” and the line attorneys. And I think that line attorneys should be involved in these discussions too, but at a minimum, career managers who were shut off in so much of the decision-making in those years need to be told directly by the attorney general that they will – that their views will be heard on every matter. Whether they'd be followed or not, obviously is the decision of the political appointees, but there's got to be a reinstatement of this relationship between career and political people.

I think related to this is, I think, is the morale of the career people. It's been so many – and this is the Civil Rights Division, and I can't really speak to the other divisions, but anybody in the Civil Rights Division has seen turmoil like they've never seen before. They've seen career managers removed without explanation, obviously, from my point of view, because of disagreements; three or four section chiefs were removed, got down to the deputy level, deputy section chief level; got down to lawyers who were moved out of sections when they disagreed and became considered disloyal.

I think that the new attorney general, whether he or she will appoint a new assistant attorney general – there's an acting attorney general in almost every division now, but certainly in Civil Rights. I think there needs to be some reexamination of those moves, because they were such morale killers for everybody in the division to see people that were respected or expert who - no reason for removing, had been removed, and there should be some consideration of fixing that.

Second big issue, which I mentioned earlier, hiring. The hiring policy has been so badly politicized that there is now a major investigation by the Office of Inspector General and the Office of Professional Responsibility. And I think we need to wait to see what those – this investigation shows before we fix it, but that is important that we get that report soon. And I think the attorney general should insist on getting that report as quickly as possible, so that we get the recommendations from the gathering of facts which has been going on for several months now, and I assume it's being very - a very careful review of the hiring process and the hiring procedures. The recommendation I would have is that the – a new hiring policy should be put into effect that is written down so people know what it is. There needs to be transparency. There's always going to be some give and each division they have different processes, but everybody should know what it is.

Crucial, and what's completely lost now, is input by career people, both managers and line people. In Civil Rights Division, it's been a tradition for many years that there was a committee of line lawyers who did the original screening and interviews of applicants for the Honors Program, and then it would go up the line and the political people would make the choices. But to have that start at the lower levels was great for morale; it was great for the division. You had people that were experienced civil rights lawyers who knew what they were looking for and could really spot people that had a real passion for civil rights. So that I think would be my number two.

The third thing I'm talking about is more directly civil rights oriented and it's because I think the Civil Rights Division policies probably have been more criticized than other divisions. I can't speak for the policies in other divisions. I think that the – certainly the responsibilities of the division have expanded greatly over the years. Certainly, in the beginning, the core mission was voting rights enforcement on behalf of African Americans. It's gone tremendously all the way up to where we're enforcing election administration laws now, the Help America Vote Act, the Motor Voter Bill. But I think what has been lost in this administration is straying from the core mission. I think many of you read the statistics and the arguments about how many cases have been brought on behalf of African Americans versus how many cases have been brought on behalf of whites being discriminated against, and it's clear that the core mission of protecting and providing equal justice for African Americans has been lost and needs to be reinstated.

The second thing I think is a great - what's most important in the government is the ability to bring the most complex and difficult cases. In the civil rights, that is the pattern of practice cases. It's the Section 2 cases in voting rights and amicus briefs that address the very difficult questions that may arise.

So that's a start and I probably could go on for a long time. I think I will mention one other thing that gets a little outside of civil rights, but it's been a big topic of debate recently, and that is the priority the department put on voter fraud investigations and prosecutions. And what I think is a clear pattern of political decision making in that area from the decision to fire U.S. attorneys who determined that some voter fraud

investigations did not have enough evidence to prosecute Democrats, to recently changing the policies, the policy in the Criminal Division of staying away from bringing any prosecutions shortly before elections, which can have a real devastating impact on the election. And the government had a longstanding policy to put off any investigations until after an election. The U.S. attorney in Missouri went ahead and changed that back in November of '06. And just last May, all of a sudden, there's a new policy published that is much looser on this issue than before.

I think the attorney general needs to take a look at this whole area of voter fraud. It is worth a real good debate. There're issues on both sides, but the politicization of the use of voter fraud is so widespread, in my judgment - I could go on for a while on this, that I think this is something that would warrant the attorney general looking at it very carefully. Thanks.

MR. KLAIN: Thank you, Joe. Our last speaker, at least among the present, is Jim Robinson who is a partner in the business fraud and complex litigation practice at Cadwalader, Wickersham & Taft. He served in the Clinton administration as assistant attorney general in charge of the Criminal Division, and earlier, it's worth noting, served as U.S. attorney for the Eastern District of Michigan in the Carter administration. And as a reminder that a large chunk of the Justice Department isn't actually here at the Justice Department - it's actually out there in the country. So Jim brings that perspective as well, and with that, I turn over to him.

MR. ROBINSON: Thank you, Ron. It's fair to say that all of us who care about the Justice Department as an institution have come to the sad conclusion that its reputation has been very seriously damaged and also importantly, the career prosecutors have been demoralized to an unprecedented degree. And that spans Republican and Democratic administrations. As some example of that is I've been, since I left the United States attorney's position back in 1980, at the end of '80, a member of the National Association of Former United States Attorneys and served as president of that organization in 1983. And it's an organization made up of Republican and Democratic appointees to that position, and it's a very collegial group and it's generally stayed 100 miles away from anything that involves criticism of the Justice Department.

