WILLIAM J. CLINTON PRESIDENTIAL HISTORY PROJECT

TRANSCRIPT

INTERVIEW WITH LLOYD CUTLER

April 22–23, 2002
Washington, D.C.

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James S. Young: I am very pleased that Lloyd Cutler has agreed to give this generous amount of time to an oral history interview for the Clinton History Project. There will be two sessions today, this morning and this afternoon.

Lloyd and I had a chat before the meeting about the ground rules, which you all know. We've all taken the pledge that this interview is confidential and we understand that Lloyd's remarks don't go out of the room, are not shared with anyone until he has had a chance to see the transcript and edit it to his satisfaction, redact whatever passages he thinks should be redacted—though we hope there won't be many of those, for history's sake—and put any stipulations on the timing of the release. We have a special arrangement for this interview, which is that if Lloyd wants to say something off the record, he will identify what that is. It will not be transcribed so it will not be taped. So we'll have to give a motion, be sure that you turn off the tape and we'll have to also start it up again so we don't lose valuable on-the-record information. Shall we begin?

Either you can volunteer some information or we can start right off with some questions, generally about how you came to be associated with the Clinton administration and the run-up to your request to join them as White House counsel.

Lloyd Cutler: Well, I had not known either of the Clintons before they were elected. I'd been involved in Democratic politics, I suppose, since at least the 1960s, but the first candidate I really worked for was JFK [John Fitzgerald Kennedy]. I went on through [Lyndon] Johnson and even [George] McGovern, because at McGovern's point that was when Senator [Thomas] Eagleton, as you may remember, was going to be Vice President and fell on his sword. There was the famous McGovern remark that, "I'm a thousand percent behind you," until the news about the electric shock therapy became known.

But in any event, Sargeant Shriver was tapped to be the replacement vice presidential candidate. He was an old friend of mine who tapped me to be his finance chairman. And it's a useful footnote to modern history that we raised $300,000, this is 1972, for a vice presidential candidate, and we thought we had done very, very well. Now the Presidency alone is probably a $200 million, $300 million enterprise. So that's our inflation index.

In any event, I was a supporter of Governor Clinton for the nomination. My daughter, who is now a judge in Alaska, overlapped the two Clintons at the Yale Law School, so we knew of one another in that sense. Just before he was elected, or during the election, I had gotten involved with, of all people, Ross Perot, because his two lawyers were good friends of mine and they invited me to come down to meet with Perot back in April of '92. I very quickly made up my

mind that Perot was not the person I would be interested in. Perot, of course, is the one who really elected Governor Clinton President. Without Perot taking a large share of the vote, it probably would have come out differently, I would imagine.

In any event, during the transition, I worked on the transition team with, among others, Vernon Jordan, who was the co-chairman of the transition along with Warren Christopher, as you heard the other day. My work had to do mainly with the organization of the White House. So I knew all of them. When he nominated Zoë Baird, who had been a close personal friend of mine and had worked for me in the [Jimmy] Carter Office of the White House counsel, I was her mentor during that difficult nomination and one of those who finally concluded we had to tell her she needed to step down.

I had also worked with Janet Reno when she was finally picked. I was part of the group that were informal advisors to her about how to organize the Department of Justice. While by this time I had met the President socially, I really was not active in his administration for another year. My first activity came just before Bernie Nussbaum resigned as White House counsel. I was approached initially by Joel Klein, who was Bernie's deputy, about the issue that existed at that point as to whether the Attorney General should appoint an independent counsel to investigate the Whitewater business.

You may recall that the independent counsel law had a sunset provision and it expired at the end of 1992. The Republicans deliberately allowed it to expire. Clinton came into office advocating that there should be an independent counsel law and he was persuaded over Bernie Nussbaum's objection, largely by Joel Klein, that the Attorney General should appoint a so-called "regulatory" counsel because of her personal political conflict—named by the Attorney General, but not pursuant to the statute because the statute had expired.

I wrote an op-ed piece about that, supporting the idea that he should appoint such a counsel. Then I didn't do any more particularly until, as I said, until March of '94. That's when Bernie was persuaded to step down. I was first approached by Vernon again. He asked would I consider the job? By that time I had remarried, my wife and I were both widowed at about the same time. Her husband was Joseph Kraft, who was one of the best known political columnists of the day and a client of mine. She is a painter and we had married in 1989, and I knew how difficult that White House counsel's job was and how wearing it was. She didn't want me to take it, either. So I initially said no. Vernon said, "Well, would you commit to stay for a year?" And I said, "A year is too long, but you're in a jam now and I'll help you out provided it's a maximum period of six months."

I thought, as I said at the time, it was an offer the President couldn't accept, but I guess he didn't have much of an alternative and he did accept it. I served this limited period from March of 1994 until September of 1994. It's very hard to believe that that is actually seven years ago.

Riley: Your connection to the transition was entirely through Vernon Jordan?

Cutler: Yes, Vernon and Chris. They were both very good friends and they were the co-chairmen. And this little task force or whatever that I served on was about the organization of the

White House.

Riley: Do you recall who else served with you on that?

Cutler: There were a number of people. Several people by that time had written books about how to organize the White House. A couple of them were there and—I'm not quite sure, but I think Ben Heineman was there. I'm not certain of that. He had written a book on the subject.

Young: Were the books of any use?

Cutler: Ben's is a very good book, an excellent—

Young: *Memorandum to the President.*

Cutler: Yes. And we had one paper on—I don't remember at the moment who wrote it—but basically it was a very good paper about how you would structure the White House.

Riley: And were your recommendations for a strong Chief of Staff? As I recall, there were debates going on.

Cutler: Yes. Strong Chief of Staff, strong White House counsel. Access by the counsel to any kind of meeting he wanted to go to. The counsel had to be someone the President was personally very familiar with and had full confidence in.

Young: Who was the client who wrote that task force report?

Cutler: When you say, "Who was the client?"—

Young: Was it intended for the President, or intended for—?

Cutler: I was never in any meeting with the President during the transition period. As I said, we'd met socially. Our little task force worked really for Vernon and Chris and they took part in some of the meetings.

Riley: There was some press scrutiny, at the time, of the President's timetable in appointing a Chief of Staff. A lot of the Cabinet officers were appointed fairly early, but my recollection is that the Chief of Staff wasn't appointed until fairly late. Do you recall being concerned at the time about the timetable the administration was using for filling its positions?

Cutler: I don't recall, actually. But as you say, it came very late and it turned out to be [Thomas] Mack McLarty.

Young: As I understood it, the priority in the appointments—I'm still learning—was on the Cabinet appointments in terms of time, and that the White House staff appointments, Chief of Staff, did not come until fairly late in the game. Which has been noticed by a lot of students as the wrong way to go about it, but that's neither here nor there.

Cutler: I don't think there is a right way. Every President comes new to the job, full of ideas, thinks he wants a particular structure, and then finds because of the pressure of events, people come at him in different ways. But one thing I do remember is that very early on Zoë Baird had been selected to be the White House counsel. It was only after the President was having trouble finding another woman candidate to be the Attorney General—Brooksley Born, who had been a very prominent ABA [American Bar Association] person, was considered for a while and dropped. I think they went through several other potential women as Attorney General and they decided to make Zoë Attorney General.

Had she been appointed White House counsel, the whole business about the green card and the status of the sort of daycare helper that they had would never have come up as a major problem, because there would never have been a hearing. The White House counsel's appointment does not require Senate confirmation, although if you fast-forward to today, that's become a big issue, whether a member of the White House staff has to testify before Congress or not. All of us did testify. I remember, in the Billy Carter days, and a number of us testified in the Clinton period.

Stephen F. Knott: Were you surprised at the reaction to the Zoë Baird nomination, the controversy?

Cutler: We were all surprised, all of us. It was a combination of what was probably forgetfulness—and I'll be off the record on this for a minute— [OFF THE RECORD]

Nancy Kassop: In reference to that, what do you think the origin was for this vicious reaction to her appointment and to the concern for these day care issues?

Cutler: I don't think it was an organized plan of Clinton haters or anyone else, or Zoë Baird haters. I don't think there were any at the time. I think it was just a reaction of working women. I remember that Roger Wilkins' wife, Patricia King I think her name is, wrote a very strong op-ed piece in the *Washington Post*—how could she have done this, et cetera. But it was just spontaneous, it was a grass roots objection to a very successful woman who had a problem with her daycare worker. We'll run into another one as we go along, of course, with Steve Breyer, but there we managed to resolve it.

Kassop: But you didn't think it was a political opposition.

Cutler: No.

Russel L. Riley: Can I dial back and ask you a question about a tantalizing meeting that you touched on with Ross Perot?

Cutler: Yes.

Riley: You said that you came away from that meeting with a sense that this was not somebody that you wanted—?

Cutler: I'll give you an example. That day he was meeting with his small group, very good Texas people, most of whom worked for him at EDS [Electronic Data Systems]. The topic of the day was, who should he pick to be his vice presidential candidate? And he said, "Does anyone know Colin Powell?" I said, "I know Colin Powell." Perot said, "Do you think he'd be interested?" I said, "I don't think he'd be interested, but he'd be very good if you could get him."

Perot then said, "Well, who knows him best? Who is his closest advisor, best friend?" I said I thought it was Richard Armitage, who is today the Deputy Secretary of State, picked by Powell, really. And if I had said Adolph Hitler, I couldn't have done any more to finish off Colin Powell. The reason was Perot had wanted to send his paratroopers over, his green berets, to rescue some of the missing-in-action in North Vietnam. Armitage, who was then in the Pentagon, was Perot's principal obstacle to a private expeditionary raid like that. That was enough for me. I didn't want him carrying the football. [laughter]

Riley: But you had been down to see him? This must have been fairly late in the political season.

Cutler: It was April or May, I think. Of course, it turned out that Perot really set the stage for Clinton. First, he hated the Bushes. He really hated the Bushes. He thought that they had interfered with the wedding of his daughter, that they had put FBI [Federal Bureau of Investigation] agents around the house or some damn thing. I forget exactly what the charge was. And he was the attack dog in the three-way presidential debates. He was the one who kept attacking Bush and left it open for Clinton to occupy the centrist position, the more moderate position. So Perot made Clinton look very good, and he weakened Bush. Of course most of his support would have been Bush votes. You never can be certain of that, but I think it's very clear.

Riley: Did you go down to this meeting with the idea that this might be somebody who you would—?

Cutler: Well, his two main lawyers were very close professional friends of mine. They just wanted me to meet him and see if I'd be interested in supporting him, sure. And I took a few lectures from my Democratic friends for even going down there because they thought he was an obstacle rather than an asset.

Young: There was a time when Hamilton Jordan even signed on to work with him.

Cutler: Hamilton went to work for him, [Ed] Rollins, who worked in the Reagan White House, went to work for him. Marilyn Berger, who is married to Don Hewitt, got interested and went to work for him.

Riley: It's a fascinating case historically, because of the extent to which—

Cutler: He's a very original character, there is no doubt about that. He'd been a General Motors director—one of his businesses was bought by General Motors. Every General Motors director gets a new car every 90 days so he can sample the entire line. It's so they'll know what the vehicles are like and how they work and so forth. These cars are supplied by orders out of Detroit and they're delivered by the local dealer, and of course they're tuned up like racing cars.

They're absolutely perfect.

What Perot would do is he'd go to the Buick dealer, or he'd go to the Oldsmobile dealer, and he'd see a car on the floor and he'd say, "I want that one." He did it deliberately to see what the ordinary public was getting. He found several of his 90-day cars had a problem of one sort—they weren't exactly lemons, but there were lots of things that didn't work, or were not as advertised. And he drove the GM management crazy. They finally bought him out.

Young: This is another question about the transition and about appointments. You referred to the fact that the attorney generalship was an office in which President-elect Clinton wanted to have a woman. Did I hear that correctly?

Cutler: Yes.

Young: Could you talk a little bit about his philosophy or strategy of appointment, about the diversity guideline for appointments. Were there other positions, for example, that were earmarked for—?

Cutler: Well, I don't think there were other positions in that sense that were earmarked, but the policy of appointing women was driven—I'm sure the President agreed with it—but it was probably driven by Hillary [Rodham Clinton]. It was a very sensible policy. His voting base had a very substantial number of women in it, as you know. He believed in freedom of choice, professional careers for women. He'd married a professional career woman. But I don't think he came in believing the Attorney General must be a woman. I'm pretty certain he wanted at least one of the four major jobs for a woman. I forget how many he named, but he probably had a minimum of three or four in his Cabinet, didn't he?

Kassop: That also then leapt over into his judicial appointments as well, where diversity, particularly diversity for minorities and women, was important.

Cutler: Same thing, sure. But all Presidents do that. I would bet anything that—well, I'm practically certain that if President Clinton had gotten a third appointment, he would have picked a Hispanic. In fact we named a couple of Hispanics to the court of appeals to get them ready, so they'd have a judicial record if another opportunity came. I would bet that if President Bush gets more than one appointment, he will name a Hispanic. And it makes a lot of sense. I would think any good President would take that into account.

Riley: You were probably something more than just an interested bystander during the first year of the Clinton Presidency. Can you tell us a little bit about your thoughts as you were watching that first year unfold? Your sense about the successes and failures, or areas where you thought they were doing really well, or places where you thought this is—?

Cutler: Well, where they did really well, no question, was the whole policy of being centrist Democrats with responsible fiscal and tax policies. There were many people who wanted to spend everything available on rebuilding our infrastructure. There were a zillion different demands for highways, for ghetto rehabilitation, for all sorts of worthwhile purposes. And

Clinton was very favorably disposed toward all of that, but thought it was critically important to get hold of the public debt. He was persuaded by Bob Rubin and a number of others to do that. And that, I think, was the centerpiece of the rest of his Presidency from a domestic point of view.

On the other side, within the first few days they issued that Executive order, the "Don't Ask, Don't Tell"—the Executive order for gays in the military—which I think was a disaster. I think they would all agree by now that in retrospect, putting Hillary in charge, as the First Lady, of a legislative program that was going to be extremely difficult politically, economically, and in every other way, was probably a mistake.

Kassop: Did you as White House counsel have anything to do with health care as it went through Congress in terms of negotiations?

Cutler: Yes. Remember, there was this huge litigation about the health care task force and whether or not it was subject to the Federal Advisory Committee Act. If so, the minutes had to be public. That was a major lawsuit that went on the first couple of years.

Kassop: Was the White House counsel's office then involved in defending in that lawsuit?

Cutler: Very much so.

Kassop: That didn't go through private lawyers, that was—

Cutler: The defense had to be put up by the Justice Department of course, because the attack was under FACA [Federal Advisory Committee Act] for failure to disclose minutes, et cetera. And the ruling was it was not subject to the FACA because the First Lady was on it and she was in effect a government official for purposes of FACA and all other purposes. There is no question Presidents' wives, first ladies, play a major part in guiding and stabilizing their husbands, the Presidents. I remember Rosalynn Carter sitting in the back of the Cabinet meetings on a regular basis. But the notion that you put her up front and send her to lobby Congress on a very difficult policy, which at one and the same time was going to provide national health insurance for all and be cheaper than what we were already spending, which nobody is ever going to be able to figure out how to do, was probably a mistake.

Knott: Were you consulted at all unofficially during that first year, either by Bernard Nussbaum or anyone else in the White House? Did they occasionally just pick up the phone and ask—?

Cutler: I knew Bernie very well.

Knott: You did.

Cutler: I would see him from time to time and as I said, I would see Joel Klein on these independent counsel issues. I had been involved in the reaction of the American Bar Association to the "Saturday night massacre" back when Archibald Cox got fired, you remember, by the President [Nixon], and had been one of the group campaigning for the independent counsel law as a result. Although, at least in my version, it would have been a counsel selected by the

Attorney General rather than by a special panel of the court.

In fact, if you look back over history, the independent counsels who were attacked as overzealous, or abusing their role, were all appointed by the court. All who had been appointed before the law was passed and after its sunset, those who were appointed by the Attorney General, mostly turned out to be quite good people. Bob Fiske is the best example of that.

Kassop: As long as we're talking about the independent counsel statute and the fact that as you said, you'd been an early supporter of drafting one after the "Saturday night massacre"—but then also, your position on the independent counsel statute had changed.

Cutler: Oh yes, it's changed. I think there is a true dilemma about preserving the independence of the Attorney General, who is the President's man. The President is the executive under our Constitution. We don't have an executive branch, we have a chief executive, who has a number of people helping him be the executive. The Attorney General works for him.

When you get a situation where the President is accused of misconduct of some sort, or the President's wife, or a member of his family, such as Billy Carter, or a Cabinet member like [Mike] Espy, for example, it is very difficult for the Attorney General to distance himself or herself enough from the President to satisfy the public that there will be a full, fair, and just investigation. So you need something. To me the best something was always, let the Attorney General select somebody whenever he or she has a political conflict of interest, or a personal financial conflict of interest. Or turn it over to some career person in the Department itself. One study commission, I think it was the Miller Center Commission, came to that same conclusion. Griffin Bell was a member of that group. You remember this I think, don't you?

Young: Yes.

Cutler: But Clinton had come into office, committed in his campaign to restoring the statute requiring position of independent counsel to be billed by the court.

Kassop: I guess the issue is not only the appointment but also the removal clauses, how that would work.