And really in an unprecedented way, in the wake of the Sampson aide, or whatever you want to call it, the firings of the United States attorneys - I guess it isn't limited to eight when you think about it a little more carefully - NAFUSA, as it's known through its acronym, strongly expressed a, I think, bipartisan serious concern about the way this issue had been handled. And the way the issue had been handled really requires in many instances, when the department brings a public integrity case in the wake of the automatic claims that every prosecution, as a political prosecution, has to disavow the existence of political influence, which is a terrible thing for the career prosecutors who work so hard and - on these cases.

I think the damage derives from a variety of serious blunders and mistakes that have occurred in recent years at the department, and that appears to me to have been that people have been allowed to run the show largely with no prior Justice Department

experience, whose credentials are largely political, who have no institutional memory of the importance of the separation between politics and the implementation of the law in a way that will give integrity to the Justice Department and assure the public that when criminal cases are brought, they're being brought because it's appropriate to bring them, and not because somebody in the White House or somebody frankly in Congress, or somebody in a state political apparatus is putting pressure on the department to bring the case or putting pressure not to bring the case or open an investigation.

As Ron pointed out, over the years, traditionally in both Republican and Democratic administrations, there's been a recognition of the importance of separating out policy with a big 'P' in terms of the kinds of things that are appropriate to debate and the implementation, the enforcement, the criminal law enforcement responsibility of the Justice Department. And as a result of that, as Ron pointed out, there was a very, very close limitation on the kind of context that could occur between the White House and people other than the very highest levels of the Justice Department. And also that was true for contacts with Congress as well because the political influence can come not only from the White House. It can come from senators and members of the House of Representatives, or other people in the political operation. So the notion was we're going to insulate the career people from that kind of influence. There is an appropriate channel of communication, but it ought to be very carefully controlled. And I echo the notion that that really needs to be re-implemented with great vigor under the circumstances.

It's important to insulate the people who are in the trenches, not making policy, but enforcing the law from these political influences of all kinds. One thing I – when I was head of the Criminal Division, I did get the National Association of Former U.S. Attorneys to weigh in and write a letter when I was trying to back off some oversight operations from Congress that were trying to call line prosecutors up to testify in the Hill. The political appointees, the tourists as sometimes we're called by the career people, are paid to take that heat and they should take it, but career people doing their job ought to be insulated from that kind of influence. And I was pleased that NAFUSA weighed in again, because these are people who care about the Justice Department as an institution, whether you're appointed by a Republican or a Democrat. And I think the insulation is particularly important in public integrity cases. And these policies like doing something public, at or around the time of an election, recognizing the tremendous influence that such an action can have on people's right to exercise the franchise in a way that isn't influenced is absolutely critical.

I don't know how many of you have ever attended a Renaissance Weekend or know at least about it, and I went to one a year or so ago and one of the things they do is they ask for two minutes on what you would do if you were president. And so I thought of what can I say about that? One thing I said somewhat in jest – though not entirely – I said, "If I was president, the first thing I'd do is I'd take myself off the No Fly list," – (laughter) – since somehow – notwithstanding my security clearance, I happened to get on that list that doesn't let me get an e-ticket. So every time I go to the airport, I have to actually go to actually see somebody who can call someone and say that James K. Robinson, not exactly a suspicious sounding name, somehow doesn't – gets to get his e-ticket.

But the other thing, with a little less levity, was the notion that in our fight against terrorism, just as in the fight against drug traffic and other things, there is a tremendous tendency to push the envelope on the bill of rights, on rights of privacy, on constitutional rights, and it seemed to me that as we are considering, and seeing Lois Schiffer here, this is a weak analogy to the environmental impact statement in the environmental context. But it seems to me that as we're developing policies that affect the war on terrorism, we ought to have the equivalent of a rule of law impact statement. Here we are, going around the world, telling the world that the rule of law is the most important thing we have, our most important export to the rest of the world, and the hypocrisy that we're accused of as a result of the kinds of policies that have been implemented, and pushing the envelope and really undermining what we stand for as a country and why we're – why it's important for other countries to think about emulating our democratic institutions, is so undermined, I think, by our failure to have the kind of honest debate by career people, people who have been in OLC for years and have worked this thing through and they understand it, and they understand the importance not only of making sure that the United States Constitution is protected, but how we fit into international law as well.

So that would be another thing that I would suggest. Restoring the department's credibility with Congress is an essential thing. Now, there's a current debate going right now, and I may have some differences of opinion in this area. It involves the McNulty Memo and the concern about invasion of the attorney-client privilege in the context of corporate criminal investigations. And the thing that worries me is that the Justice Department, as it goes to try even defend its policies in Congress no longer has the kind of credibility that it once had to go there and explain why some of these things are important for law enforcement and have some credibility. And so, that's a concern that I have and that needs to be restored. We've just had too many situations in which members of the Department have gone there and Republicans and Democrats alike have just shaken their heads and said, "What is going on here? We're not getting the straight story." And, therefore, the credibility of the Department to go over and argue strongly for law enforcement policies that ought to be debated, vigorously debated, but the Department's view ought to be given some real impact and that credibility has been seriously undermined.

The – let me just speak briefly to this notion of the hiring of career personnel. I became United States Attorney in 1977. I was 12 at the time actually. (Laughter.) Actually I was 33 and I was very fortunate to be appointed at such a young age. But I – there was still in the memory of man then - when the United States attorney was appointed in the old days - I'm talking about the really old days, the first thing he or she did, and mostly it was he in those days, was to fire all the assistants or most of them and replace them. That was sort of standard operating procedure. It was patronage. Assistant United States Attorneys were patronage positions, and thank goodness, that changed and over the years, it evolved to the point where it was verboten to hire career people on the basis of politics and patronage. And that was critically important to the building of the Justice Department, both in the field and at main Justice.