Cutler: Of course, this is one case in which [Antonin] Scalia was absolutely right, because the whole theory of the [Alexia] Morrison case[1] is that it is all right to have an independent counsel appointed by the court. It doesn't violate the appointments clause of the Constitution because that independent counsel is an *inferior* officer, as if he were a third assistant clerk or something, in the criminal division. The fact is, once you've appointed an independent counsel, even though he is now under Morrison, subject to removal by the Attorney General for various kinds of misconduct, the Attorney General cannot in practice remove him except at an enormous political cost.

Kassop: Wasn't the idea also that it was to be somebody who had already made their career and it was not somebody who would be—?

[1] *Morrison v. Olson*

Cutler: A man on horseback. It was Tom Dewey, it was the successful prosecutor who goes on to be Governor, Senator, President, God knows what. And we have a few of those, we've had them in the past. Ken Starr was very seriously considering running for Senator from Virginia when he was first appointed.

Riley: Did you have conversations with the President before your appointment as counsel?

Cutler: Yes.

Riley: Can you tell us a little bit about what he was looking for from you? And conversely, other than the question about the amount of time that you would devote to this, what your sense was back to him about what it is that you wanted to accomplish in this position?

Cutler: Well, he had a hole to fill. I don't know how clear he was in his own mind what he wanted a White House counsel to do, but I had been through this question with President Carter. When I was recruited by President Carter, which was also in the middle of an administration under fire, I said to him, "What do you expect your White House counsel to do? Is he just to defend you? To investigate scandals or write executive orders, or does he have pretty much free roaming power over every legal issue that arises in the White House?" And he said, "I want you to play a Clark Clifford role."

By that time Clifford I think had written his book. Clifford had been the White House counsel under Harry Truman. Nobody in the Carter White House remembered by this time exactly what Clifford had done, other than he had persuaded President [Harry] Truman to recognize Israel and served as an election campaign advisor. So I got that in writing from President Carter, that my role would be a general roaming role over everything that was going on. Every time I had a problem, and I had a lot of them with [Zbigniew] Brzezinski and others, turf problems of one kind or another, I would go in to him or I'd go to Hamilton [Jordan], or I'd go to the President and say, "I think President Truman would have had Clark Clifford at this meeting." Since I was the oldest person there by far, nobody would contradict me. So I did have that sort of conversation with President Clinton and he said, "That's the sort of role I want you to play." This time I didn't get it in writing, but it still worked.

The whole job, the fun of this job, is what I call the offensive part of the job. That is, law making, decision-making, policy guidance, rather than the defensive part of the job, which is defending somebody who made a personal mistake, or is accused of one.

Young: You mentioned, did I hear correctly, that you were approached by Vernon Jordan about the counsel's position?

Cutler: Yes, and then by Mack McLarty.

Young: OK.

Riley: Had you had conversations with Nussbaum about his resignation?

Cutler: Before he did it?

Riley: Yes.

Cutler: No. No. If I can go off the record again for one minute. [OFF THE RECORD]

Riley: Did you have conversations with Nussbaum after his resignation about transition things?

Cutler: Yes, quite a few.

Riley: And those were mechanical, logistical conversations or were they—?

Cutler: Oh no, they were more than that. He was full of introspection as to, "What did I do wrong? I was right about Judge [Louis] Freeh." Remember, they had just succeeded in getting Judge Freeh named to be head of the FBI. They had just gotten—I think I'm right about the timing on this—I think they'd just gotten Ruth Ginsburg appointed to the Court. I think it is about that time, the same year. But his Waterloo was that he had clearly not wanted to have an independent counsel.

Looking backward, he might have been right about it. He has a story he's told publicly. This was in a panel discussion of former Attorneys General and former White House counsel, down at Mercer in Macon, Georgia, which is Griffin Bell's law school. The story was, suppose the President comes to you, you are a friend and advisor and he says to you, "X is my lawyer. I have complete faith in his judgment. He is very sensible. Whenever I'm in trouble, I always go to him. Not only does he have good judgment, he's totally loyal and dependable. My question is, should I make him the Attorney General or should I make him the White House counsel?" Bernie said his answer would be, "You mean he's totally loyal and you trust his judgment completely? I wouldn't make him either one, I'd name him as independent counsel." [laughter]

Knott: Again, during that first year when you're on the sidelines in a sense and you're seeing the Vince Foster episode and Whitewater started to emerge, and I believe Travelgate is starting to percolate at this time—

Cutler: Right.

Knott: What was your thinking as far as these so-called scandals? In other words, was there a poisonous atmosphere in Washington that had been there for some time, or was this a new development directed particularly at the Clintons? Do you have any—?

Cutler: Well, it was probably some of both, really. Every White House comes new to the game. I've written about this before. Every new President comes in with a zillion obligations to people who helped him get there. It isn't as if General Electric had bought a company and brought in a team of fifteen people who had worked together for their entire business careers at General Electric. Even the key campaign people in California don't know the key campaign people in New York. They all come together in the White House and they all think that at a minimum,

they're the Chief of Staff. They're the President's right hand. They have a great deal of difficulty working together and building themselves into a team.

And all of them talk freely to the press. This is a problem there is no way to solve. If you've come to Washington, you've helped the President get elected, and you get called up by the White House reporter for the *Post* or the *Times,* the last thing you're going to do is say, "I don't know anything about that"—admit you're out of the loop. So you sort of ad lib and you give your opinion. Or it may be something you have worked on, but you're being opposed by somebody else in the building. So you leak to that reporter what you think and who is opposing it and so forth.

It takes any White House six months to a year to get itself organized. I think in the Clinton case, he also during his Arkansas experience had built up a political opposition who were determined to destroy him. Of course, they didn't destroy him anyway, in the end, but they certainly tried. It's certainly true of the whole Paula Jones story. But he also had flaws that increased his vulnerability.

Knott: Do you have any reflections as to why you think these people felt such animus toward him?

Cutler: They were bitter political enemies who had run against him and lost.

Knott: Particularly in Arkansas, based in Arkansas?

Young: Very early, there were bumper stickers appearing on vehicles around Charlottesville, "Impeach Clinton," very early, very early.

Cutler: Or read the books that Barbara Olson and others wrote. There were three or four such books, and everything that happened out there, including alleged CIA cocaine running through the old Mena Air Base, various murders, all sorts of things, were all attributed to the Clintons. And 99 percent of them never happened.

Riley: And you've got somebody like Jerry Falwell out there peddling videotapes on his program about these very things.

Cutler: Yes, right.

Riley: I guess, part of Steve's question is trying to figure out why this particular individual, what was it about Bill Clinton as a person, that seems to have taken this to a completely different level. Are you of the opinion that it was just something that you could anticipate from somebody who had such great political success in a small state?

Cutler: It's more than that. It could be partly a degree of thoughtlessness about what he was doing, that he could keep on doing in Washington what he had done as a Governor. That other Governors had gotten away with before they became President, that many of his predecessors as President had had sexual adventures, and nothing happened politically. It never really affected

their presidencies. And there is the difference between the time when those issues were all off-limits to reporters and when they became on-limits.

I attribute most of it to Watergate. The Presidency carried a degree of public trust in the incumbent which Nixon threw away with Watergate. From then on, we've never really had that kind of abiding trust in a President.

Kassop: Following up on that as well, I wondered if you could talk about whether or not you thought there were perhaps two sets, maybe two or three sets, of explanations for this appetite against Clinton. One possibly because of his personal background, but also cultural, in the sense that he was sort of the poster child for the 1960s and a liberal lifestyle that was very rankling to conservatives. Also the institutional explanation that this goes back to Watergate, but perhaps even was continually fed with the opposition to [Robert] Bork's nomination during the Reagan administration and even perhaps [Clarence] Thomas's appointment as well.

In other words, were there personal, as well as cultural, as well as institutional reasons that all seemed to come to a head under the Clinton administration?

Cutler: There are some things you could cite in support of that, but I don't really believe that. And he was not deeply involved in most of those things. He wasn't publicly involved in the Bork appointment that I can recall.

Kassop: No, I didn't mean that he was personally involved, but that he was sort of the symbol for those who felt that things had gone sour at that time and this was a political reaction to the first Democratic President. They would have a chance to retaliate, in a sense.

Cutler: I don't think people felt that way about Gore, or that if Gore had become President, they would have felt that way about him.

Riley: Of course, Gore was a bit of a different case. I mean, having been in Vietnam and—

Cutler: Yes.

Riley: In that sense, I guess he was kind of inoculated from this but—

Cutler: I think there is no doubt, there is still a right-wing group in the country who think that we were right in Vietnam and that the country really abandoned our own soldiers. That's a very strong feeling in the South, no question about that. But it's probably also true that even though Clinton is a Democratic centrist, he is identified in the South—which was shifting from traditionally Democratic conservative to Republican conservative—he was and is identified as a populist and a liberal.

Young: Can we make a parallel with Jimmy Carter, who was also a centrist, wasn't he?

Cutler: Jimmy Carter was very much a centrist.

Young: Coming from the South.

Cutler: But Jimmy Carter wasn't identified with opposition to the Vietnam War. In fact, he was a submariner, a Naval officer. He had other problems that were different from Clinton's. He had a small stature, a high voice, didn't look particularly presidential. He came to office at the time of the second oil shock, the gasoline lines, and never really got over that.

Riley: Can you tell us what you found when you got into the White House? Did it look like you think it would look? I mean, there's kind of a reputation of this White House being populated by people who were not quite grown up yet and a sense that there was more of a free-wheeling atmosphere, or a more chaotic atmosphere to this White House than before. At least part of the conventional wisdom is that you were brought in to—

Young: Set things right.

Riley: Did you find that when you came in?

Cutler: He brought in people who knew very little about Washington and didn't learn fast enough. I think that's true. But it was equally true of Carter and other Presidents. Most of Carter's people had never been in a previous White House. And under Clinton, I think the only senior people in the White House who had served in a previous White House were David Gergen, and later me. I think that's right or it's close to being right. There were a few there who had worked for Carter, actually, and came back in.

Young: In the White House.

Kassop: OK.

Young: Not the Cabinet.

Young: With Carter there were a number of people in the Cabinet who did know the fine print of Washington.

Cutler: Oh, sure.

Young: A lot of them. Cy Vance—

Knott: Joe Califano.

Cutler: I once wrote an article called, "Two Cheers for the Revolving Door." I'm a great believer that the experience you get in private life helps you explain the private sector to government people, and the experience you get in government helps you explain the government and the government's needs to private industry, and to private people generally. And you learn from your experience in both sectors what works and what doesn't work in practice.

Young: Griffin Bell used to refer to Carter's White House staff as "government by children."

Young: So there are some interesting historical parallels between bringing the trusted young campaign people, who are there because they know outside Washington—

Cutler: And then you had people like Harry Thomasson, who had produced the film, *The Man from Hope*, and he wanted to take over the White House travel office. He had owned a charter service, some sort of travel agency type of service, and he wanted the White House travel office to contract out their work to his own company. And he wrote memos about it. Now, you ought to know that if you're that close to the President, you don't maneuver that way.

Kassop: How much of that disarray in the White House can be traced back to Mack McLarty as well, as the Chief of Staff? I mean, wouldn't one have assumed that he should have been presiding over this and supervising and monitoring?

Cutler: Well, let me go off the record again. [OFF THE RECORD]

Kassop: …more recently that there is this reluctance to leave anything in writing, to leave any kind of a paper trail, that White House staff—

Cutler: Yes, that's another whole subject. The answer is yes, that apart from national security matters, nobody keeps any notes any more. Nobody keeps a diary any more. But I assume we'll get back to that. Do you want to go into that right now?

Kassop: It's up to you.

Young: I think there are probably a few more questions—maybe I'm wrong—have you said everything to be said on the subject of the understandings between you and the President as to what you would do and why in the White House, aside from the understandings regarding the importance of the "Clifford Principle?"

Cutler: I think I have, yes.

Young: You had a fairly free hand from him.

Cutler: Yes.

Young: It wasn't an assumed—

Cutler: That's right.

Young: OK. Did you have another question?

Knott: I have a question. It's going back just a bit to something you just said and concerns more the transition and staffing in the White House. It's this question of the young people, the young campaign aides who were brought in to prominent positions on the White House staff, both for President Carter and for President Clinton. I guess I'm trying to figure out—is it loyalty that

compels these Presidents to reward these young people who were with them from the start? The lesson that you might need some old Washington hands to help you establish your place fairly early on seems to be something that these very smart men must have understood. Yet they staff their White House with these young people with little Washington experience. How would you explain that?

Cutler: Well, they do both. If you go to work in a political campaign, there's a certain amount of personal ambition involved in it. You may want to elect somebody because you think he's good for the country, but you want to take part, if you can, in what he is going to do. That's how you motivate people to go work for you. So that exists.

It's an exaggeration, really, to say that some Presidents pick nobody with experience and others pick only experienced people. They each do a good bit of both. The current President Bush, number 43, of course, having witnessed his father's experience, having spent the last year of his father's term in the White House, knowing [Richard] Cheney, knowing [Donald] Rumsfeld, knowing the others, picked a lot of experienced people. You could even get into an argument that he has got too many experienced people who are still back in the 1940s or in the Cold War.

Young: Yes, this is true, even with a lot of the White House staff appointments. They go way back. They have a history. Carter used to—in answer to such a question—said that he felt he ought to have people in the White House with whom he had had an actual working relationship. He preferred this with Jody [Powell] and Ham [Jordan].

Cutler: Jerry Rafshoon is another example.

Young: Yes, whereas in the Cabinet, that was a different—there he felt he ought to have people with knowledge. That was his Washington strategy, for someone who had run against Washington. And even then, there came a point where he saw that was not working, I think especially after Bert Lance, who was more or less Carter's equal, one of the few in the White House. And Lloyd Cutler filled a hole in that White House also.

Cutler: I knew Carter because I'd been one of the founding members of the Trilateral Commission and Carter was a member, as a retired Governor. In those days, when we'd go to our meetings you would sit more or less alphabetically. The distance between Carter and Cutler is only two or three chairs. So we spent a week in Japan together, we spent a week in Europe together. But I was not part of the early Carter administration.

Riley: Have you given thought to whether there ought to be a larger permanent substantive White House staff? Is that an idea that you think has some merit?

Cutler: I think it has merit but I can't imagine it happening. In part because—all of you know this very well—if party control shifts in the British government, or the French government, or the German government, there may be 100, 200 top jobs in the government that change hands. Everybody else is the same. They have their true Civil Service, which can be a dead hand on innovation, energy, reform and so forth.

We have something like 6,000 jobs that change hands. Half of those are various kinds of part-time commissions and things, but the other half, some 3,000, most of which require confirmation—I mean, that's an enormous number. Of course, we have a much bigger government. And they are going to be unfamiliar with one another. That's just part of our system and it is something we have to accept.

If you talk to Paul Light, he's written a good deal about this subject—how to reinvigorate the Civil Service. The spoils system may have been better. We still have a kind of spoils system ourselves, in the sense we have all these appointments to make.

Young: Well, do you want to get into the previous question about record keeping and so forth? Of course, one of the reasons we have heard from some of the people we've interviewed in the Bush and in the [Ronald] Reagan administrations is very gratifying because it speaks to the question of how much there is that should be known that one cannot find out from the records. So oral history is important, the spoken record, which has become important to elucidate or fill some of the gaps in the records.

Jim Baker and others have been quite public in their statements, in their advice. "Don't keep paper. Don't keep a diary." Documents in presidential libraries have in past times been the principal nourishment for research on earlier presidencies, and one wonders at the quality of the documentary evidence that we're going to be finding from now on. But let's get on the subject, that's the oral history rationale nowadays. Let's get on the subject of the substantive issue here, about record keeping and diaries and so forth.

Cutler: Let me just give you my biases about it, because I think myself that there should be more use of executive privilege, especially on policy documents, advice to the President, questions back from the President on substantive issues, policy issues of one sort or another. Most White House counsel have taken that position. In fact, a whole elaborate procedure has been worked out between the Office of Legal Counsel and the White House as to when it would be proper for the President to invoke executive privilege. For the last 20 years or so, he has only done it after the Office of Legal Counsel has written him a memo saying this is a proper case in which you may invoke executive privilege.

The problem is, if the President invokes executive privilege, particularly when the issue relates not to should we invade North Korea or Iraq, but to a charge that a Cabinet member failed to sell his stock that he was supposed to sell, or didn't tell anybody about his stock, the President he tries to invoke executive privilege has to pay an enormous political price. If he says, "I won't give you that material," he is hiding something. And the mere fact that a demand is made for a document and is rejected, a huge political price is paid by the President.

Most Presidents, after a little bit of maneuvering back and forth, gave in. Particularly when it's the Congress or an independent counsel that is asking the questions. And the courts have said, I think quite properly, that they should stay out of all this. In fact, the court decisions in the District of Columbia are that it is up to the other two branches to work these things out as a practical accommodation, one way or another. You see this playing itself out again today, about the energy task force. In the end they'll give the material or strike some compromise because it's

too costly politically not to do it.

So that's where I come from. One consequence of all of this is that a number of advice memos do get made public. There is such a thing as the iron triangle between the Cabinet agency, the congressional committee and the industry that's being nurtured in effect by that Cabinet agency. They're always wanting to rush in and hand documents to the congressional committee, for example, without checking with the White House. We put in—and I think it has happened before, I'm sure it is true today—we put in a set of rules about how advice documents cannot be made available by an agency without the permission of the White House counsel.

As a result, since so much does get out, people stopped making memos. I suppose it is true that in the National Security Agency area, there is still a pretty good written record, there are minutes of meetings and everything else. But in all the other policy areas, people just stop. People as important as Sandy Berger, for example, would say, "I just stopped writing memos." While that still leaves you vulnerable to being called up yourself and having to testify, if you didn't create your own notes, you're better off.

People have also learned, especially recently in the White House, that when you try to wipe out your documents day-by-day, or you destroy the notes of your appointment calendar at the end of the day, you can't get them out of the goddamn computer. Actually, you can get them out, but most people don't know how to do it. Of course now, the typical subpoena will define a document as, "Notes, diaries, this, that and the other thing," and they'll also subpoena the computer. The inner hard drive has to be turned over and probed to see what's buried down in there.

This is what happened to Jim Baker. I was Jim's lawyer in the independent counsel investigation at the end of the Bush administration, when he was Secretary of State in the Bush administration. He'd have an appointment list, an agenda sometimes for the meetings, and his secretary would wipe them out on a day-by-day basis. The hard drive was subpoenaed by the independent counsel, and sure enough, they were in there. Fortunately, there was nothing incriminating in any of them, but it was a lesson. So people just stop. And that's, of course, as you say, a great loss to history. You think of the hundreds of letters that Elihu Root and Teddy Roosevelt sent back and forth, they'd write to one another six times a day.

Knott: On this issue—I'm pulling you out of context here—but do you have any comment on the current administration's efforts? They seem to be drawing a pretty stark line in the sand to try to rebuild perhaps some of this executive confidentiality.

Cutler: If I were there, I'd be urging them to do it. But as soon as you get into territory where the accusation relates to somebody's alleged personal misbehavior, it's very difficult. There I think you have to say, "We'll make everything available."

Riley: Did you ever find it necessary when you were serving as counsel to suggest to people that they not keep notes? Or was it just a part of the culture when you came in, people knew better?

Cutler: Well, I got asked by one very key person, "Do you mean they can subpoena my

diaries?" And I said yes. It was a shock to him and I believe it's the last diary entry he ever made. But he was someone who never got accused of anything bad personally, at all. I once had to ask the President, "Do you keep a diary?" Fortunately, the answer was no. Bush's diaries got subpoenaed. Reagan's diaries got subpoenaed.

Riley: Then there was this Treasury, younger Treasury—

Cutler: The Treasury diaries.

Riley: [Joshua] Steiner, that got caught with some incriminating—now you were actually counsel when this came up?

Cutler: I was appointed to—one of my first jobs as counsel was to do our own investigation of whether the previous contacts between the White House and the Treasury had been improper. The so-called "heads-up" contacts, which I assume we'll get to.

Young: Nancy?

Kassop: I was actually going to just go back briefly to the issue of executive privilege and the fact that it seems that the court decisions in the Clinton administration on executive privilege, what you were just saying was that when it is somebody's personal matters, that those should not be divulged, that there should be privilege on that. But when it comes to policy advice, that that should be able to be shared, was that correct?

Cutler: Just the other way around.

Kassop: It was the other way around, OK. I think I'm getting tripped up in my own thoughts, so let's go on to something else then, sorry.

Young: Russell?

Riley: I guess at this point, I could ask you a few questions about the transition, your transition into office and what you discovered once you came in. I don't know whether we'd finished up on that point. Whether there were—

Cutler: No. I guess point one is, there was an excellent deputy there, and that was Joel Klein, who later went off to the antitrust division. On the other hand, there was also Linda Tripp, and she had been Bernie's secretary. She had maneuvered Bernie's previous secretary, who had something of a personal problem, out of her job. She was sitting there outside of Bernie's office. When I was appointed, Linda Tripp came to see me and said she would like to carry on. She said, "I can be a real help to you because I was here in the Bush days. I know every skeleton in every closet, I know who is out to get you, I know who you have to watch out for, who you have to check things with, and I'd love to have the job."

Fortunately, I had a perfect excuse for turning her down, because my own secretary of ten years wanted to come with me into the White House. I'm used to her and she knows what kind of

phone and other records I like to keep and so forth. But can you imagine if I'd started out on that job with Linda Tripp as my secretary, and there she would be listening to all the phone calls, maybe taping them, God knows what she would have done.

Young: You said you had an excuse, but I gather that you would not have hired her even if you didn't have an excuse.

Cutler: Correct.

Riley: She stayed for a while?

Cutler: We told her we had no room for her in that West Wing area, because I was bringing in a secretary and because of the state of the computers and the space shortage. Are you familiar with the West Wing offices of the counsel? There are two offices, more or less adjoining, and a common secretarial and file entrance where there are four desks and three computers. The three computers could talk to one another and they were put in at different times. I think all of this must have been repaired, this was seven years ago and the place was just a shambles. We had trouble finding files. Of course, this was after [Vincent] Foster's suicide, among other things. But as I said, Joel was very, very good. There were a number of other excellent lawyers on that White House staff.

Kassop: If I could go back, I think actually I did manage to straighten out my thoughts about the question on executive privilege. I'm not trying to belabor the point, but it occurred to me that now that I think I have it straight, that you said that executive privilege should be used on policy matters but not on the personal matters. And yet, what I think was trying to say, was that during the Clinton administration, the administration was arguing for executive privilege over personal issues, and so, in a sense, the—

Cutler: Why do you say that?

Kassop: Well, on his question of immunity in the Paula Jones lawsuit. That's not executive privilege, but it is the idea of not allowing the President to be subject to a court process.

Cutler: Well, immunity from suits is an entirely different question. That's not withholding any document.

Kassop: OK.

Cutler: The kinds of things that should not be produced are, as I said, advice memos, or drafts of advice memos, or legal opinions prepared by a department, or drafts of that legal opinion. Or you want to publish a formal legal opinion and a congressional committee might want copies of the various drafts of the opinion before it was finalized. That's the sort of thing that to me clearly ought to be privileged. I really think, if you went to court on it, you might have to pay a political price, but if you went to court on it you'd win the case.

Young: I understood that in the past, it was fairly well established that where an individual from

the executive branch, say in a department, is called upon to testify, let us say on an appropriation for their department, they were not supposed even to say what they asked for, they were not supposed to divulge that, because their testimony was supposedly limited to what had been approved as compatible with the President's program and in the President's budget. So that the argumentation within the executive, about what funds for what purposes were to be needed, were not supposed to be divulged in actual spoken testimony.

Cutler: I think that's right.

Young: Is that still true? There are ways to leak—

Cutler: I'm not aware of a specific instance, but there are certainly cases, some where the government has waived it. For example, money for strengthening security in our embassies abroad. The Under Secretary of State was lobbying Congress for more money two years before the first attack, and she was turned down by OMB [Office of management and Budget] or by an appropriations committee. Now, of course, they can have anything they want to for that purpose.

Riley: Can I go back and pose one more general question about the transition? You've told us basically what you found in your office when you came in, but I guess my more general question is about the morale in the White House and the operating style of the White House as you discovered it, by comparison with your experience in the Carter administration. The public perception is you were brought in to kind of stabilize an environment that wasn't—the perception is it wasn't working very well. Did you find that it wasn't working very well? Was it a bigger job than you might have thought you would encounter?

Cutler: The biggest difference was the amount of your time that got spent on policy issues, what I call offense, and the amount of time that you had to spend on defensive issues.

Riley: OK.

Cutler: In the Carter White House it was 80 to 90 percent on positive issues, substantive issues. We did have a Billy Carter problem and that took some time. But that was the only serious one. It was always true, it's true in any administration I guess, I remember the way Carter put it, was that "Every farmer in South Georgia had a foreign government that wanted him to act as its representative doing something or other." There were people like that in the Clinton administration, there always are. In fact, Hillary's Little Rock law firm, you know, was going to set up an office in Washington.

Young: Well, there was, Ham Jordan was accused, Clark Clifford served as his counsel.

Cutler: No, Hamilton?

Young: Hamilton was accused of—

Cutler: But Clifford had nothing to do with that.

Young: I thought he appeared, no?

Cutler: We found Stephen Pollak, who was a very good lawyer in Washington. He had served, I think, in the Kennedy White House.

Young: And Bert Lance, there was a problem with Bert Lance too, just as some defensive issues that came up. But this has become, by the Clinton time, this has become a major part of the work, is that what you were saying?

Cutler: A major part of the work was dealing with the aftermath of Travelgate, dealing with the health care issues, dealing with the so-called "heads-up" or alleged cover-up, which was an accusation—when we investigated these contacts between the White House and the Treasury, and the Treasury investigated them through their own inspector-general, and we agreed to share information—that is, we would let an inspector-general sit in and interrogate a White House person, so long as we got transcripts of memos of the inspector-general interrogating a Treasury person. We were in effect accused of exchanging information between counsel in a way that we could prepare our own people with advanced knowledge of the questions that might be asked, which was ridiculous.

I mean, here I was being accused of conspiring with Lloyd Bentsen, who got confirmed, I think, within hours of the time he was named. They didn't even have a hearing, they just confirmed him.

Riley: Is it putting words in your mouth then to say that to the extent that there was—I think the term that you had used in some of the materials we read was a "helter-skelter environment," that there was "always a helter-skelter environment in the White House." To the extent that that was perhaps more so in the Clinton case, was it because of the defensive nature of so much that they were having to do at the time that you came back?

Cutler: Well, it was probably helter-skelter on both sides. But when I came into the Clinton administration, I think the foreign policy side of it was working pretty well. On the domestic side, a lot of things had really gotten done. Certainly, the economy had gotten turned around, among other things. But it's all helter-skelter. Staff meetings are always helter-skelter.

Riley: More so than your experience with Carter?

Cutler: Yes.

Riley: Can you tell us a little bit about that?

Cutler: In Carter's case, remember there's more than 20 years of difference between the two of them. But in Carter's case, the White House staff was still small enough, and the notion of the Chief of Staff as doorkeeper was still untested enough, so that we would meet with the President every morning, roughly from 7:30 to 8:30. Perhaps six or seven of us, no more than that, reporting on various things that had happened, so you were *au courant* right away.

In the Clinton White House, the senior staff was so big that we couldn't even fit into the Chief of Staff's room. Every seat was taken around the table, people would perch on the side of an armchair, they'd be running in and out. George Stephanopoulos would never stay more than five minutes for anything. It was helter-skelter in that sense. And the President was not in the meeting. I mean, you had no trouble getting access to him if you gave him a memo or said you needed to see him, you'd get a response right away. But he did not attend the Chief of Staff meetings.

Riley: The conventional wisdom is that this was a President who wasn't terribly disciplined with his own time. Is this something that you found to be true when you came in?

Cutler: Disciplined or undisciplined?

Riley: That he was not very disciplined.

Cutler: Not disciplined, that's true. Especially true at night. I can remember many, usually social events of one sort or another, come and see a movie, this that or the other thing, when you'd be there till one o'clock, two o'clock in the morning, because he'd never stop talking or showing people around.

Kassop: In talking about Clinton, you mentioned before that he had certain flaws that were well known. Picking up on what you've said too, are there positive attributes about him that you would like to—?

Cutler: Oh enormous, enormous. He was probably—he was one of the most articulate Presidents we've ever had. His ability to empathize, to feel your pain was extraordinary, and so was his ability to analyze things politically. He had a very quick mind and you'd get memos back from him with that little left-handed check up in the corner and he could follow what you were doing very easily. He could even sit in meetings where he was more listening than talking and he'd be doing the *New York Times* crossword puzzle, which I do too, but not in meetings. He was better at it than I was.

Young: I think tomorrow, we can also come back to some of the flaws and some of the strong points, or the real "Clinton up-close" as you saw him and at work. I think if we go to this subject and treat it exhaustively today—we have some other details to get out of the way. First, we're going to have a break at about twelve o'clock. We've got about an hour to go. Or we can have it earlier, Lloyd, if you want.

Cutler: No, twelve is fine.

Young: What about talking about the RTC [Resolution Trust Company] business? You said we'd come back to that later. Why don't we move to that now, and your role in that, particularly Whitewater?

Cutler: Yes.

Young: You might take us through that as you found it and worked it.

Cutler: When I first came in, the burning issue of the day was, Did the Clintons do something personally improper relating to the Whitewater real estate properly? The background, if you remember it, was that there was something called the Re-something Trust Company.

Many: Resolution.

Cutler: Resolution Trust Company, which would take over the assets of failed S&Ls [savings and loans] and then sell them on the market and make deals to dispose of them. One of the failed S&Ls was Madison Savings and Loan. The Clintons had borrowed money from Madison Savings and Loan to make their Whitewater land investments. Their partner in these investments was the head of Madison Savings and Loan. I may be wrong on my memory, but I think in the beginning when they first made the investment, [James] McDougal had not yet acquired Madison, but later Madison took part in the financing.

There was a woman named [Jean] Lewis, I don't know if investigator is the right word, but she was in the Kansas City office of the Resolution Trust Company, trying to get people to look at this Whitewater thing as it related to Madison Savings and Loan. She got nowhere with it, including the Washington office of RTC, until she put down in one of her reports that among the people who should be interrogated were the President and Mrs. Clinton. That got everybody's attention and she went to the press with it, was called as a congressional witness and so forth.

It was at that point when I became counsel. The first thing I had to do was appear on three Sunday morning talk shows, or maybe four, I don't even remember, and say that so far as I knew at that point, at most the Clintons were wanted only as witnesses. There was no evidence and no allegation, really, that they had committed any kind of personal impropriety. They had just made a losing investment. That's what was going on at the time. Do you want to ask any questions about that? Because the next thing I would go into chronologically was the so-called "heads-up."

Riley: Go ahead.

Cutler: The Treasury had a general counsel. The Treasury also had Roger Altman as the confirmed Deputy Secretary of the Treasury. Roger is a very good man. He was much liked by everybody in the White House, including Bob Rubin. He had to be named as the head of the Resolution Trust Company. This is kind of an esoteric legal point. There is some statute saying that when there is a vacancy—there was somebody they had in mind for this RTC job, who they couldn't get confirmed, as head of the Resolution Trust Company. When there is a vacancy, under the Vacancy Act, it can only be filled on a recess basis by somebody who was already appointed an officer of the United States. So they made Roger Altman the head of the Resolution Trust Company, even though, as he himself pointed out, "If anything comes up involving Madison Savings and Loan and Whitewater, I'm going to have to disqualify myself."

The Treasury general counsel thought Roger should disqualify himself; Roger himself thought he should disqualify himself. He went over to the White House—this is all before my time, just before—to say to Bernie Nussbaum, to Harold Ickes, three or four other people in a meeting,

that, “I think I better resign as the head of the Resolution Trust Company because I’ll have to disqualify myself anyway if anything comes up to me involving the Clintons.” Bernie said to him, “You shouldn’t do it. Even though you would have to disqualify yourself, if you’re there, they’re less likely to make an attack on the Clintons than if you’re not there.” This episode was being investigated by Bob Fiske, the “regulatory” independent counsel.

Fiske issued a report concluding that nobody had violated any criminal law. I’m skipping a little bit here because before Fiske issued his report, we’ve done our own inquiries at the Treasury and the White House. Fiske said in substance, “There are policy questions, ethical questions, as to whether Altman should have resigned, but I leave those to other people. There’s no violation of any criminal law that I have found by anybody.” Then we had our own investigation, we presented our reports to the Senate Banking Committee and the House Banking Committee. The House Banking Committee was rather moderate about it all. I

On the Senate side, we had a good deal of trouble with [Richard] Shelby and a number of others as I recall, and Senator Bond, Kit [Christopher Samuel] Bond. Our report was accepted and made public, but the ranking Democratic Senators then said to me—this was the chairman of the committee and Paul Sarbanes—that the Committee was unhappy about Altman’s testimony and that he ought to resign now. And I had to be the deliverer of that message unfortunately, and Roger resigned.

Kassop: There was a lot of testimony then given to the congressional committees. You testified and other White House staff testified as well.

Cutler: That’s right. And we gave written reports to them.

Kassop: That’s not very common for White House staff to provide that kind of information to congressional committees, is that correct?

Cutler: Well, we go back to what we were saying earlier. Because it involved allegations of personal misconduct, we took the position that we would cooperate and provide all the information. As I said, we did that earlier in the Billy Carter years when there was a special select committee of the Senate appointed to investigate whether Billy Carter had done anything improper vis-à-vis the government of Libya.

Then just as that took up most of the summer, and just as that success—and I think it really was a success—was achieved, at that point the panel of judges, under the revived independent counsel law, decided to replace Fiske. Although the revised law allowed the panel to reappoint Fiske, they did not do so. You know that whole story. They put in Ken Starr instead.

Riley: We’ll want to come back to that. The Steiner notes was an aspect of this story. How did they fit in?