And these recent incidences in which it appears that career people, right down to hiring honors grads, which is ridiculous, out of law school, have to pass some kind of political litmus test in order to get these career jobs, has got to be stopped for the good of the department and more importantly, for the good of the country, it seems to me. It is critical that the Justice Department, as it always has, attract the best and the brightest to do these kinds of jobs, and we've had some great examples of this. And there's some recent examples of that in the current administration. Unfortunately, I don't think their contributions are valued as much. Jim Comey is a good example, as far as I'm concerned. A person who stood up and said, "No," when saying "No" was the right thing to say. Pat Fitzgerald was another career prosecutor who somehow, in somebody's mind and the - got on the, well, these are underperformers who ought to be fired as United States Attorney - absurd proposition.

And so I think the notion of including the career people with their institutional memory of the importance of the Justice Department in the decision making of the department is essential. The Justice Department is an ongoing institution and those of us who were - had the honor of being tourists, need to recognize that we're tourists for a short time and the career people need to - their views, their experience, their background needs to be recognized and they need to be included. It doesn't mean - on policy issues there are legitimate differences of opinion. If an administration wants to shift law enforcement priorities - we're talking about policy - but in terms of implementation and avoiding any appearance that the Justice Department is being used for partisan political purposes in any arena, environmental, criminal, civil rights, that has got to end if we have any hope at all of restoring this notion that the department is different.

I've had, as some of you may have, the framed copy of Justice Sutherland's words in *Berger v. United States* about the United States attorney and not being the representative, but an ordinary litigant, and whose job is done when justice is done. That's the kind of thing that traditionally, even the visitors who get appointed, understand that they leave at the doorstep their partisan political alliances, except in the large - in a large "P," Policy issues which is appropriate. But when it comes to implementation, that - those considerations have to end and they have to act accordingly.

So that's my sermon for the day.

MR. KLAIN: Thank you, Jim. That's great. We're now going to have an opportunity for all of you to ask questions and if you have a question, raise your hand or something and please wait for the helpful ACS staffer with a microphone to come or else your question will not be picked off a microphone and will not be immediately beamed to the Justice Department. I should say, obviously, Bruce Fein could not be here. We tried to have all the ACS panels be balanced and Bruce was an appointee in the Reagan administration and obviously, a well-known conservative in town who would have brought that perspective. I should also add that Bruce's perspective is highly critical of the current Justice Department. I think ACS tried to find someone to come and defend the current Justice Department, but Diogenes is still off on that project as we speak. (Laughter.)

So with that, we will go to your questions. Sure. We need a microphone up here.

Q: I would direct my question to Mr. Robinson. Actually I have two questions. One will be brief. How did you get on the No Fly list? (Laughter.)

MR. ROBINSON: Beats me. I really don't know. It just sort of happened and I filled out all the Homeland Security paperwork, sent them a copy of my passport and my driver's license. I did everything short of calling my immediate successor as head of the Criminal Division, Michael Chertoff and saying, "Mike, can you get me off this damn No Fly list because it's really a pain when you go online and you can't get a e-ticket and you get to the airport a few minutes late and you have to go through the hassle." And maybe the world is a safer place because I have to arrive earlier at an airport – (laughter) – but I don't really think it is. So I really don't know –

Q: Are you still on?

MR. ROBINSON: Oh, yeah. Let me just make the distinction. There is a list and I think there are 50,000 Americans on this list that sort of triggers the computers of every airline that doesn't – that makes you then go to a person who then has to make a call to somebody to check a list to say, "Oh, no, no, that's not the terrorist James K. Robinson. That's – he's an okay regular citizen." But as I say, I have no idea but it's quite frustrating.

Q: That came to me as an afterthought. My more serious question is the whole thrust of this meeting from all the speakers seems to be fairness and law. For some time in the last decade, concerning the internal revenue and prosecutions of – there were like 2 million people in the U.S. penitentiaries today and over half of them committed no common law crimes and many of these are some income tax evaders and others. And recently, in the last decade, there's even a case now going where the woman is a former IRS agent, but many have challenged the question of what is the law that requires one to file and there have been many, many prosecutions. Perhaps you must have, as a U.S. attorney yourself. But now, the – one man, Bob Schulz, got on the steps of the Capitol and fasted for three or four weeks defying that – saying he's going to die if they don't answer where is the law and they want to know what law it is that requires people to file. And I just wondered if you have any insight on this because we've been writing quite a bit about it at *American Free Press* and is the law that - apparently, (unintelligible) 201, people being prosecuted on, it says that 'any person required.' These people want to know who is required.

MR. ROBINSON: I can have an easy out for that. It won't answer your question. And that's that criminal prosecutions in the tax area are conducted by the Tax Division, not the Criminal Division. (Laughter.) Occasionally we bring some tax charges. We – I keep saying "we," as all of us do when we talk about Mother Justice, but nevertheless – but even then, we have to get the permission of the Tax Division. So I'm familiar with some of the cases that's been well litigated, and at this point, I think that most of those cases have gone against the tax protestors on that issue, but I don't really have an answer.

The Tax Division , the people that do the criminal tax prosecutions, there's a little unit there - not so little, but that does those cases.

MR. KLAIN: Thank you. Mark?

Q: A couple of the panelists referred to 9/11 and the war on terror and Jack Goldsmith in his book said that a – it was an ostensibly responsible high government official told him that if you say “No” to the president, the blood of thousands of Americans will be on your hands. The question I have is, how, if it does, does this affect the traditional role and responsibilities of the Justice Department when the president has engaged in a war on terror?

MR. ROBINSON: I think it was Jim Comey that said that an argument like that was made in response to his saying “No,” and I'm proud to say that he still said “No.” And as a result, was quite happily, by this administration, shuttled out the door so –

MS. JOHNSEN: That's what I was going to add. Jim Comey and Jack Goldsmith both report they have said “No,” and there is, I think, reason for hope that people in this administration did stand up for the right thing, but they weren't there very long. And I think the last week's *New York Times* report about the fact that – soon after they left, OLC issued these two additional secret opinions saying any form of interrogation is lawful, despite Congress' clear ban, demonstrates that really, as I said, we need a change in tone from the top. We need the attorney general to stand firm and for Senate to make sure we have an attorney general who will do that.

MR. ROBINSON: I think as a general proposition for those of us who've been inside, we all know it. There're tremendous pressures, whenever you're trying to accomplish a law enforcement objective to try to say “Yes” to prosecutions, to investigations. And the first thing assistant U.S. Attorneys need to understand and learn is that just because some FBI agent wants you to indict the case, doesn't necessarily mean you should indict the case; that prosecutors in our system – because federal criminal law is very expansive and in terms of your ability to interpret the mail fraud statute and some of these other statutes, it requires sensitive quasi-judicial exercise of discretion into making these determinations. And so, you have to have people who understand.

In other parts of the world – I taught for a semester in Europe in a law school and there when the prosecutor brings a case to the - the police bring a case to the prosecutor. They don't have discretion to say “No.” They have to prosecute it. One of the great things about our system is that we have people whose responsibility it is to say “No.” And therefore, we need to have people who are willing to stand up to the normal pressures because the job of these agents and all the law enforcement agencies, and I won't criticize them, is to push. And the job of the people who believe in the rule of law and had charged with the responsibility for applying it is to say “No” when you appropriately say “No.”

That doesn't mean you don't try to do what's within the rule of law and there are going to be differences of opinion where that line is, but if somebody gives up the

responsibility of saying, “I’m going to examine this carefully. I’m going to determine where the line is, and when the line comes, I’m going to say “No” and be prepared to say, “You know what? I’m going to resign rather than” – let somebody else be a “yes” person. You don’t – frankly, over the course of my career as a prosecutor, some of my proudest moments in terms of my own exercise of discretion were cases where I did say “No,” where I did - notwithstanding a lot of pressure said, “This is an inappropriate case.” And that’s what people – that notion needs to be reinvigorated throughout the Justice Department in my view.

MS. JOHNSEN: I want to add just one quick thing I think is important. When we say you have to tell the president “No,” it doesn’t mean, and therefore allow the next terrorist attack and a million people die as that White House official claimed would happen. I think Jack Goldsmith’s book is great at this when he and Jim Comey said “No.” What they said was, “Congress has said you do not have the power to do this. What you must do is go to Congress if you think you can make the case and you need the power, get them to change that restriction.” Also important in Charlie Savage’s book, makes clear that this administration came into office hostile to that idea of ever going to Congress, wanting to expand unilateral executive authority and leave the presidency stronger than when they arrived. So it was an agenda to not comply with statutes or have them fixed when they thought the president needed greater authority, but simply to assert commander in chief authority to ignore federal statutory restrictions and not go to Congress. So nobody’s saying, “Just say ‘no’” in situations where the president really has the need for expanded powers. If that’s true, go to Congress, and Congress has certainly proven very willing to expand presidential power when the president says he really needs it.

MR. KLAIN: Listening to all this, I’m struck by the observation that it’s probably no surprise for Justice Department veterans that we think of the Bobby Kennedy era, or the Levi era, or the Civiletti era as the golden days of the Justice Department. In fact, that we think of the Ashcroft era as the golden days of the Justice Department is increasingly shocking.

In the back.

Q: I have a question for Joe. I was struck as you were talking about the morale in the Civil Rights Division. Twenty-five years ago, just about to the year, there was another meltdown in the Civil Rights Division and I was in the Office of Legal Counsel at the time, so it’s interesting things keep happening. This was the Bob Jones case I’m talking about in particular, but more generally, the morale of the Civil Rights Division under Brad Reynolds.

MR. RICH: Well, I think –

Q: Or – let me just ask the question.

MR. RICH: Okay. Yes, right.

Q: This is my question. How is it different, if it was different, and do you think that the Division will have the capacity to recover, that it did from that incident?

MR. RICH: Second part's the harder part. I think the difference – certainly, the Reagan administration and the Justice Department's civil rights policies were vigorously resisted to or at least debated by career people. There's a lot of difference, as Bob Jones stood out, and I think Bob Jones stood out as an example of the political people ignoring the career people on what would have been good advice for them. But there's no doubt that there was constant debates. One big difference, a very important difference, is you got to debate. Brad Reynolds was as good a debater as you're going to find. And I think I have a quote from Brian, another quote that I think is worth reading in this question.

He said that "One further personal note, I disagreed with some of the civil rights policies of the Reagan administration. I worked for Assistant Attorney General William Bradford Reynolds, the administration's foremost spokesperson on civil rights. We engaged in many heated discussions for what positions to take in cases. We listened to one another, and occasionally one or the other of us would change his mind. I respected the fact that he represented the president that the people had elected and the Senate had confirmed his nomination. He respected my knowledge in civil rights law and my ability to analyze cases."