Cutler: He was called on to testify and to produce his notes. And his notes are a diary. I think it’s—here again, I’d have to go back and look—but either in his notes, his diary notes, or in Altman’s notes, Hillary is quoted as saying in substance, “I can’t handle this. And if we go back

into what happened in Arkansas, it's so endless that I won't be able to do my job on the health care panel," et cetera, et cetera, "We've got to have it stopped." And that was the gist of it. I forget now whether it's Roger's note or Josh's note. But that's one of the last diaries that we—

Riley: That was why I raised the question about when you first arrived, because my sense was that by the time that became publicized, everyone had a pretty good idea that that's a no-no.

Young: The Whitewater thing was really kept alive, kept alive, kept alive, until it was replaced by further allegations, wasn't it?

Cutler: Well, it kept going all the way through to impeachment. While most of the impeachment charges were not the Whitewater charges, certainly Whitewater was the start and everything else was a fallout of Whitewater. Paula Jones is a little different and starts in a different way.

Young: You came to the White House in March and Paula Jones filed her lawsuit in May, May 6th, and that raised a number of other issues, did it not? Legal issues about the answerability of the President, a sitting President, to things that occurred prior.

Cutler: Yes.

Young: And that is a substantial legal question too, I believe. Would you like to move to that?

Cutler: I thought we were going to have a 12 o'clock break?

Young: We do. We are. It's five after twelve.

Cutler: Why don't we do a five-minute break?

[BREAK]

Cutler: On this issue of how helter-skelter was the Clinton White House, there was this episode involving the fact that while the key White House personnel were supposed to be cleared within 90 days from a security point of view, they didn't meet that deadline. A number of the people who had already started work with a temporary waiver kept on working for a year or more. This was still a live issue when I came in, in March of 1994.

For the moment I forget the name of the official who had this responsibility of vetting, but he was someone who had worked in a bar, been a bouncer in a bar or some such thing.

Knott: Craig Livingstone.

Kassop: Yes.

Cutler: Craig Livingstone, who had minimal credentials to be a security vetter of any kind. Then, what really shocked me was to discover that according to the White House organization chart, he worked for the White House counsel. I didn't even know it and none of our people had

supervised any of the things he had done. But somehow or other, he got attached to the White House counsel's office. Now that's a good example of how helter-skelter we were.

Riley: That's a little different than we—

Cutler: I think we disposed of him shortly thereafter.

Riley: No parallels to that in the Carter White House.

Cutler: Not that I—

Riley: I'm being facetious.

Young: But that is quite an interesting thing, that a bouncer is in the counsel's office, unknown to him, and is charged with important duties of clearance and meeting a deadline.

Cutler: I don't think I ever met him until these stories came out in the papers about the late clearances.

Kassop: But then who would have hired him? Would it have been the Office of Personnel?

Cutler: Good question. Anyway, it wasn't on my watch. Long before I—

Riley: You can see what we're struggling with. If we begin with the assumption that every White House has a kind of helter-skelter quality to it, then what we're trying to do is make relative judgments about one White House seeming to be relatively more chaotic than another. At least the early returns on the Clinton White House, and indeed the journalistic accounts, seem to suggest that this was a place that often had an almost fraternity house quality the first year or so.

Cutler: This episode is certainly chaotic.

Kassop: Wasn't that also then the reason why they brought in Leon Panetta as Chief of Staff? In almost a similar kind of way as bringing you in, as bringing in the grownup, somebody who could impose some discipline and some structure?

Cutler: Yes, that's a fair comment.

Young: And somebody with at least some relevant Washington experience, I suppose, too.

Riley: Did you have conversations with David Gergen in the interim period after he came in and before you arrived?

Cutler: Yes. I'd known him for some time and I had talked to him when he was there before I got there. We did have at least one or two briefing sessions.

Riley: Right. And in your previous conversations, can you tell us anything about what you talked about? Did it relate to the—

Cutler: It was essentially how the place was organized, how decisions got made. A lot of it had to do with the torn up Foster notes that were discovered in the briefcase, because I believe he was traveling with the President in Chicago at the time when the briefcase notes were found in Washington.

Knott: Do you think it's a good idea for administrations to reach across the aisle and bring in someone from the opposite party? Not just in the Cabinet, but in a White House staff?

Cutler: Absolutely, especially if it's someone you know and trust. And I think actually Gergen probably did Clinton a lot of good. But think of [Franklin] Roosevelt and [Henry] Stimson and [Frank] Knox. Think of [Norman] Mineta, who President Bush has just appointed.

Knott: Right.

Young: [C. Douglas] Dillon and Kennedy.

Cutler: Yes, Dillon and Kennedy is a very good example. We should do more of that.

Young: There was not much reaching across the aisle, as I understand it, in Congress though, in dealing with legislative matters during the first term. The budget deficit reduction was done without a single Republican vote, [inaudible] to 161 some Democrats, it was a very close vote.

Cutler: It wasn't for lack of trying. They were always reaching, but it was one of those periods where they had a floating majority that would vote together on some things but not on everything. That's another feature of our system. Helmut Schmidt ran Germany for I think a five-year period with a margin in the Bundestag of two, but he never had a defection.

Young: We have several subjects, one is your dealings with Congress, on issues and in general, members of Congress. That has to do not only with some judicial selection issues, but a range of other issues.

Cutler: Yes.

Young: And it does strike me that perhaps more than most counsels, you were involved in the congressional side of affairs, perhaps for good reason.

Cutler: Yes, I wouldn't want to put a quantitative measure on it, "more than most counsels." I think I probably did more of it under Carter than I did under Clinton, because under Carter we had the seizure of the hostages, all the legal maneuvers and the rescue mission that went on afterward. I had to give an opinion on the War Powers Resolution, for example. I had to brief Congress about that.

But with Clinton I worked on various aspects of the health program, where we were dealing with

members of Congress. Occasionally I'd get called in because there was somebody on the Republican side that I knew I could work with. But I didn't have that much to do with Congress.

Young: On a number of the executive privilege issues, you would have to—

Cutler: Executive privilege issues, and when we got to the Supreme Court appointments, we had a lot to do with Congress there, including looking over members of Congress who might have made good Supreme Court appointees.

Kassop: Before we move to the judicial nominations, which seems to be where we're heading, just to recap, you would say that on policy matters you did not deal with Congress as much as one might have expected?

Cutler: I dealt with policy issues, but usually with other people in the White House. I dealt a great deal with Tom Foley, for example, on campaign finance reform. We had a bill back in '94, which was 90 percent of what's in McCain-Feingold [McCain-Feingold-Cochran Campaign Reform Bill] today. Our biggest opponents in getting it through on the Democratic side were the chairman of the Democratic National Committee and Tom Foley. And the reason was, of course, that while the Democrats were getting less money than the Republicans, incumbents by and large were getting more money than their challengers. The Democrats had never raised this much money before, they were getting in quite a lot. So we dealt with Foley on that.

We had issues related to RFRA [Religious Freedom Restoration Act], which the President took a great deal of interest in. And that went through and there were a number of steps, executive orders and other things that followed it.

Young: As long as we're on the subject, do you want to talk about judicial selection? At some point we'll get back to Paula Jones and the press and press relations as well.

Cutler: Well, judicial selections is kind of a long subject. Do you want to start that one now? Or does it matter?

Young: More than 35 minutes worth?

Riley: I think so.

Kassop: Yes.

Young: OK, we'll reserve that for post lunch.

Cutler: Or we can do it right now if you want.

Young: We can do Paula Jones now.

Cutler: All right. Paula Jones is, as I said earlier, a good example of something that was going on just about at the time I got there. You all know the background events, I'm sure I don't have

to go through those. But there were issues in particular relating to who should defend the President, whether he was subject to suit, whether David Kendall, who was defending the Clintons in the Whitewater case, ought to get involved in this one as well.

It was Harold Ickes, I think, who had retained Bob Bennett as his lawyer on the Whitewater stuff. He came to me and suggested that we consider Bennett as the one who should represent the President in the Paula Jones case. I had known and liked Bennett a good deal and he was particularly good in handling the press, I thought. So I joined in the recommendation and Bennett was selected as the counsel. Then there was a series of negotiations at the very early stages, I think, either before the complaint was filed or while it had been given to us in draft form, but it hadn't been filed yet.

Bennett knew the lawyers in Virginia who had been retained, I think in Alexandria, for Paula Jones. You have to remind me now of the name of the fierce opponent, someone he defeated for Governor—

Young/Knott: The Rutherford Institute.

Cutler: Was it Rutherford who paid in the beginning? No, it was somebody else, a political opponent, who had raised some money and bankrolled Paula Jones in the beginning. She got paid, I think, for her first sort of public appearance.

Kassop: John [inaudible]?

Riley: Yes, but that's not the one who he's talking about. This was in Arkansas.

Cutler: An Arkansas politician. Very Republican, very right-wing.

Young: I can't find it.

Riley: I'm not coming up with it.

Cutler: Well, I'll go on.

Riley: OK.

Cutler: Anyhow, there was a negotiation, which Bennett carried on with these Virginia lawyers, who wanted to be paid a fee and wanted to get the matter settled if they could. We struck, or thought we'd struck, an oral deal that could be made for a payment of—I think it was a low six figures payment. This is something that never happened, but we got that far. As part of that, there was a long negotiation as to what kind of acknowledgment the President would make, that she had behaved perfectly properly in that hotel room. We finally worked out words that she was willing to live with, but she put in a condition. Since she had already been trashed by White House people like Jim Carville, I forget the phrase now—

Riley: Trailer park trash.

Cutler: Trailer park trash.

Riley: "Drag a twenty through a trailer park."

Cutler: She wanted a provision in there that if there were any more attacks on her personally by anybody in the White House, she could say the deal is off and be able to refile her suit.

Riley: Mr. Cutler, the name you were looking for is Cliff Jackson.

Cutler: That's the guy, Jackson. We couldn't agree to that because it was then something she could walk away from immediately. That's how it all began. Then after Starr got appointed, which was immediately after our great success, we thought, before the Congress, on the "heads-up" business, Starr built up on that. Paula Jones was able to get discovery, other alleged episodes between Clinton, and a whole list of people back in Arkansas. And that, of course, is what led to the final outcome after it was held that Clinton had to answer those questions, whether he had testified falsely or not.

Kassop: The suit that went to the United States Supreme Court regarding the question of the President's immunity from having to respond to court subpoenas for the court case in the Paula Jones case, do you see that as a direct link to the fact that we ended up with impeachment? That because he had to give that deposition and did not have immunity from the Jones case—?

Cutler: Yes. I think that's quite right. I worked a great deal with Bennett on the Supreme Court papers and I think our argument was a very good argument, really. That given the demands that discovery put on a President and the cost of defense, that the notion that it would take only a small part of the President's time to defend a personal lawsuit—I'm not thinking of a murder, but this kind of lawsuit, something that happened before he took office, a civil lawsuit—that there ought to be some tolling agreement, so that a President could devote his full time to being President. He couldn't be sued until afterward. But it would have preserved her right to sue and she could have had depositions to preserve the evidence.

Riley: You said you'd worked on this, but this was after you left the counsel's office. You worked on this with Bennett and the preparation of the Supreme Court papers.

Cutler: Yes.

Riley: During the period of time that you were still counsel though, this question was beginning to be considered, correct? As to whether this—

Cutler: That's right. We were certainly going to defend the lawsuit in part on the ground, if we could, that the President shouldn't be sued while he was in office, it would be a major distraction. Even though the Court came out differently, I think time has proved that our argument had something to it.

Riley: Were you surprised that the Court decided that way?

Cutler: No. In part because of the fact that hardly any President had ever been sued. I think JFK had been sued once in an accident involving a limo. It was his limo, but he wasn't in it and it had something to do with a crash with some other car. And that lawsuit was settled and it never became a court issue as to whether you could sue a sitting President and toll the statute of limitations meanwhile.

Riley: So as you're working on this, projecting ahead, it was an open question in your mind about whether this argument would ultimately prevail?

Cutler: Yes.

Riley: Because there just wasn't sufficient case law on the subject, is that what I'm interpreting?

Cutler: Why did we feel that way?

Riley: Yes, I guess—

Cutler: It's a line-drawing problem. Clearly, if a President doesn't pay the interest on his mortgage and he gets sued, that's not going to take much of his time one way or the other. But something like this, involving alleged sexual affairs with one or ten or fifteen women in Arkansas, was clearly going to take him time because his Presidency could turn on whether or not he won the case.

Knott: You had some people in the Court who in the past had been considered sort of defenders of presidential power, presidential prerogatives. You weren't surprised by the—it was a unanimous verdict, am I correct? *Clinton v. Jones*?

Cutler: [John Paul] Stevens wrote the opinion, I remember.

Riley: Eight to one.

Kassop: [Stephen] Breyer, was it?

Cutler: Was it one dissent?

Riley: No, not a dissent, a concurrence. But Breyer's concurrence was critical of the—

Cutler: Breyer was on the Court by then.

Riley: He was on the Court and wrote a concurrence—

Cutler: I think somebody, I guess it was in the Nixon case where it was either [Warren] Burger or somebody else cited Judge Learned Hand for the proposition that "There was hardly anything that would take more of your time or be more frightening or expensive than to be the defendant in a major lawsuit." But it gets quoted over and over again. There are cases today on whether

former government officials can be sued, or whether the government should step in and defend those cases itself. But that's usually whether the former government official can be sued, like Henry Kissinger and the Chileans, for something he did in his official capacity.

Riley: Right.

Cutler: And the Nixon-Fitzgerald[2] case in effect says the President can't be sued. Someone acting directly under the President probably can't be sued without absolute immunity, and everybody else would have so-called "qualified immunity."

Kassop: Of course, those were all for official conduct, in contrast to personal conduct and events that occurred prior to taking office.

Riley: And I guess from the outside it looks—I'm not a lawyer, so I would think about these things in a different way—it would seem that that would almost be a stronger case to make for a court, for private conduct rather than public conduct you would want to delay. You're telling me that it is actually the reverse.

Cutler: I'm telling you that's what the Court held. And this notion that no one, not even the President, is above the law. Of course that's true, depending on what kind of an issue it is. And he's not above the law here; he can be sued. The only issue was, can the suit be put off until after he's finished being President.

Young: It's a little bit hard, again, from the outside to see why that isn't entirely consistent with the principle that the President isn't above the law, it's just a deferral for practical reasons. Do you want a President or do you want a defendant serving in the White House?

Cutler: And there is a statute for members of the Armed Forces, that while they're in the Armed Forces, especially if they're serving abroad or something like that, and they get sued, that the lawsuit is deferred until they get back.

Knott: Was there some consideration—this was in the press as well—that they were considering, perhaps you were involved in this, using that particular statute, or trying to refer to that in order to—

Cutler: We did refer to that.

Knott: You did.

Cutler: And I think what the Court said is that Congress, of course, could pass a statute saying the President is immune while he is in office, but they didn't. They just covered the Armed Forces. The real issue was, could we say the President as Commander in Chief is one of the Armed Forces? And in some ways he is.

Knott: I remember that caused a bit of a stir.

[2] Nixon v. Fitzgerald

Kassop: Was there any—in terms of working as a White House counsel on that particular matter and working with the President's private personal attorneys—was there any division of labor on that matter?

Cutler: I wasn't in the government any more.

Kassop: Oh, I'm sorry, that's right. But I guess at the time that the Paula Jones suit was instituted, isn't it true that you did go to OLC [Office of Legal Counsel] to ask for some advice about whether or not there was presidential—?

Cutler: Right, and I took part with Bennett, we were on phone calls together. But I think that's legitimate enough when it's such a burden on the President and he has to approve it in the end anyway.

Another example of where the White House counsel in effect acts as the President's personal lawyer is on the publication of your income tax return. The income tax return is prepared by private accountants and lawyers, but then the White House counsel looks it over to be satisfied that any close issue is decided in favor of paying the tax rather than not paying the tax and that you can defend what you did. If the accountant had cut too many corners, we would step in and say you shouldn't do that because it will be politically costly to the President. So in effect we're giving personal advice, but it's institutional advice as well.

Young: That's another interesting area for inquiry by later people and currently, the dividing line between what is being a counsel for the Presidency and what is being a counsel for the President. It strikes me that there is a gray area—

Cutler: There is.

Young: —between those two, which one enters at risk in terms of one's own integrity as a counsel.

Cutler: A good example is the presidential defense fund that we put together, where we knew that there were millions of dollars of legal fees involved in defending all these cases. Williams & Connelly had to get paid. Bennett had to get paid. The White House counsel took part in finding an outside private counsel who would help in the organization of a presidential campaign fund. Then we put on the board of that outside private organization people like Ted Hesburgh, the head of Notre Dame, Nicholas Katzenbach, various other distinguished Democrats and Republicans. So it was done privately, but the White House counsel was involved in getting it set up in a proper manner.

Young: "In a proper manner," which is the key phrase.

Cutler: A manner that would minimize public criticism and be perfectly lawful.

Knott: Had this ever been done before, I'm not sure where?

Cutler: There had been defense funds organized by members of Congress and a whole set of congressional rules as to whether you could take money from a lobbyist, how much you could take from one person, et cetera. We just followed all of those rules.

Young: And in the case of Nixon, there was—

Cutler: In fact, we had some ceilings that were lower. I think Congressmen could accept up to $10,000 per person; we held it to $1,000. As a result we didn't get enough money and we had to go out and form a second fund after I left, which had a $10,000 ceiling.