And I think as much as we disagreed with Brad and the political appointees, we had that ability to debate it. There were a couple of examples where issues were taken away from career staff which I thought was the worse, the affirmative action stuff – but that was the big difference. The second big difference was never, in my judgment, during the Reagan years was there partisan political decision making on civil rights cases. And that happened in several voting cases that I'm very familiar with. And I've never seen that before. And I found that probably the worst example of politicization.

Can we recover from this? I think – I have great hope. I think it'll take a while. I think it will take a very wise, strong leader to come forward. I'm hopeful that the new attorney general will at least publicly recognize what has happened to a certain extent and start to make the changes that are necessary. I have noted that I think last – recently, there was some sort of announcement that the hiring policy was changing, but I'm not quite sure how it's changed. There was at least some recognition that it needed to be changed. I don't think it has changed the way I would have changed it. You get a lot more career input, but I'm hopeful. I'll put it that way.

MR. KLAIN: Before I take the next question, I'd actually like to pose a question to the panel, especially to Joe. We were here to talk about the next attorney general, but I suppose many of us are thinking about the attorney general after the next one, perhaps. And one thing that dawns on me, as I listen to all this, is to the extent that many things have happened at the Department that have skewed the way the career staff worked, that skew the way the hiring has happened, that skew the sorts of people who are now left behind in the Department, if a progressive president is elected in 2008 and comes to take over the Department with an attorney general in 2009, will a set of simply neutral policies, well, just going back to the way it used to be, really be enough to achieve

meaningful change in reform of the Department or are you essentially kind of grandfathering in a lot of bad stuff and then left with that - The career - the quote-unquote "career team" is now a bunch of people who were hired for political reasons, treating them as the career team, kind of skews the playing field a lot. I'm curious as to what Joe's thoughts and other's thoughts are on that question.

MR. RICH: I'll go first. I think that is a conundrum. But I would strongly urge that we go back to the way things are - there being respect for career people, whoever hired them. If they - my feeling in civil rights is that an awful lot of the people hired politically really have no commitment and are unlikely to stay. If they do stay and produce, all the better. If they don't, there should be - I think it's going to be a much tougher management job, because these are going to be a group of people - and it's not all of them. Not every hire is a political hire, but you're going to have a group of people that foremost lack the commitment to civil rights enforcement that was the tradition in the division.

And that's what you need to get back. And the new assistant attorney general is going to have to insist on that, make very clear where he wants to go, what policy he wants to follow and insist that the - and particularly the management level, the career management level. I think there would be a need for some changes, because at that level there's been politicization too.

MS. JOHNSEN: Yes - go ahead.

MR. ROBINSON: I was just going to say I think it might be a little easier in the U.S. attorney's offices and the criminal division to get back on track. We have to remember that in all administrations, there's been a little bit of burrowing in. Let's not forget that there are very fine people who come to government with very idealistic instincts about the Justice Department and get hired into the political slots. And at the end of an administration, some of them find their way to U.S. attorneys' offices and other places. It happened in the Clinton administration and it's going to happen in this administration.

I do think that in terms of people who are prosecutors, who prosecute cases, I'm not as worried about that as - but I understand the point in some of the other divisions that are a lot closer to the policy in terms of what you investigate, the cases you bring, and that sort of thing. So -

MS. JOHNSEN: I think that's an excellent point and something that I worry a great deal about with the Office of Legal Counsel, for two reasons. One is the hiring and the people who are there. In the *New York Times* story last week about the secret OLC torture memos, the new ones reported that Bradbury was there kind of on a trial basis and the White House finally was impressed enough to nominate him, when he stopped the hiring of a brilliant young lawyer, who happened to be a liberal, and that convinced the White House that he was loyal enough to deserve a nomination. If that's true, that's just horrifying.

So there's that problem. And I don't think people at OLC are maybe as likely to leave as the civil rights lawyers, at least not right away. But here's another problem. OLC operates under a system – a kind of a system of stare decisis, where it very much looks to prior advice given to prior presidents. It's supposed to be bipartisan, accurate and neutral advice. So now we have a whole body of law at OLC under this administration that under ordinary circumstances, the next administration should honor and take seriously.

When we went in, there were definitely positions we disagreed with, but we studied very carefully which ones merited reversing, and it is very difficult to tell the president “No,” when President Reagan, President Bush were told “Yes.” Several times I was told, especially in the area of National Security “No, you can't say ‘no’ to that. OLC told Bush and Reagan they could do it.”

So there's real reason for concern about that, particularly in the area of presidential power. And so I think there really needs to be careful thought about – well, first of all, we don't know what OLC has said. We know what opinions have been leaked and we know how awful some of those are. We don't really know for certain that it's representative of OLC's work. And so I try to hold back and not condemn everything OLC has done, because maybe in other areas they are neutrally, honestly, accurately interpreting the law.

But there certainly has to be – I would say with the next attorney general, not the next administration, the next attorney general needs to undergo an investigation of OLC and see what guidelines have been guiding the work of that office. And there – I believe just cannot be the same kind of deference and stare decisis practice in the next administration.

MR. ROBINSON: Ron, can I just say one thing? And that is I do hope if there is a new administration and a new attorney general that those folks will learn the lessons of what happened here, and in their decisions about who's going to be the attorney general, who they're going to select for the deputy, the associate and the assistant attorneys general, that they keep this lesson in mind and hire the kind of people that will really advance the values that we're all talking about agreeing with here. And so, one would hope that they would keep that in mind when they're figuring this out, if there's a regime change.