Riley: So the first fund was set up when you were serving. That was the one that Michael Cardozo—

Cutler: Michael Cardozo ran it. Bernard Aidinoff, of Sullivan & Cromwell, who is a very distinguished tax lawyer, was the one who devised it and put it together.

Young: So there was no Nixon—I'm trying to remember—defense fund.

Cutler: Nixon had lawyers and his lawyers got paid. It was a little different because Nixon had a claim to his papers. The government took his papers and there was a fund to compensate him for having taken his papers. And the lawyers got some money out of that.

Riley: Can you go back? You mentioned Ken Starr's appointment, and it may be that this will take longer than we have in the rest of the morning session, but I guess I'm curious about your perceptions of the job that Fiske was doing. Was it anticipated by you or by others in the White House that Fiske would probably be relieved and that they would appoint somebody else?

Cutler: No. In the White House, because of this problem of maintaining the independence of the Attorney General, in the White House we had thought that the statute should be so worded, the new statute when it was passed, that Fiske and anybody else who was continuing under a prior appointment, including a regulatory appointment like Fiske, would carry on. On the advice of the Justice Department, that was changed so that Fiske was made eligible to be named, but the actual appointment was left to the special panel of judges. You couldn't name as independent counsel somebody who was in the Department of Justice, and technically he was part of the Department of Justice when Janet Reno appointed him as regulatory counsel.

So we made him eligible and we thought the special court would appoint him because he's such a distinguished fellow. And in the end, the special court rejected him on this ridiculous ground that Fiske had been counsel for International Paper, the big paper company, and his work had related mainly to pollution of Lake Champlain or something like that. And the Whitewater land development company had bought or sold some property from International Paper. Therefore, Fiske would have a technical conflict of interest, he couldn't sue his own client, which was absurd. And it was at a time when the head of the three-judge panel was the judge from North Carolina—

Riley: [David] Sentelle.

Cutler: And his wife, I think, was working for the other Senator from North Carolina. Somehow there was an allegation, was it Senator East, the fellow in the wheelchair? I don't remember who it was now, but in any event, an argument could have been made that Starr should not have been appointed and that they should have gone ahead with Fiske. We were all very surprised and very disappointed. With Fiske, Whitewater would have been over by 1995.

Young: Of course, speculative questions in the press do arise about the contamination of the process of the selection of Ken Starr, because of connections with the "Get Clinton" crowd.

Cutler: And there's even a court case on this. I think the court went two to one, but anyway, the majority of the court of appeals upheld the appointment. David Tatel, the blind judge, wrote a dissent saying he should not have been appointed.

Knott: Did you know Kenneth Starr well?

Cutler: Oh, very well.

Knott: What was your assessment of him?

Cutler: Very good lawyer, very strong on the First Amendment, very good Solicitor General. He had political ambition, no question about that. He was attacked strongly by all the Clinton people and he reacted to that in the way that you might expect. He was going to show them. There's an old adage, "If you shoot at a king, you have to kill." If you don't kill, you've just made everything worse. But we tried, at least in the White House counsel's office, to dissociate ourselves from any criticism of Starr as an independent counsel.

Riley: Did it set off alarm bells with you that this was going to be a problem?

Cutler: Anybody new was going to be a problem because Fiske and all of his people were very angry that they were pushed aside and they all resigned. So that Starr had to assemble a new staff, and since he had been appointed under these circumstances, he had to redo everything that Fiske had already done. It took him, I think, more than a year, to come out with the same conclusion that Fiske had already reached before being fired about the suicide of Vince Foster.

Knott: How do you explain—I probably shouldn't be directing this question at you—but there was this almost obsession with the Vince Foster suicide in some quarters. Again, is this—?

Cutler: This is the "hate Clinton" group, this is the apex of what they did, I think.

Knott: And Fiske had concluded—

Cutler: —That he did indeed commit suicide and that it was probably due to the things that were said in the so-called suicide note, which was not a suicide note. It was a note he had apparently made to himself which he later tore up and the four pieces were in the briefcase that was found in

his office.

Riley: Would you comment on your perceptions of how that was handled in the immediate aftermath by the White House? There was a fair amount of criticism. I don't think all of it came from the "hate Clinton" folks, about how that was handled. I wondered from your perspective as somebody who—

Cutler: There was an issue as to whether Foster's room should be searched by the Department of Justice. The Deputy Attorney General was Phil Heymann, who had been head of the criminal division, I think in Carter's time. He is a very distinguished law professor up at Harvard. There was an oral agreement worked out between Bernie and Phil Heymann that somebody from Heymann's office would be present with Bernie and they would jointly do the searching of Foster's office. Then that got changed somehow and Heymann felt very strongly that Bernie had not done what he promised to do. Whether Bernie was persuaded by somebody else not to let the Justice people join or not, I don't know.

In any event, they worked out some compromise which really didn't satisfy Heymann very much. Somebody from Justice was there but never got his hands on anything. That's when the notes were found.

Riley: The theory of Nussbaum going through it first was—what was the basis of his having the most privileged access to the office?

Cutler: His deputy's office. Whether it was a precaution, just in case something was found or not, I don't know. I don't know.

Riley: And the Park Service police also got in on this at some point?

Cutler: No. It was the White House security guards, one of whom was out in the hall, because he walked around following the cleaning women the night before. There was an issue as to whether Maggie Williams, you know who I mean—

Riley: Sure.

Cutler: —Mrs. Clinton's assistant, had carried something out of Foster's office the night of the suicide, observed by the guard. And he said she was carrying something; she said she wasn't carrying something. That issue, as far as I know, never got resolved. Except Maggie had to hire lawyers of her own.

Young: Full employment for lawyers.

Cutler: It's no joke. Let's say you take a government job and it pays $120,000 a year and you sit in a meeting and as a result you get called as a witness. You've got to have a lawyer before you go before the grand jury. You might end up paying the lawyer more than your salary.

Young: And yet people still do want these jobs.

Cutler: People still want the jobs. It is amazing how many still want them. But not everybody.

Young: Right. It's about time to break for lunch.

[BREAK]

Riley: In the topics page that we had prepared, there are a whole cluster of issues related to your relationships with other offices and people within the White House. I thought this would be a good occasion for us to launch into that discussion, just for you to tell us a little bit about your day-to-day working relationships with these various offices, some of them within the Justice Department, also.

Maybe the place to start would be with the Chief of Staff's office and what kind of relationship you had with the Chief of Staff's office. Was there a routine day-to-day relationship or was it more of a—?

Cutler: Yes, it was routine and day-to-day. With Mack McLarty, he was a very loose-reined person, not a tight-reined person. You could walk in and see Mack at any time. He'd walk into your office. With Leon, it was somewhat tighter reined. As I said, we'd have these huge staff meetings at which he'd make notes. He was always accessible, but he was doing many more things than Mack did and really deciding a lot of things for the President on which we, as individuals, didn't see the President that regularly. Our main contacts were with Leon. That lasted and worked very, very well until Leon made some personnel decisions, which the persons who were affected appealed to the President, who would see them individually and then persuade Panetta not to do what he intended, had already committed to do. That was especially true with the [Dee Dee] Myers change.

Riley: About the—I'm sorry.

Cutler: Dee Dee.

Riley: Oh, Dee Dee Myers.

Cutler: Dee Dee Myers, who was the press secretary.

Riley: And so once Panetta became Chief of Staff, the degree of accessibility to the President was somewhat more restricted because he chose to be a more active gatekeeper?

Cutler: Yes. I'm not sure "restricted" is the right word. I could have gone to the President, but I didn't need to. Leon would make the decision himself.

Riley: Was there a notable change of character in the senior staff meetings after Panetta came in?

Cutler: Much more organized. As I say, he took very careful notes. He was a doodler. He was writing all the time, and then during the rest of the day he'd carry out all of those notes. When I

would write memos or send notes to the President, I'd usually copy Leon in rather than send it through him.

Riley: Was there much internal turmoil associated with that change of command between McLarty and Panetta? Was there any kind of internal agitation—sounds like too strong a word—but any kind of noticeable disruption internally within the White House?

Cutler: Not that I was conscious of. There may have been. There were other relationships that Leon couldn't manage, that I couldn't manage. For example, Bruce Lindsey was an intimate of the President. For a while, he was sort of his "gofer" on a great many things. Clinton practiced law with him between elections, especially when he was out of office. And Bruce at that point had a job as more or less chief of personnel and he wanted to be the deputy general counsel. I was worried about having someone as deputy general counsel who was such an intimate of the President, that they would have many conversations I would know nothing about. That's not a personal criticism of Bruce, because on many things he came down very much on the right side. He was also a meticulous notetaker. He had notes about everything. I don't think he stopped. He was highly ethical.

Riley: All the way through?

Cutler: Um-hum.

Riley: How did he manage to keep those—or did he manage to keep those to himself? Was he never in a position where somebody would subpoena—?

Cutler: A lot of them got produced to the independent counsel and Congress before we were finished.

Riley: Did you ever advise him that he was keeping too many notes?

Cutler: No.

Knott: Was Mrs. Clinton—could you feel her presence in the White House outside of the health care issue?

Cutler: Oh, very, very much so and I worked a good deal with her. And she had her own staff. And in addition to her staff, she had unofficial part-time advisors who would come down and help her on particular projects. But I worked out a very good relationship with her staff as well, especially with Maggie Williams.

Knott: Mrs. Clinton, of course, was a lawyer as well. Would she ever offer her legal advice to you?

Cutler: That's not what we usually talked about. We talked mainly about the earlier Watergate things that you referred to and about the health care plan, that sort of issue.

Riley: Was she testing you out on the substance of the health care plan and its marketing—?

Cutler: Various legal difficulties related to it, yes. For example, it had provisions in it relating to whistleblowers on health care fraud and their right to fees. I thought that was going to be a huge problem in getting a bill through and it did turn out to be a huge problem, because it really meant that the whistleblower's lawyer could bring cases against every health provider in the country, alleging a fraud, and if you turned out to be right, collect a fee.

Knott: You mentioned this morning that when you first came into the White House counsel's office, Linda Tripp could have been your secretary but you wanted to bring your own person in. Were there other staff changes that you made when you first came into the counsel's position, beyond just the secretary?

Cutler: Well, just as an aside, Linda Tripp came in with Kathleen Willey. Kathleen Willey was more or less an unpaid volunteer in the legal secretary's area of the office. She had that fourth desk with no computer. While she could make a very good receptionist, she really had no other secretarial talents at all. She wanted to be paid because she had been a volunteer during the campaign in Richmond, Virginia. Remember, her husband had committed suicide. She seemed to be a very nice person, totally different than Linda Tripp. But we couldn't pay her and we ultimately sent her elsewhere also.

Riley: But in terms of other staff people, policy-making type positions.

Cutler: There was already, as I said, a very good legal staff. We had to augment it. The more things happened, the more vetting had to be done, either of people who were already on the payroll or people who were being considered for appointments. We had to keep adding constantly to the number of vetters. A lot of that went to very inexperienced interns of various kinds, and they needed supervision. But the people who were in charge of that, Beth Nolan and a woman named—I'm forgetting one more, she had an assistant, they were both very, very good. Is this something that would show up there?

Knott: I don't know if it would be in these names. There's Beth Nolan's name.

Cutler: But everyone else that's there was there when I was there. I didn't bring any of them in. The two I brought in were two young litigating partners in my own firm, and they were Sheila Cheston and Jane Sherburne. Then Sheila left with me and became the General Counsel of the Air Force and Jane stayed on and worked both under Ab [Abner] Mikva's direction and at the same time under Harold Ickes's direction. She became more or less counsel for Mrs. Clinton. That created some tensions too, of course, because of the dual reporting chain.

Kassop: She's written or given some interviews about that. She has said in interviews that her relationship was really with Harold Ickes and that it caused some tension with Mikva.

Cutler: That's right. But they were both very good.

Knott: This is somewhat related to the question of White House staff we're talking about. You

also said this morning, you referred to the fact that some White House staffers or former campaign people were pretty tough on Kenneth Starr in terms of their attacks on Starr. I think most of that occurred after your tenure as White House counsel. Do you have any comments about that? Was that something that made you uncomfortable or you thought was appropriate?

Cutler: Well, some of it happened while I was there, and I was uncomfortable about it. I made a statement at one point that we had no reason to question the competence or integrity of Kenneth Starr. I did have more or less of a disagreement with Jim Carville. Remember, he wanted to leave the White House and spend his whole time attacking Ken Starr. I thought that was wrong.

Knott: Later, after you're gone, he does resume that practice.

Cutler: That's right.

Kassop: During your time in the counsel's office, I guess the main scandals that you were dealing with were Whitewater when you first came in. But I know during the later scandals, there was an effort to try to wall off scandal management from the rest of the counsel's office so that the remaining part of the counsel's office could continue to function on policy matters and try to leave the scandal management to just the White House counsel himself and maybe one close deputy. Did that occur during your time as well?

Cutler: No. Because I did have these two people I brought in who worked on the Whitewater stuff themselves. I did a certain amount myself on the Paula Jones stuff and the court cases. But everybody else there was working on substance, I would say, other than the vetters and the ethics people.

Kassop: But in the later time in the White House counsel's office, my understanding was there was a real conscious effort to keep the two very separate for just that reason.

Cutler: If so, I'm not aware of it. May well be. As I said, Jane stayed on and she functioned primarily in this area.

Riley: We'll turn to some of the Justice Department relationships in a minute, but just some of the other White House offices. Any substantial interaction with the legislative affairs people?

Cutler: Yes, as I indicated to you, we had our own version of McCain-Feingold. I worked on that. I think I worked with all the legislative people, Howard Paster and the others.

Riley: Were you consulting with them on legislative tactics as well?

Cutler: Partly it was tactics, partly it was particular amendments and what our position would be, that sort of thing.

Riley: What about the communications staff, the speechwriting staff, the press office and so forth?

Cutler: Dee Dee Myers quite a lot. We had our difficulties, partly because Dee Dee would not—most legal issues are quite complicated to explain. You'd explain it to her but she wouldn't explain it in the White House press briefings. When she'd get a question, an unfriendly question, instead of giving the answer that we briefed her to give, she more or less implied that she agreed with the questioner—"I'm told so-and-so, so don't blame this on me." I think that Panetta had some similar problems with her.

Riley: I guess that was the kind of stuff that ultimately led to her being replaced.

Cutler: I think, yes.

Riley: Of course. Let me think if there are others. The public liaison people, would you have had any dealings with the public liaison people?

Cutler: Who do you have in mind?

Riley: I'm trying to think who was the head of public liaison at the time. I'm just sort of mentally going through the organizational chart to see if anything sparks any recollections.

Cutler: You're not thinking of domestic affairs?

Riley: No, but that –

Cutler: Domestic policy, foreign policy. You're not thinking of any of those? I don't recall anything in the public liaison area and I don't even remember who worked on it.

Riley: It's not coming to my mind either.

Cutler: Unless you count Stephanopoulos in that area.

Knott: There's the National Security Council, the NSC.

Cutler: I worked quite closely with Sandy Berger and with Tony Lake. We had a number of problems that were national security but also Department of Justice related. In particular, the interception of what we thought were drug planes flying out of Peru, Colombia and elsewhere. We gave the information—you've seen it repeated just recently—we gave the information to the Peruvian Air Force and to the Colombian Air Force and they proceeded to shoot down the planes, which is a violation of treaties that we're parties to, attacks on civilian aircraft. We had to get that stopped.

Kassop: You worked with the NSC counsels then also, as well.

Cutler: Yes. Then we had a process of regular meetings among all the general counsels of all the departments and agencies, at least the ones that were not independent, like the SEC [Securities and Exchange Commission], in which we tried to coordinate policy on issues such as executive privilege. It was more or less show and tell. At each of those meetings, we'd have a different

host and a different agency counsel would talk about that agency's problems. That was a regular event.

Riley: But nothing particularly substantive ever came out of that? You said it was mostly "show and tell."

Cutler: Other than the executive privilege stuff, which led to a memo that Ab Mikva and I wrote, but he actually put out just after he took office, which said, "You must clear it with the White House counsel on any assertions of executive privilege, any turning over documents that might be subject to executive privilege." And that you couldn't have any contacts with Justice unless you did it through the agency general counsel or the White House counsel.

Knott: Could you talk a bit maybe about some of the Cabinet members, the Attorney General?

Riley: Sure. Go ahead.

Knott: My knowledge in this area is somewhat slim, but how often would you be interacting with the Attorney General?

Cutler: A great deal with the Deputy Attorney General. Janet Reno delegated a lot of questions, a lot of issues to her, had total confidence in her. Many of those contacts I would initiate, some she would initiate, but that was a very frequent occurrence, in particular in the national security area.

Knott: This was Jamie—

Cutler: Jamie Gorelick. Off the record for a moment— [OFF THE RECORD]

Kassop: And your interactions with OLC, I'm sure, were constant.

Cutler: Constant, yes.

Riley: They provided the institutional memory of sorts in this area, is that correct?

Cutler: Well, they write all the President's opinions. They give legal advice on what's constitutional or how a statute should be interpreted. They get consulted on just about everything. That was especially true while Walter Dellinger was over there, because he had been in the White House counsel's office and as you know he's a very distinguished law professor.

Kassop: My understanding too, is the dynamics would often be, as you said, you would go to OLC to ask them for their professional, legal advice based on precedents. Often, more often than not, they would come back and say, "No, you can't do this." Did you ever find—

Cutler: Well, not more often than not, but certainly on occasion. Some of those we'd win, some we'd lose, that's right.

Kassop: Is it possible to give us some examples?

Cutler: I can give you examples from the Carter era. I don't remember any in the Clinton era where we really had a fight about anything. In the Carter era, two that I remember very well. Our first, when our hostages were taken in Iran, there were demonstrations and counterdemonstrations between Iranians, the pro-[Ayatollah] Khomeini people, the anti-Khomeini people who had left. They wanted to have a rally. I think the anti-Khomeini people wanted to have a rally in Lafayette Park and we got together with the District police and said, "We think the other side will also show up, there'll be a fight, and the next thing we'll see are photos of policemen clubbing down some Iranian. You wouldn't know which side the person was on. Could we have an alternative site?"

We picked McPherson Square, which is 15th and K, I guess. The Justice Department said to us, "You'll never get away with it. You have to let them demonstrate in front of the White House, because the protest has to do with the White House." We said we thought we had a plausible basis for doing it, because if you had one of those clubbing pictures, something could happen to our hostages who are still being held in Tehran. The court of appeals here agreed with us. That's the way it ended up.

The other had to do with the census. For years, decades I guess, the Census Bureau would appoint thousands of people to conduct the ten-year census. It became the prerogative of every member of Congress of the party in power to select those people from his district. That had gone on and it went on while I was there. This was back in the Carter days, and Zoë Baird, who was then in the Office of Legal Counsel, said to me, "There's been a new statute and you can't do this." I was impressed enough by her arguments so that we stopped deferring to these Congressmen, and all hell broke loose in Congress, as you can imagine, as a result. But I was impressed so much by Zoë so I asked her to come over and work for the White House counsel. That's two examples.

Knott: How much contact would your office have with the Solicitor General? Any?

Cutler: A fair amount. Again, I can think of Carter episodes that were more glaring than we had. The Clinton Solicitor General, who was again Walter Dellinger for part of the time on an acting basis, we would have quite frequent contact on cases that got to the courts. Such as the Clinton tolling agreement case, the Paula Jones case, where they were consulted, of course.

Kassop: And probably also the line-item veto cases, but those came later.

Cutler: Those came later, yes.

Riley: I just wondered if there were any other—Darby, are there others?

Morrisroe: Those were the main institutions.

Riley: Darby is doing work in this area with respect to the counsel's relationship with Justice and so on.

Kassop: This is not so much on relationships, but on the question of executive orders. Certainly those came from your office as well. Could you talk a little bit about executive orders from the Clinton administration?

Cutler: Most executive orders, as you know, are quite routine and they're drafted way down in some department, usually. We had a Miller Commission Report in which we wrote about executive orders. There have been something like 13,000 of them over forty Presidents, so that's 200, 300 a President, easily. It was one of the routine jobs that was done. Occasionally, you'd step in with an Executive order that would have real policy purpose or effect. That's especially true in the military area.

Kassop: Were there examples that you can think of where you did things by Executive order because you felt that you would not have had the political clout to get it through Congress?

Cutler: Yes. I used to have a maxim that on a scale of zero to ten, anything you could do by Executive order was a ten and anything that required a statute was maybe a two or a three, because you'd never get exactly the statute you'd want. The answer is yes, there are things you do by Executive order if you want to do it fast and if you think you have a basis for it.

Kassop: Another one of those legal political issues that came up and also that dealt with OLC, was the refusal to enforce certain portions of legislation. I mean, this began in a sense back in the Reagan administration with their signing statements and their active refusal to enforce certain parts of legislation. I know that Walter Dellinger had written some memos on that in the Office of Legal Counsel—

Cutler: Yes.

Kassop: And the Clinton position was an interesting one.

Cutler: Seth Waxman, who is now with our law firm, and Ted Olson, surprisingly enough, all say they think it is the duty of the Solicitor General to support a statute that is under facial challenge in the courts.

Kassop: This is not intended to get into the judicial appointment process, it is not judicial necessarily, but the recess appointments that Clinton made. He also had been criticized for making some controversial recess appointments, partially because of the difficulty of getting some of the confirmations in the Senate. Can you talk about those at all?

Cutler: Yes. I don't think, in my six months, that Congress was continuously in session. We didn't have one, an issue. But I think, myself, recess appointments are perfectly legitimate. The only risk you take when you make one is that the person while serving during the recess period may do something that makes him very unpopular, and then you can never get him confirmed for a full term.

But we have many judicial examples of that. For example, Potter Stewart got a recess

appointment. Bill Brennan got a recess appointment. In each case they had to decide things as Supreme Court Justices between the time of their appointment and the time of their eventual confirmation. They both got through, of course, but that's the risk you run.

Kassop: Did Clinton have a particular philosophy? Were there any conversations that you can recall where he would go for a recess—?

Cutler: Well, long after I left, he did it as you know, after he'd lost control of the Senate. I believe, and this also is after I left, there were one or two cases where he did it when it wasn't a true recess. They may have used the word "recess," but it was a ten-day recess or something like that. He appointed someone to an appointment that would last another year and a half.

Riley: Did you have any active relationships with members of the Cabinet, with department heads? Or did everything pretty much go through the counsels?

Cutler: I had quite an active relationship. No, I had very active relationships with the Treasury Secretary, and with the Secretary of State, [Warren] Christopher. With the Attorney General. I think with most of them. We had to make the call on whether to make Espy resign, which was the most difficult of all.

Riley: Can you elaborate on that, tell us a little bit about what happened?

Cutler: He had been, as you know, a very successful Black Congressman from Mississippi. He was a Clinton supporter from the beginning, and when Clinton appointed him as Secretary of Agriculture and the Senate confirmed him, he always put off his ethics briefing. He continued to function exactly as if he were a Congressman, which meant getting a Ford Bronco or a four-wheel drive vehicle from the Ford dealer for a $100 a month or some nominal amount, because that's what dealers do for their Congressman. Then he got involved in official travel with his girlfriend, you know the whole Espy story.

We concluded that while nothing he had done was of a criminal nature—again, we ended up with an independent counsel—he really ought to go. Good as he had been to Clinton, and good as he was as Secretary of Agriculture, he hadn't followed the ethics rules the way he should have. We learned in the course of our inquiry that even some things his lawyer represented to us as true, we discovered were not true, and it wasn't the lawyer's fault. It was because he'd been misled by his own client.

So we ended up writing a memo concluding that nothing he had done was of a criminal nature but that he should resign, and he did.

Riley: This is one of those intersections of politics and legal issues that the counsel ends up having to balance, right?

Cutler: Yes.

Riley: The legal implication here is he had done nothing legally wrong, and yet your

recommendation, from primarily a political vantage point, is that he was creating additional problems for the President.

Cutler: Yes.

Knott: Would you say these kinds of ethical—and then we have this—

Cutler: Then we have the [Henry] Cisneros problem on top of that, as you know.

Riley: That worked itself out during the course of your time there or later?

Cutler: During my time.

Riley: Can you tell us a little bit about your role in that process?

Cutler: Again, it was to investigate the facts and to learn what he'd actually done. That was the one where a girlfriend actually taped the conversations between the two of them, because she was angry that Cisneros was taking his wife to Washington, rather than her. In those conversations, he indicated that in the vetting process he had misled the FBI as to money he'd given her in the past.

Riley: This was going on at the same time that there was an independent—

Cutler: I think it is prior to the independent counsel. Cisneros, I think—we did not ask him to resign, if I remember correctly, but he did choose to resign once the independent counsel got going.

Knott: Do you think these kinds of ethical restrictions that have been put in place—I guess basically since Watergate—do you have any general comments about whether this has been a positive development or a net negative?

Cutler: It is enormous overkill. It's constantly locking the barn door after the horse has been stolen. It's an enormous burden on the individual to be considered and not only have to give a complete financial summary of his life—what assets he has, how much money he owes—but also the constant danger that somebody is going to make a political raid on you, an attack on you on some personal issue. And in the end, although you didn't ask for the job and you agreed to serve, you get dropped like a hot potato. That happens over and over again.

We had a Bush I ethics commission report on that, you might want to go look at, which involved—Boyden Gray is the one who put me on that commission.

Riley: Your interactions with people on Capitol Hill were primarily driven by the investigations, or you also had a proactive role in legislation?

Cutler: More the investigation than legislation because I had to spend so much of my time on investigations.

Riley: Were there individuals that you worked with on the Hill that we ought to pay special attention to? Individuals that were particularly helpful to the administration or—

Cutler: Foley you've had, of course. Sarbanes was very helpful. [Patrick] Leahy has always been very helpful. [Joseph] Biden has always been very helpful, but you know all of this.

Riley: Sure. Were there people on the other side of the aisle? Were there any Republicans that you found—in an environment that tended to be very, very hostile toward the President—were there some Republicans who you found reasonable and accessible and—

Cutler: Oh, there always are, sure. But I don't want to give you names. The answer is yes.

Kassop: I understand you don't want to give us names, but if we're talking about the politics of the time, you left and everybody knew that you had a defined tenure and you were going to be leaving after 130 working days. As it turned out, it was really just about a month before the November '94 elections. Was there any premonition? Did people have any idea of what the '94 elections were going to bring?

Cutler: Well, there was certainly a feeling you could lose.

Kassop: That big?

Cutler: No. Rarely that big. Most polls that you get to see tell the optimistic side of the story, as you know. And in the end, of course, it seems to help a President to have an opposition Congress, because then he has somebody he can blame for the things he doesn't get done. If he has control of both houses and the White House and he can't get it done, that's much worse. I remember saying to President Clinton that losing the House in 1994 is probably going to help you get reelected in '96.

Riley: Although, on the investigation side it creates—

Cutler: On the investigation side you pay a price.

Kassop: And on the judicial nominations.

Cutler: And on judicial nominations you pay a price if you've lost the Senate, that's right.

Riley: Why don't we move in that direction, then? When you took the position, were you expecting at some point during your six months to get to deal, or have to deal with a Supreme Court nomination?

Cutler: Well, I was rather hoping I would. We did get an intimation fairly early on from [Harry] Blackmun that he was not going to stay, that he was going to resign during the summer. We began looking, actually, before it was generally known Blackmun was going to resign.

Riley: Had you done this before? Had you been involved—

Cutler: I did a lot in the Carter days, but he never had a Supreme Court appointment.

Riley: Right. Is the process from your perspective interchangeable, basically the same? Or is it of such a great magnitude that you're really working in—

Cutler: Well, the Supreme Court is much more important, of course. And it's where you're more likely to run into problems. This is a huge subject, as you know, but we've gotten to the point where it's a little bit like the Arabs and the Israelis, that each side is getting even for what the other side did to it, blocking its appointments in the last year or just before a presidential election, and that's still going on. You can clothe it in terms as Senator [Charles] Schumer does, of "Why shouldn't we be looking into ideology? Why isn't ideology important?" In one sense he's right, but it doesn't mean that you pick only people who you know are going to decide the next Roe against Wade case in what you think is the right way.

As I said, once again, it's a big Miller Center subject and you have huge reports on it. When Clinton had his vacancy, as this material suggests, we spent a lot of time putting lists together. Some were judges. But Clinton had a particular yen for creating another Earl Warren if he could do it. He wanted someone with political experience and what he called a "heart," some feel for ordinary people. We tried to find him somebody who would fit that bill. That included Senator [George] Mitchell, it included Bruce Babbitt. At one time it included Sarbanes, David Pryor. But we also had two very well qualified judges, one was Stephen, of course, and the other was Richard Arnold, who is the President's personal friend and on the Eighth Circuit, from Little Rock. Either of them would have made a very good appointment. And the process went on and on and on.

Clinton began to get criticized for taking too long. In the end, he came down in favor of Breyer and that was a universally approved appointment, with the exception of Senator [Richard] Lugar, who had that objection related to Lloyd's [of London]. I can say more if you have any questions about it.

Riley: Absolutely, something we'd like to get you—

Cutler: Clinton does have difficulty making up his mind on something like this, because he talks to dozens of people, including conversations that the rest of us don't even know about it. He'd call you in the next morning and say, "What about So-and-So?" And most of the so-and-so's were pretty good. One we told him he could certainly appoint if he wanted to was Richard Arnold, but then the Arnold advocates overplayed their hand.

We made very clear that we wanted somebody whose time on the Supreme Court bench would be at least ten years. Arnold suffered from lymphoma. His supporters got some expert from the Dana Farber Cancer Center at Harvard, who said that if he followed such-and-such a regimen the expert believed in, "I think he'll do much better than he would on his present regimen." We talked to that doctor and we asked him, "What's your prediction as to how many more years he'd have that he could be a fully active Supreme Court Justice?" And the answer was, "Five." Well,

that's now seven years ago and Arnold still seems to be in good health. Clearly he was going to give us ten years or more had we appointed him. But that episode, plus the opposition of some women's groups because of some court of appeals decision he'd made following a Supreme Court precedent, was disapproved by the professional women's groups. For those two reasons. But for those two reasons, the President finally decided he didn't want to go with Arnold.

Mitchell, and Babbitt and [Mario] Cuomo he talked to at great length, one-hour, two-hour telephone conversations in the middle of the night. In Cuomo's case, if Cuomo had said, "Mr. President, I've always been a lawyer—" you know, Cuomo used to edit the briefs of the state of New York in the court of appeals in New York— "and I'd really like that appointment. If you offer it to me, I'll take it." Instead, Cuomo was Hamlet. He was "on the one hand" and "on the other hand" and the President never made him the offer.

In the case of Babbitt, the President talked to Babbitt on end, and Babbitt would have made an excellent Justice of the Earl Warren style, I think, as Cuomo would also. In Babbitt's case, the President had to weigh the fact that Babbitt's public land reforms, that the President supported, were very unpopular with all the western Senators, Republican and Democratic alike, as you know. And so if he named Babbitt, he would get flak in the Supreme Court hearing about Babbitt's decisions about land use, et cetera. And, he would also have to find a new Secretary of the Interior who, to get confirmed, would probably have to make a pledge that he would undo some of the land reforms that Babbitt had made.

So they passed over Babbitt for the reason that the whole set of confirmation problems would have been too difficult. All of that left Steve Breyer the only man standing.

Kassop: I don't know if you're able to talk about this, but Breyer had also been in consideration for the Ginsburg appointment as well, hadn't he?

Cutler: Yes. There's a funny story about that. Stephen, as you say, was in the running for it. He had just had that bicycle accident, he was hit by a driver making a right turn, not seeing Stephen's bike on the right side of the car. He wasn't even available for interviews during most of the search that ended up with Ruth Ginsburg. He did come down from his hospital bed to see Clinton just before Ruth was appointed. And when Ruth was selected, he congratulated her publicly, and said she was an excellent choice.

When they had Ruth's Rose Garden swearing in, before the official swearing in, or just after it, he came down for it. And the President remembered all of that very well. After the President had appointed Stephen to the next opening, the President was at a birthday party at Jim Wolfensohn's ranch in the Teton Valley. One of the other guests there was Marc Leland, a Republican who was a very good friend of Stephen's, who had grown up with him in San Francisco. Leland introduced himself to the President, said, "I'm a friend of Stephen's, he's an excellent choice." And Clinton said, "Yes. You know, I've always wanted to appoint him. I'm so glad we had the chance to do it. He was such a good sport about the Ginsburg appointment. I made up my mind then and there that if I ever had another appointment it would go to Breyer."

When I heard that from Leland, I said to everybody, "If only he'd told us who advised on

Stephen's appointment," because the President had trouble making up his mind. But I'm sure he believes it now.

Riley: Did you spend much time examining the Ginsburg process before you began your own? Or were you just too busy?

Cutler: Well, we did it pretty much the same way. I don't think Joel Klein was there for the Ginsburg process. Joel really ran the Breyer process, pretty much. But you'd go about it in just about the way we went about it, I think.

Riley: You start basically with the same list of names that you had before? Was there an ongoing effort to keep a file of active candidates that were on the list on the presumption that you might get another appointment?

Cutler: You do that for the other judgeships, where you have hundreds of judgeships. Most of the appellate and district court judges you name you would never meet if you're the President. Your staff may have met them or interviewed them, or the Justice staff may have met them, but there are so few names for the Supreme Court. You don't really need that. For example, I don't recall looking at any vetting material on other candidates that had been left behind from the Ginsburg appointment.

Kassop: But I think what you were saying was some of the same names remained on the list, it's such a small pool.

Riley: Sure.

Cutler: Sure.

Kassop: Amalya Kearse was also I guess—

Cutler: Yes

Kassop: And José Cabranes.

Cutler: She was involved in the first one, in the Ginsburg one, yes. At least, she was an alternate.

Kassop: Were those names then given to you by Senators? I mean, is that how—?

Cutler: Oh, you get names from everybody, everybody. Then we had that last minute episode about Senator Lugar because Breyer's wife, who is English, is quite well off and Stephen himself is reasonably well off. He had agreed to become a Lloyd's of London "name," so-called, in one of the Lloyd's syndicates, which people did in those days. In effect you loaned your credit, you didn't have to put up any money or anything else, but you had unlimited liability within your particular group. If the group had underwritten, let's say, an asbestos liability claim that ran into the billions of dollars, there was a lot of litigation about the asbestos claims which Lloyd's of

London had to pay off eventually as reinsurer.