MR. KLAIN: Well said. Lois? Wait for the microphone.

Q: I'm sorry. I'm Lois Schiffer. I have a few quick observations. First in – I agree of course with all the values of the Justice Department, as most people who work there – have ever worked there. First is that when you talk about a separation between the White House and the Justice Department on enforcement, I think it's extremely important to recognize that it is both civil and criminal enforcement, because in the environmental area at least, a great deal of enforcement is civil and it is every bit as much open to abuse for somebody to come and say, “What do you mean prosecuting our biggest donor,” or enforcing against our biggest donor even if it's civil. And so I think

that principle certainly operated in the Clinton administration, and I believe in administrations before that. And I think as we go forward, it's important to keep in mind that it operates in both ways as well. That's one.

Two: I have long thought that one of the gaps in the Justice Department is that – and Dawn, this is with all deference to OLC, that there's no good institutional advocate for civil liberties, and that while you're not going to see any new division, and I wouldn't expect it, it does seem to me to have an Office of Civil Liberties or an assistant for civil – an advisor on civil liberties, because there's someone who's job is to be cranky about the protection of civil liberties at a time when it's very easy not to do that, is a very important modification that could be made in the organization of the Department.

Now, you obviously then need to pick someone for that job who has some familiarity with and conviction about civil liberties. But it's – there just isn't a good institutional home for it. And OLC, while it raises those issues, is more of a balance and less of an institutional home. So that's one suggestion for a reform. My third point –

MR. ROBINSON: A rule of law speed bump, right?

Q: Well, it isn't even a 'just say no' office. (Laughter.) I mean, just as you all have been saying, it is that you can do it this other way, or at least think about the implications.

Finally, on the question of 'Can it be fixed?' it's my general observation institutions can be fixed. And I cite as one very small example, not the whole Department, that in the early 1990s in the Environment Division, the criminal section was quite broken, to be charitable about it. And when we got back there, we said, "This is quite broken, there must be a way to fix it." And after a few years, it's very functioning and quite fixed and indeed, I think, one of the high points of the Department. And so I think we can't despair. It's going to take hard looking and hard work, but that it is an institution that's gone on for many years, the Department of Justice. It serves a crucially important function for the American public and there will be a way that we can move forward.

MR. KLAIN: Some encouraging words here. That's been a rare thing today. Yes, the gentleman right here.

Q: Hi. Everything that you said from your hiring process of honest attorneys to anything that we've seen in the news reports about political hiring of immigration law judges, to even last week's *New York Times* piece about possibly – you have interrogators actually calling Justice Department about the combination of torture techniques they can use. I just - even whether they can water board at all, but whether they can do that in combination with another technique. Do you actually think that it would just be either a succession of attorney generals that would need to set a new tone, or will you need to have special prosecutor to actually reinforce this idea that there needs to be institutional change and, quite frankly, to sort of raise the floor for any other type of executive reach?

So if – as Dawn Johnsen just said, you can't say "No" to one president because you said "Yes" to two presidents or one president ago, do you need a special prosecutor to say, "Well, this has to stop," period? And so that the next president that comes in isn't tempted to do something to overreach just because there's – just because he or she was not as bad as the previous president.

MS. JOHNSEN: I do want to make clear we did say "No" in response to you can't say "No." So I think it is possible and the key is – one key is getting the right person at the top, but also the heads of all the components and depoliticizing the hiring of the line attorneys. But I do think we need some kind of external pressures as well. As I mentioned, I don't think a special prosecutor is exactly the way to go, but I think ideally it would be Congress that would be the primary pressure from the outside. And one of the things Congress needs to do is insist on more transparency, so then all of us know what's going on and public advocacy groups can also chime in.

And the courts – the Supreme Court has been doing a fairly good job. We just have the report in the al-Masri case. Unfortunately, they're not going to look at the interrogation techniques and that's one area where some judicial review would be very helpful. So I would say, absolutely, we need more than just one person at the head of the Department of Justice to make a difference on this score. But I think we do have the system of checks and balances that we need of all the various players would do their part.

MR. ROBINSON: Let me just say on that front, I think some credit needs to be recognized for the Office of Inspector General of the Justice Department, because I think Mr. Fine has done some good work and he needs to be recognized for having had some independence and sort of called some shots that needed to be called. I think, in terms of special prosecutors, we ought to go back to lessons learned and I think it was right to eliminate the special prosecutor rule, although theoretically you could still do it under the legislation.

But I think we need to rebuild a Justice Department with – like the office of inspector general, OPR and those kinds of institutions that can handle these kinds of things, and recusals and that sort of thing. But I think we learned that turning something over to somebody who has no accountability to anybody, no institutional memory or policies in effect resulted in some excesses that we should try to avoid in the future.

MR. KLAIN: Jim?

Q: Just because I have confidence that Judge Mukasey is going to listen to the web presentation of this, let me just say for the record that although normally, I like Lois' idea of a special person to be in charge of civil liberties and privacy, we have that in the Homeland Security Department. We have one of those people in the director of National Intelligence Office. We have a board that's supposedly doing this throughout the intelligence community. I don't think that's the right thing for the Justice Department. I think everybody at the Justice Department has to be checked out for civil liberties on the way in the door at the Senate. I think if you put it in a special provincial office, then the implication is, well, that's his or her job, not everybody else's job.