Some of the litigation was in the United States, brought by people who had to pay up more than they thought they should be made to pay up, or they thought they'd been misled by their syndicate. They filed suits against Lloyd's in the United States. Senator Lugar, out of the blue, after Stephen had come out unanimously from the committee, said he was going to oppose Breyer on the floor because Breyer clearly had bad judgment. Anyone who would agree to be a Lloyd's of London name and expose himself to unlimited liability clearly didn't have the judgment to sit on the Supreme Court.

I remember talking to Lugar about that. He had to have been instructed by some constituent who was a plaintiff in one of these cases, which he would never tell me. I said to him, there probably isn't a building in the state of Indiana worth more than a million dollars that isn't reinsured in one way or another by Lloyd's, but it didn't stop him at all. I think he got nine votes against Stephen on the floor as a result of that.

Knott: If I remember correctly, Ralph Nader went after you—

Cutler: In the hearings, that's right.

Knott: What—?

Cutler: Well, it's what Nader does. He finds somebody on the other side he can demonize. I'd been a victim before in some of the auto industry emission control antitrust cases. He got some Georgetown or George Washington law students to carry picket signs around in front of our office saying, "Lloyd Cutler plus General Motors equals smog," and "Clean air requires legal ethics, not legal fees," or some such thing. He got up and testified that Steve and I had had a relationship because I'd lectured in his classes, et cetera. We'd written articles together. Nader said I was the symbol of corporate America, so this had to be a bad appointment, that Steve was just going to be the secret agent of American industry on the Supreme Court. It didn't quite work out that way.

Kassop: Could you also speak about some of the actual vetting of the judicial nominees? Certainly much has been said about the Reagan administration having a litmus test and other later administrations have backed off of that, but perhaps the kinds of questions you'd talk to nominees about?

Cutler: Well, there's a whole string of problems, as you know. In the first place, the idea of the Justice Department, which is a litigant in half of the cases before the Supreme Court, interviewing the future judges who would decide those cases, but would also decide whether to make this person a judge or not, or recommend them. There's a basic problem there. It would be much better to have the American Bar Association do that kind of interviewing. They're far more likely to know the individual and his reputation and his home town, and what the trial lawyers think of him, if he's already a sitting judge hoping for promotion. That in and of itself is a problem.

Then as we move along now with such a long string of different questions that have to be vetted out, you need a whole string of vetters. You really have to examine a judge's life history to be sure you haven't run across something bad in the middle of it. So, as I say, it's a very complicated problem.

Riley: Not to take us too far off track, but Breyer had a "nanny problem" and it didn't—

Cutler: He had a "nanny problem" and it didn't—

Riley: Why, in his case—?

Cutler: Two reasons.

Riley: I mean, students years from now will look back and see—

Cutler: As a result of the Zoë Baird case, the then-Clinton administration, before I got there, adopted a policy that all those who, after the Zoë Baird case, had a "nanny problem" and came in and took care of it before they were nominated to anything, would, in effect, not be prosecuted or dropped from consideration. In Stephen's case, he and his wife came in and they did pay up whatever was owed, even on the theory that anything was owed. So that helped. Then the factual circumstances were much better in his case because he did not have a high corporate salary, he did not have the kind of professional woman profile that Zoë Baird had had. And the "nanny issue" didn't amount to much in the end in his confirmation.

Riley: I would have thought that it was still a political vulnerability for those people who may have been out to do some damage to the administration. I suppose my question is not so much why—

Cutler: Well, one reason why is, remember Stephen had been the counsel and later staff director of the Senate Judiciary Committee, both under Democrats and Republicans. He had the support of people like [Orrin] Hatch, [Strom] Thurmond, everyone else on the Committee. Anyone who had been a Senator on the Judiciary Committee was very much in favor of Stephen Breyer.

Kassop: That must have been a very strong reason for going with him.

Cutler: Yes, that's right.

Kassop: Could you say something about the kinds of questions you would ask in an interview of a prospective nominee?

Cutler: Life history. Then you might have collected unverified stories, and if so you'd ask him about those stories.

Riley: And who is doing the collecting?

Cutler: Hm?

Riley: Who is actually out collecting the raw—

Cutler: Things come into the White House. Senators call up. We ask for three years of tax returns. You check with the IRS [Internal Revenue Service]. The FBI checks its files to see if he was a scofflaw on parking tickets, or was arrested as a Weatherman back in 1960 or some such thing.

Riley: Did you find anybody who was arrested as a Weatherman back in 1960?

Cutler: We found a brother of somebody who was arrested and convicted of a bombing, I think in Buffalo. He is Michael Boudin, the current Chief Judge of the First Circuit. He is an excellent judge, and he was swiftly confirmed after full disclosure of the facts.

Riley: Maybe about the same question I was going to ask, which is, did you have conversations with the President in very broad brush terms about what it was he was looking for in filling this particular slot? Can you tell us a little bit about—?

Cutler: Yes, we would meet with him about once a week, sometimes we would go on two or three hours on different people, on different names he'd heard of. And what he wanted, which I summed up earlier as an Earl Warren type, somebody with political experience and a heart.

Riley: But was there—

Cutler: Somebody like himself, you might say.

Riley: Was there an implication there that this person would also have the same kind of ideological dispositions as an Earl Warren?

Cutler: Much less of that, much less of that. I suppose if we'd had somebody who was very much in favor of right to life, you might think about passing over a person well known to have that view. You might think about not appointing him. But in Clinton's case, he was so clear on freedom of choice, and most of the people we talked about were also clear on freedom of choice, as a very high percentage of Democrats are.

Kassop: In your conversations with the President about the judicial choices, was he—Eleanor Acheson has written about the fact that the Clinton administration was intent on not trying to necessarily balance tit-for-tat what the Republicans had done with Bork, had attempted to do with Bork, and then with Thomas. That they were not trying to necessarily balance liberals against conservatives. They were going for a more moderate, more centrist type of judicial nominee. Did you have discussions with him about that topic, that the political aspect of it was trying to de-politicize the process that had already been so politicized? That by going to somebody who was less of a lightening rod, that might be to your advantage?

Cutler: Yes, but let me say again, at the district court level, and the U.S. Attorney level, and the court of appeals level, the President doesn't know these people at all, especially if he has not

been a practicing lawyer, litigating lawyer.

I think it was Bobby Kennedy who said when he was Attorney General, that in the case of district judges and U.S. Attorneys, it is the Senator who nominates and the President who confirms. You have to defer to that, and he would. These issues really arise much more at the Supreme Court level.

Kassop: I guess I was asking whether there was some sort of a guiding philosophy that you thought Clinton was trying to, in a sense, communicate to you.

Cutler: What we were doing is the appointment process had turned 180 degrees from a time when it was thought unseemly for a nominated judge, a candidate who was actually nominated, even to appear before the Committee. Most of them were confirmed without hearings, without any serious vetting. The first Supreme Court nominee who actually appeared was Felix Frankfurter. Louis Brandeis, who'd been appointed 30 years before Frankfurter, never appeared. He was very active in lobbying his nomination or lobbying the confirmation process, but he would never go down and appear and no one ever asked him to come and appear.

Then you get to Scalia, who appeared and refused to answer questions that might indicate how he would decide a particular case. You get Breyer doing the same thing. You get Bork with a ton of writings, which he tried to defend in the hearing. I actually supported Bork, mainly because I was a good friend of Alex Bickel's, and Bickel and Bork were inseparable at Yale. While Bickel was dying of cancer, Bob Bork and I would go visit Bickel together.

Kassop: Was Clinton trying to de-politicize the process, do you think? Was he conscious of trying to de-politicize the judicial selection process?

Cutler: Only in the sense that was put best, I think, by Ken Duberstein when he was Reagan's Chief of Staff. And that was when he would get a name, he would say, "Tell me one thing, is he confirmable?" Certainly Clinton tried to pick people who were confirmable and most of his minority selections and most of his women nominees should have been confirmed, I think. They were quite within the zone of reasonableness or whatever you want to call it.

Knott: Do you think something changed for the worse—again, I'm pulling you out of context here—but the Bork hearings were a fairly ugly affair.

Cutler: Yes.

Knott: Thomas as well.

Cutler: They were an ugly affair and they were badly motivated in the sense that Bork was being attacked not for lack of judicial qualifications or experience. He'd been a judge for ten years. He was being attacked because he stood for a particular right-to-life conservative philosophy that many members of the Senate objected to. They went to unusual lengths and professional lobbying groups, like right-to-life people, freedom of choice people, literally went out and tried to get dirt of a personal nature. What movies did he watch? That's been happening

more and more ever since. If you really want to block somebody now, what you do is you go out and try to find somebody who will say he sexually attacked me or he came on to me or he likes dirty movies or he made me kick back part of my salary, or whatever.

Knott: Do you think this is here to stay, if you had to guess?

Cutler: I think it is probably here to stay as long as you have a White House of one party and a Senate of the other party, which is now most of the time.

Knott: That White House of one party, Senate of another party had happened in the past but those tactics hadn't occurred in the past.

Cutler: It has been true more than half the time since [Dwight "Ike"] Eisenhower that we've had a President of one party and a Senate of the other party. Before, in the 19th century, it hardly ever happened. I think it only happened three times. So it's a relatively modern phenomenon. It really goes back to the rise of the investigating reporter and some of the bad blood that is so clearly prevalent in Congress today among the members.

Somebody put it that the reason the House of Commons works so well is there are more bars there than there are in the Senate or the House. They can call one another every kind of name on the floor and then they go have a drink together.

Kassop: But you also have the coincidence of divided government at the same time that the independent counsel became more pronounced.

Cutler: Yes.

Kassop: So what you really have, you have committees that have subpoena power and also an independent counsel to carry it through.

Cutler: That's true.

Kassop: So there's really sort of a meshing of those two at the same time.

Cutler: But on ideological questions, I think that's been true for quite a while. I remember one of these Fred Friendly panel discussions in which everybody plays a part. I took part in one with Carter and he, of course, played the role of President. He was asked by the interlocutor, "You never had an appointment to the Supreme Court, but if you had one, would you ask that person how he would decide the next Roe against Wade case?" And Carter's answer was, "Of course I would." He didn't see anything wrong with that at all.

While we certainly take into account how we think a person would decide a particular case, most of us agree you shouldn't ask him. There is a famous [Abraham] Lincoln story you probably know also of, the legal tender case, which was the use of paper money for the first time to finance the Civil War. After the Supreme Court divided on its constitutionality four to four, there was a vacancy, and Lincoln had the job of filling that vacancy so that the case could be reheard.

He wrote to a friend, that "We dare not ask the man how he would vote and if he should answer us, we should despise him for it. Therefore, we must pick someone of whose views we are absolutely certain." And he picked Salmon P. Chase, who had been the Secretary of the Treasury, who had put the legal tender bill through the Congress. Chase got on the Supreme Court as Chief Justice and decided the case against the United States government and held the Legal Tender Act unconstitutional. So that's the real saving grace of the lifetime appointment. Presidents can and do make mistakes.

Kassop: These stories of justices that vote contrary to what one would have expected are legendary.

Cutler: Ike was supposedly asked once, "Did you ever make any serious mistakes?" You remember that? And he said "Yes, two, and they're both sitting on the Supreme Court."

Riley: Why don't we take a quick five-minute break and we'll come back and pick up with that.

[BREAK]

Riley: Steve, you had a question about the Supreme Court nominations that you wanted to pose.

Knott: Yes. Actually, I'm interested in your own opinion about the need or the desirability to have an Earl Warren type, a politician with a big heart, on the Court. Was that a position that you find yourself in some sympathy with?

Cutler: Well, I'm a great believer in a diverse Court, if you could have one, rather than nine look-alikes, all New York lawyers or some such thing. I think, particularly when the Court has to pass on what are clearly political issues, like First Amendment versus money-raising for campaigns, like the Black experience, what slavery was like, the role of professional women, the way women see things differently than the way men see things, it's very important to have that kind of variety. We've had some very good judges who were better known as political figures than as lawyers or professors, and John Marshall is probably the best example. He was a major political figure in the [George] Washington and [John] Adams administrations and he was [Thomas] Jefferson's chief rival, as you know.

So I would say yes. Maybe you don't want nine of them, but having one or two who have run for office I think is very helpful.

Knott: The President had two opportunities and ended up not reaching that standard. Perhaps you've already answered this question. You mentioned Bruce Babbitt, you mentioned Mario Cuomo, you mentioned Senator Mitchell. Was it simply a matter there were no alternatives to those three that you thought could be confirmed? Why didn't President Clinton end up putting another Earl Warren type—?

Cutler: Partly because the people who seemed to fit the Earl Warren description had other problems, and partly because the people you described as mere judges did have political experience. Ruth had been very much involved in the battle for women's rights over the years. In

fact, in the Carter days, I was involved in Ruth's appointment to the court of appeals and it was not easy to get her confirmed. It was a very hard one to get through. And in Stephen's case, even though he'd never run for elected office, he had been the staff director of the Senate Judiciary Committee. His major field of law has been administrative law, economic regulation. So he understood the politics of all these problems very, very well.

Riley: But not anybody to the same extent as Warren, as somebody from the elected political arena. In fact, that was one of the criticisms of the Court after the *Clinton v. Jones* decision. You yourself said that you felt the Court hadn't taken a very realistic view of the disruption of the Presidency.

Cutler: That's right.

Riley: An important claim, even from conservatives like [Richard] Posner, has been that you needed people with more political sensibilities on the Court. You would be unlikely to get this kind of decision.

Kassop: The same thing was said with the legislative veto case as well. If you had politicians who knew how the system worked, you never would have had that decision.

Cutler: That's right.

Kassop: A whole string of these.

Cutler: We actually have had a number of people, like Chief Justice [William Howard] Taft, who certainly had political experience. In fact, in Taft's days, you know, he played a major role in helping the President pick other Supreme Court Justices, the same way Frankfurter did.

Riley: How much of a role, or how seriously did the President consider using this appointment to go with a minority, or with a member of the minority community? Was there active consideration?

Cutler: I think if there had been a really outstanding court of appeals judge who was Hispanic, he might very well have picked him. If [Henry] Cisneros's life had turned out better, he could have been picked. It was probably too early to pick somebody like Cisneros, but I think there should be a Hispanic on the Court and we'll get one very soon. I remember back in the Kennedy days when the Kennedy people were looking for an Italian American to be on the Supreme Court, or even on the district court. As late as 1960 or '61, there were very few really distinguished Italian-American lawyers or law professors. Now you could fill a whole Court with Scalias, with Palmieris, with Calabresis, with all sorts of good people.

Kassop: What happened to José Cabranes, who had been in the running as a Hispanic?

Cutler: Well, we actually elevated José from being a district Judge, to make him a court of appeals judge, to give him that opportunity. So that if another appointment had come along, he would have been one of those prominently considered.

Kassop: Are you saying it was just too early for him to be elevated at that point?

Cutler: To jump him from District Judge to Supreme Court Judge would be quite unusual. I don't think we were really that sure about José, either. He may have been too far to the right for Clinton. But we certainly thought he ought to be up there.

Riley: Was there a conscious effort to create a kind of "minor league," if you will, in preparation for people?

Cutler: Yup.

Riley: For the majors? I mean, when you're sitting down looking at appeals courts, are you speculating?

Cutler: Yes.

Riley: Can you tell us a little bit about that process?

Cutler: It has to do with the advancement of women, the advancement of Blacks. But Cabranes is a case I particularly remember because we didn't yet have a confirmable Hispanic for the Supreme Court.

Kassop: Did Clinton consider the Justice Department also as another breeding ground for future Supreme Court Justices, as other Presidents have?

Cutler: Well, certainly other Presidents have, but I don't think he did. Of all the people we considered for the Breyer appointment, I don't think any were from the Justice Department.

Kassop: Dellinger was obviously one possible potential, I suppose.

Cutler: Yes.

Kassop: Was Drew Days in at that point, or—?

Cutler: I think Drew Days had come back to Yale by then.

Kassop: I just thought as a minority who might—

Cutler: We already had two Afro-American justices. **W**e did think of Amalya Kearse, but more because she was a woman. The joking was, a "two-fer," but we weren't looking for another Afro-American. We still had Thurgood [Marshall] on the Court.

Kassop: But you also must have realized that he was going to step down sooner or later. If it wouldn't be too laborious, would it be possible for you to go through step-by-step the process for the nominations, the process for lower court judges?

Cutler: You want me to go through that?

Kassop: For the record, is that—

Cutler: What happens there is first you have the problem of the Senator himself. The Senators sometimes will be very quick with the name that they propose, but as often as not, they don't want to make the selection right away. They have ten people who want the job who helped them get elected or reelected. They don't want to make one friend and disappoint nine other people. So they appoint screening committees. They do various other things. It is very difficult often to get the Senator to move. You have a seat that's been vacant for a year or two and you still can't get the Senator to move.