The answer is the way it was done in the old days is that everybody from the Attorney General on down, whether it was Robert Kennedy or Nick Katzenbach or Ramsey Clark or anybody else you can name, they were all committed to civil rights and civil liberties. You didn't need somebody to encourage them or to keep an eye on them. And as much as I respect Glenn Fine and I think he's the best career lawyer maybe in the Department ever, his job is to fix things after they've gone wrong. And the fixing them before they go wrong is the job of the attorney general and the deputy attorney general and the other presidential appointees.

So I would hope that that would be the goal to improve the level of all of the appointees and that Judge Mukasey should not leave that to his successor, that he should go in and do some house cleaning now and find some potential appointees now and set the standard and symbolically show that it can be done even by the current administration.

MR. KLAIN: Thank you, Jim.

MS. JOHNSEN: Could I just – one other – I totally agree with that. It has to be every official. One other way though to get the voice of civil liberties before the Department is if you let people know what the Department is doing, then the civil liberties organizations, they're on top of it. They want to meet with the attorney general and the heads of the various components. And they were - when I was there, there were numerous meetings that DOJ and sometimes sponsored the White House with these public advocacy group representatives. And so again, transparency is key to having that kind of external pressure on the administration.

MR. KLAIN: Yes, right here.

Q: I know that Bruce Fein wasn't able to be here representing the Reagan Justice Department and I guess Joe was probably the only one panel who served in both Republican and Democratic administrations as justice, but as someone who actually worked for Joe in the Department in both the first Bush administration and the Clinton administration, my perspective has been, looking at this now from the outside, that this is not a Republican or Democratic thing, this level of politicization, and that is more specific to this administration.

And I'm curious whether the panelists share that view and whether though going forward, to try and fix it, that's necessarily a good thing or a bad thing because there may be some incentives of saving power or executive immunity from checks and balances or something, that maybe that's a bad thing that it could be, no matter what the next administration is, that we're – it's going to be hard to undo.

MR. ROBINSON: Well, let me say I agree that the danger of political influences has always existed and will always exist and therefore, it's a constant matter of concern and that's why you have to have mechanisms and more importantly, than the mechanisms, is that you have to have the kind of people who are entrusted with this very

awesome responsibility of – the people in the Justice Department have who recognize the need to insulate career people from political influences.

And I think there have been – you can find examples in every administration. I think what we're seeing most recently is that it's kind of got out of control to the point where there's bipartisan concern for an institution we all care about, and we all recognize that without a Justice Department that has core credibility and competency, and a sense that when people get prosecuted isn't because they were a Democrat or a Republican or they supported some candidate. That has got to be – that's got to end.

And there are going to be examples that we always had – we've had situations of some U.S. attorney in the Eastern District of fill in the blank; it goes off the reservation and everybody's administration and maybe got the appointment because of some close relationship with somebody and is a little too close to that. But that's why we have to worry about this thing, it seems to me, and get the place back into shape.

MS. JOHNSON: I have one specific example, where I did the – it's called the transition review when Bill Clinton was elected and before he took office. There was a review of every agency and component. And so I did that for the Office of Legal Counsel and the Solicitor General's office. So that involved calling a meeting with all the former heads of the Office and deputies and some line attorneys, everybody – everybody from both administrations said the most important thing for the office is the ability to say "No." You need someone at the head, you need the deputies to be people who will not just rubber stamp what the President asks for and they all – I remember especially two Republican former heads – had lists that they could recite of times when they told the president "No." They really viewed that as a point of pride. So that is absolutely a bipartisan principle.

And one that, unfortunately, it's so easy to pay lip service to, right? So Gonzales, in his confirmation hearings for attorney general, was asked, "Do you agree with these principles?" that I helped draw up and 19 former OLC lawyers drew up. And he said, "Oh, yes, of course. Advice should be honest and accurate and you have to be willing to constrain the president."

So the difficulty is looking behind whether what they're actually doing is that. But going into the Clinton administration absolutely felt like it was a sincerely held belief of prior administrations. And even though – the two Republican administrations before. And even though we didn't always agree on some of the details of the legal analysis, it was a genuine substantive legal disagreement.

MR. RICH: I'd just add one other point that I think's important. Of the 36 years I was there, 24 were Republican and 12 Democrat. But I would say that certainly in – ideologically, the difficult times were for civil rights and for – generally, the Republican administrations, but at the same time, Democratic administrations would come in and there would be disagreements. The career people would look at what's going on and the same dynamic is at play. There has to be that give and take.

People who've done this for their whole career are the heart and soul of the Department. They're there for a reason and I think the career staff, career lawyers at the Department play a very important role in this politicization issue because if they're listened to, you're going to get honest legal advice. They're not going to be political. The political appointees are by nature political, but if they listen, you're going to eliminate, I think, a lot of the – what's happened in this administration. There was no listening at all in this administration, which was so much different from others.

MR. KLAIN: Great. I think we have time for about two more questions. So this gentleman here in the front row has had his hand up for a while.

Q: Thanks. I have a question, but first I just want to mention to Lois Schiffer there actually has been a privacy officer within DOJ for about the last two years or so. It was Jane Horvath who recently left to go work at Google. But my question picks up on something that Dawn said earlier about congressional action in this area. I wonder – going to the issues that Joe raised about politicization of hiring, promotions, that sort of thing within civil rights and elsewhere, whether you think there's a need to bolster the penalties for engaging in improper conduct in that area.

And touching on something that you, Ron, had mentioned about White House contacts. Senator Whitehouse has introduced legislation to codify those restrictions. And I'm wondering what all of you think about the appropriateness or wisdom of those kinds of statutory constraints in this area. I know this is a panel about guiding principles, but following on what Dawn said, do you really think there's a need for legislation here?

MS. JOHNSEN: Yeah. I have to say I'm not really even sure what the prohibitions are and how enforceable they are currently. So maybe somebody else? So I don't know if that's the problem that we need more actual laws.

MR. RICH: Yeah. I think that my understanding of Senator Whitehouse's just got out of the committee is that this is a reporting requirement. It doesn't limit the number of people, but it does try to give some transparency to Congress about how much give and take there is between the two branches. I think that would be useful. I think there's a concern from, I think, people in government that's just more paperwork and Congress gets these reports and puts them in the round file and never looks at them. But given what's been happening, I think this might be useful.

MR. ROBINSON: I would hope we can get at this problem without criminalizing more things. I mean, it seems to me that there is enough bipartisan consensus around the unique role that the Department of Justice plays in our society and the importance of having an institution that can command the respect of everyone in the country as an aspirational goal at least. People are going to make mistakes, but if we can't do it that way, I mean, putting somebody in jail for violating the rule against asking somebody who they voted for in the last election, it seems to me, is an awfully feeble thing at the end of the day. And I hope we don't have to get to that myself.

MR. KLAIN: Last question. We should go over here.

Q: Hi. You all have talked a lot about desirable characteristics in an attorney general and I was hoping maybe you could comment on what you felt were some of the strengths and weaknesses of the current nominee, Judge Mukasey.

MR. ROBINSON: Well, I have to say I don't know the judge. I know something about him from some colleagues and I understand him to have been a very fine federal district judge, conservative on national security issues and other issues generally. And I think the president of the United States is entitled to appoint a person that he or she believes is consistent with their general philosophies.

And I think subject to what happens at the confirmation hearings, and my sense is that hopefully, with his judicial background he would come to the Department with a view towards recognizing that there are things that need to be done and need to be fixed. And he would listen to these kinds of concerns and more importantly, the concerns of Joe and others who've been in the Department, who've seen this thing. I mean, he would be well advised, it seems to me, to make among his first thing to do, when he takes office, is sitting with the Joes and the David Margolises and the other people who've been – and the Jack Keeneys and people who – and it's in every division. Wonderful career people dedicated, and get a good diagnosis of what needs to be done, and to recognize and value the contributions of the career people, to listen to what they have to say and to recognize that – call it perception, call it whatever you want, the Department has a problem. And it's a perception problem to some extent, but it's a reality problem and that needs to be fixed for the good of the country.

Hopefully he'll want to do that. He can play the role that Ed Levi and others who've come in at a difficult time to the Department and sort of start talking about the things that makes the Department critical and different and important. And inspirational goals ought to be part of that and I hope that happens.

MR. KLAIN: Joe?

MR. RICH: I generally agree with that. My own real knowledge is just reading the answers he made to the questions from the Senate. And what I am happy to see is this is a person that does not have an apparent political background. He is a judge. He was at U.S. Attorney's office, I believe, wasn't he?

MR. ROBINSON: Yes.

MR. RICH: And he's a lawyer. He's not – he wasn't wrapped up in the political process like the last two attorney generals. And I think that's important. Certainly, the qualifications and the answers he gave lead me to believe he will be a good attorney general, and we'll see. I particularly echo the need to sit down. I'd really recommend that he'd go to each division and have a meeting in the Great Hall with each division and let people air their thoughts and then sit down with the senior people. There's a need for this new attorney general to connect with career people.

MR. KLAIN: Dawn?

MS. JOHNSEN: Well, I thought it was very encouraging that the president eventually was willing to go outside the inner circle. That was of course only under pressure from the Senate. But he did and so I think Mukasey definitely has the potential to be a good attorney general, but that we do need to still know more. I think the Senate has to absolutely ask very tough questions and find out for certain if he's the kind of person that we need, who will do all the things we've described must be done, but I would say that based on what we do know – and I don't know him, again. It's just from public reports and also friends who know him that there definitely is potential, so that was encouraging.

MR. ROBINSON: Senator Leahy wrote a letter to the nominee a few days ago and I think asked some very important questions about national security issues in particular and I think that will be very important in the confirmation process.

MR. KLAIN: And I'll just close with this thought. I do think that obviously, there are some encouraging signs from Judge Mukasey, but I do think one thing we can't escape is that the head of the Executive Branch is the President of the United States and this begins and ends with him and his perspective. And an interesting irony here about how politicized the Justice Department has become under this President is a shocking lack of actual political appointees in the senior positions of the Justice Department. So we have the most politicized Justice Department in history with the greatest absence of filled positions of political positions of the Department.

And I think what that really to my mind has always said is that this is a president and a White House that fundamentally does not care about the Justice Department. It doesn't care about it as an institution. It doesn't care about its stature and its status as an important part of our executive branch.

And I think one thing that certainly we had in the Clinton administration is we had a president who thought the Justice Department was a very, very important institution and tried to staff the building with very, very talented people and tried to make sure those people had the right values and the right approach about the Department of Justice. And I think, fundamentally, until either this president or another president takes that point of view, the ability of the attorney general to fix some of these things is always going to be somewhat limited.

But with that, let me just again thank everyone for coming. Thanks ASC for sponsoring this. Thanks Lisa and Judy for their role in putting this together. And hopefully, see you all again soon.

Thank you. (Applause.)

(END)