The only way to do it is, as one of these Miller Commission reports recommended, is for the President to say, "I'll give you thirty more days," or whatever number, "and if you don't come up with somebody, I'm just going to pick someone myself." And that Senator may or may not do it. Of course, if he's powerful enough he can block you anyway, he can put a hold on. Until recently you could keep the hold anonymous so the public didn't even know who it was.

In the case of the court of appeals, what some Presidents have done, what Carter did, was to create a commission to review candidates for the whole circuit. Then people would be screened by that commission and the commission would come up with a number of recommendations. The President didn't have to chose one of those people but he often did.

Kassop: The [noun uses hyphens] between your office and OLC on that—

Cutler: Our office and OLC, the Bar Association. In those days, we consulted the Bar Association much earlier in the process. Now with this Republican position that the ABA has no special rights—they're not entitled to know who we're going to appoint before we do it any more than anybody else is—the Senators, the Democratic Senators on the committee consult the ABA anyway. The ABA can't even start its process until the name has gotten to the Senate, so that adds another six or eight weeks.

What we've recommended is that there ought to be a period of something like no more than seven to eight months between the time of nomination and the time of the actual vote. Presidents have had different ways of going about this. It's probably true this President [George W. Bush] is picking somewhat more conservative judges than the Democrats picked more liberal judges. The Democratic choices may have been more toward the center than the Republican choices. But you'll see this argument go on even at the district court level now: is he too conservative, or are there too many conservatives?

Riley: The members of the Senate are dealing with whom, principally, in the White House on these appointments?

Cutler: With the White House counsel, with the White House personnel people, with the Karl Roves of the world, and with the Justice Department.

Riley: So there's no single channel.

Cutler: No, no. The staff decision is usually a consensus recommendation—I'm talking lower court now—made jointly to the President, which would include the Justice people, the Eldie Achesons, the White House personnel people, and the White House counsel.

Knott: Would members of the Senate call up not just to offer a name but would they ever actually attempt to torpedo a name that they knew?

Cutler: Oh sure, sure. That's where the words *persona non grata* come from. And that's happened at the Supreme Court level as well.

Knott: They might call up with a bit of information that they thought would damage the chances?

Cutler: Or just say, "I'm opposed to him." And I put on a hold. Or I'm going to go out and filibuster and find forty people to go along with me.

Riley: That's at a district court level or only at the appeals and above?

Cutler: Well, normally—we've had very few true filibusters recently because of the new Rule 22. If you can't break it after three efforts to get sixty votes, in effect in the Senate you have to give up. But it's often enough for a Senator to say, "I'm opposed," and that's happening right now. And there's a lot of bad blood over the [Charles] Pickering situation.

Morrisroe: May I ask, did the Clinton administration solicit more than one name for district or circuit court appointments? I know, for instance, the Reagan administration required that the Senator or the commission for circuit to forward three names, from which the White House counsel and Office of Legal Policy would make their choice. Did you ask for more than one name for each vacancy?

Cutler: We sometimes had more than one name but we didn't have a rule. And sometimes a Senator would give three names. Senator [Theodore] Stevens did that last year, for example. One of whom was my daughter. She is a judge on the state court in Alaska. But she didn't get it.

Riley: Would they give you three names and then with a wink and a nod tell you which—?

Cutler: Sometimes. Or the guy who gets picked, it turns out, worked in the campaign.

Kassop: Were there deals made also with Republicans in the Senate so that for every three Democrats you got one Republican, or something like that?

Cutler: Yes. Sometimes, if the two Senators from the state are one Republican and one Democratic, usually they have a 2:1 ratio or something, depending on which party is in the White House.

Kassop: Was that relatively smooth?

Cutler: That goes pretty smoothly because they've worked it out between themselves. I don't know what the rule is now, but I just noticed that for a Republican seat in New York, Schumer had approved one of the names he was given, but not the other. Of course, there's no Republican Senator from New York, so he can play that kind of a game now.

Riley: Again, as somebody who doesn't follow this all that closely, how often does it happen that you're given a name that you elect not to run with? Does that happen?

Cutler: Oh, yes. And there are people you don't want because you think, or the President thinks, or his people think, that the person is unqualified, or they'll be a difficult confirmation problem.

Riley: How do you proceed under those circumstances? Did you just go back—

Cutler: You try to work it out with the Senator if you can.

Riley: And that was primarily your responsibility, or—?

Cutler: It would be more often Eldie Acheson or the Justice Department responsibility. Sometimes it would be the White House person.

Riley: I was going to ask about whether you got the sense that Mrs. Clinton had a particular role in the judicial selection process?

Cutler: Well, in the Breyer case that I know about in detail, she certainly never sat in any of the meetings. She may very well have been in favor of Breyer, I don't know. But there could be other cases in which she might play a role. In the case of a woman who is being opposed by the Republicans for freedom of choice reasons, for example, she might very well urge the President to pick that person.

Riley: But it was not even high enough profile so that you would have seen it.

Cutler: I have not seen her take a position or even had it reported to me that she had a position on a particular Supreme Court or lower court appointee.

Knott: Perhaps you've already addressed this, so I apologize if this is the case, but were there any striking differences between the Carter selection process and the Clinton selection process that jump out?

Cutler: I think that Justice played more of a role in the Clinton years. Now that may just be 20 years of evolution rather than the difference between a Carter policy and a Clinton policy, but there are many more vacancies to be filled. The Congress keeps adding to the number of judges, the backlogs of vacancies keep growing, and you need more and more vetters. Justice is the one that has those vetters. When they've simmered it down to two or three people, then the White

House vetters take over, they add their own review.

Kassop: So are you saying that Justice does the vetting first and then gives you those that have risen to the top?

Cutler: Yes.

Kassop: So it's sort of an alternating [noun uses hyphens] process between the office—

Cutler: It's an iterative process going on all the time. And between the vetters they're always checking with one another, and it used to be with the ABA as well.

Knott: Was this a part of the job that you enjoyed the most or got the most satisfaction out of?

Cutler: I take more satisfaction out of the appointment of Breyer than anything else I did. This at least I helped get done and it seems to have passed the test of time.

Kassop: Is there anything that you think we haven't asked about regarding the judicial selections?

Cutler: If I looked in the book, I'd probably remind myself of a few things.

Riley: Maybe so, but that's our job and not yours. Although tonight you might want to have a look and see if there's anything that we haven't covered. I don't know that I want to get us off into anything else today. We're approaching the point that we said we would break anyway. I think maybe the thing for us to do is let us break.

Cutler: That's perfect.

Riley: And we'll come back in the morning. We're under the usual strictures not to discuss anything that ought to be on tape, otherwise I've got to ask you to repeat yourself tomorrow and Jim will be back.

[BREAK FOR DINNER]

April 23, 2002

Young: I think this morning we'd like to do several things as we wind up. First of all, there are some additional questions about the various aspects of the role of counsel that we haven't covered before. I think it might be interesting also, or useful for the historical record, to get your observations on the rise of the [Newt] Gingrich phenomenon, because although it didn't come to full fruition, the "Contract for America" was bubbling at that time, with considerable import for the future politics of the administration. Then we might wind up with your observations on Clinton as a President in the number of capacities, or roles, which a President plays, including foreign leader dealing with foreign leaders, as a peacekeeper, as a politician and so forth. Try to

get aspects of Clinton as you saw him and as you evaluated him throughout his term.

If that's OK with you, we'll begin with some questions about the aspects of the counsel's role that I think were not touched upon earlier. Nancy, you had several questions, but the first one is about vetting people who get into the Oval Office.

Kassop: Isn't it true that people, in order to be able to go in to see the President, need to be monitored or at least have background checks through the counsel's office? To make sure that there's nobody—

Cutler: Not in that formal a sense. The President sees any number of people and the counsel's office plays no role in that. There are occasions when the counsel's office is aware that, say, a Congressman is under investigation by the Justice Department. If the counsel learns from the President's schedule or something like that, that the President is about to meet with this person or invite him to fly out to his home state when the President is en route to his home state, the counsel will give what I referred to yesterday as a "heads-up" to the President. That "Congressman X, who you apparently want to take on your next trip to Kansas City, is under investigation by the Justice Department for criminal fraud," or goodness knows what. You tell him so that at least he could make up his mind whether he was going to avoid an embarrassment by disinviting the Congressman, or whether he thought it was all right to go ahead anyway.

Riley: Was the counsel's office routinely notified by the Justice Department when a member of Congress was under investigation? How would—?

Cutler: Pretty much so, yes. They would certainly notify if anyone was under investigation whom the President might be in contact with, or they thought he might be in contact with. But it is not a routine knowledge of every prosecution or every investigation that Justice makes. It is only when Justice says, "Better let the White House counsel know."

Kassop: So it's not as if the counsel's office would see the President's schedule on a daily basis and go over it to see if there would be any red flags?

Cutler: No, no. And it happens. It's rare, but it happens.

Young: There's another area of questions that has to do, one, with ethics rules, and the counsel's role with respect to that requirement.

Cutler: Right.

Young: And another with respect to presidential statements, in terms of a signing statement, veto messages, review of executive orders, and things of that kind.

Cutler: Some of that we went into yesterday.

Kassop: Speeches, we didn't.

Young: Well, you went into executive agreements I think also, did you?

Kassop: No.

Young: I'm at a loss, so I don't know.

Cutler: We went into executive orders and also presidential national security orders.

Young: Speeches, then.

Cutler: Occasionally you'd get to see a speech in draft before it was finalized and make a contribution to the draft. But the way President Clinton worked, he was always revising the drafts up to the very last minute before he was on the air. You didn't have the final text and an opportunity to comment on that. By the time you got in your comments, he might have junked or added a whole page or two that you didn't even know about.

Young: Did you ever know Sam Rosenman?

Cutler: Yes, you're talking about [Franklin] Roosevelt's—

Young: Yes, I'm talking about Roosevelt. Well, this term, I think, was fixed up for him. Roosevelt did call him a counsel.

Cutler: Special counsel.

Young: Special counsel. He was very much involved in, among other things, speeches, as was Ted Sorensen I think for Kennedy. Has that sort of dropped off the main radar screen of the counsel's duties?

Cutler: No, it's still a part of the counsel's duties. It was in the Carter days and it is in the Clinton days, but what began as bringing in Judge Rosenman or Ted Sorensen as a speech writer, more or less transmogrified itself into naming him as counsel, or special counsel. But the whole White House staff is larger and each member is more specialized, and there are people who do nothing but speeches. There is a great Rosenman story—I guess everybody knows about FDR [Franklin Delano Roosevelt]'s balance-the-budget speech, which he made in Pittsburgh during his 1932 campaign. After he was elected, he had to go back to Pittsburgh, and Rosenman was drafting his Pittsburgh speech. The President asked him, "What am I going to say about balancing the budget?" And Rosenman's answer was that, "The only thing you can do is deny you ever were in Pittsburgh."

Young: You knew Jim Rowe also, didn't you?

Cutler: I knew Jim very well, yes.

Young: He was a visitor out here on several occasions.

Cutler: Very salty fellow.

Young: Very salty, and we have plenty of Roosevelt stories from him also. Presidential vetoes, was that a significant part—veto messages?

Cutler: Clinton was not a big vetoer, as I recall, certainly while he had majorities in both houses. Once he lost control of the House and Senate in 1994, we did have a few vetoes.

Young: Carter had very, very few.

Cutler: He had very few. Of course, he had a Democratic Congress throughout.

Young: Was there more—

Cutler: The Bushes had a lot. Reagan had an awful lot, a tremendous number.

Kassop: Executive agreements and treaties? The counsel's role there?

Cutler: Yes, well in the Carter days I did a lot of work on SALT II [Strategic Arms Limitation Treaty], but that was really kind of an accident, in the sense that I had been invited to become an Under Secretary of Defense for International Security by Harold Brown. I finally decided not to do it, but one of the assignments would have been to shepherd the SALT II treaty through the Senate. I agreed that I would do that *pro bono* out of my law firm, and I did do that. Then several months later, I was invited to become the President's counsel, but I was already working on the SALT II treaty, so it stayed with me. I was in charge of the presentation to the Senate, to the Foreign Relations Committee and Armed Services Committee.

Young: What about the Clinton years that you were there, or months?

Cutler: In that six-month period, at the moment I don't recall taking part in the presentation of a treaty.

Young: The NAFTA agreement [North American Free Trade Agreement] was signed during your tenure, was it not?

Cutler: It was certainly being pushed through Congress.

Philip Zelikow: It was not signed during that period. It had been signed during the previous Bush administration. The ratification—ratification is not quite the right word—but the process of securing congressional approval—

Cutler: Fast track.

Young: That was December the 8th, the bill implementing the North American Free Trade Agreement.

Cutler: But in ’94, that was a red hot topic, just getting the approval, yes.

Young: Did you do a lot of congressional work?

Cutler: On that?

Young: Yes.

Cutler: Not a great deal. Mostly it was a matter of conditions, reservations, that sort of thing, that various members wanted to put on. The unions went along but very reluctantly. I guess you know, the environmentalists went along, but very reluctantly. It was one of his major legislative achievements to get it through.

Young: On the [James] Brady Bill that was signed also, was that a significant part, did that loom large in your—?

Cutler: Which bill?

Young: The Brady Bill?

Cutler: The Brady Bill was thought of as a big legislative objective, one of the few things in the whole sensitive area of gun control that you had a chance of getting through. And he did get it through. Years before that, I had been the executive director of the Milton Eisenhower Commission on the Causes and Prevention of Violence. We had made a very strong handgun licensing recommendation that had never gotten anywhere, but I always maintained my interest in that area and I did work on the Brady Bill issues. The Brady Bill was just a patch. It was worth doing in and of itself, but it certainly wasn’t going to solve the problem.

Young: Did you deal mainly with the legal issues on that or also with legislative persuasion?

Cutler: With both. With presidential messages, speeches, lobbying issues. Tom Foley was very active in that, as you know.

Young: Did you have a question about the crime bill?

Knott: The crime bill was enacted just toward the end of your six-month stay.

Cutler: That’s right. The crime bill dealt primarily with providing funds for additional police.

Knott: That was 100,000—

Cutler: Clinton managed very skillfully, I think, to be seen as somebody very much concerned about law enforcement. He did get a lot of the legislation and the funding for additional police through.

Knott: The opposition to that was based on the argument of increased federal—

Cutler: Camel's nose under the tent. But we were able to maintain the support of the police chief organizations around the country, as I recall.

Riley: Were you involved in any of the public outreach related to that?

Cutler: I went to some meetings where the police chiefs were invited to the White House, yes.

Riley: As an active participant or a presenter, or were you there more as a resource person?

Cutler: More as a resource person.

Young: You remember from the Carter administration; I think it may have begun in a more systematic way with the Panama Canal treaty—

Cutler: "We stole it fair and square." Famous remark.

Young: Ann Wexler set up an operation that would bring in outside groups, brief them and so forth, fairly systematically done. That was continued on many of the legislative issues in the Carter years, as I understand it. Was the crime bill or other bills an example—did the Clinton White House do the same thing?

Cutler: Very much so on the crime bill, yes. And Panama Canal really preceded my time in the Carter White House, just before me. That's where it was really Howard Baker that got it through the Senate. It may well have cost him his chance to be the Republican candidate.

Young: And a few others as well, I think. From that.

Knott: So you had an instance there of a prominent Republican helping out a Democratic President. In your time in Washington, did you see over the years a decline in that ability to sort of reach across the aisle and forge these kinds of bipartisan consensus? In other words, was there a harsher partisan atmosphere?

Cutler: Well, it varied issue by issue. During the Cold War, of course, there were a number of alliances of Republicans and Democrats all agreeing that we had to confront the Russians in one way or another. When you got to the Panama Canal, there was very wide dissension about giving back the canal. Even in Cold War terms, national security terms, many Republicans were very much against giving back the canal. Of course, we also had a string of more or less unsavory Presidents of Panama.

Knott: Did you notice during the Clinton years perhaps a harsher partisanship up on the Hill than you remembered during your—?

Cutler: Probably so, yes. How to divide it between harsher partisanship on policy issues, and between the way people appraised President Clinton as compared to the way they appraised Jimmy Carter, it's hard to draw much of a distinction.

Young: There's a general view shared by some leaders, including President Bush, George H. W. Bush, who have commented on the decline of civility in Washington. I think this is what Steve is probably referring to, and that is seen to be a sort of sea change in the climate of political conduct in Washington. That's not specific to any particular President, but is a general atmospheric change. Are you saying it's probably specific, not general?

Cutler: I think it is general, resulting in part from the change in the majority in the House of Representatives. You know, the Democrats had it for what, 32 years or some extraordinary length of time. Democratic leaders of the House, people like John Dingell, who have been chairman of the Commerce Committee for 20 years or 30 years, real powerhouses, felt that the atmosphere was getting very bad, that the Republicans were shoving him aside. That being ranking minority member, you were not given the respect you should be given, that there was a sense of bitterness and revenge. But that's a Democratic view of what happened when they lost the House.

There's much less of that in the Senate, of course, where the elections are only every six years and where control has shifted back and forth a number of times. There is more of a camaraderie, I guess, among Senators, even on the floor. The good manners among Senators are extraordinary. If you compare it, say, to the House or the British House of Commons, it's very different.

Riley: I think some of this is also related to developments in the press, though. The emergence of these programs like *Crossfire* and *The McLaughlin Group*, which is a qualitatively different exercise than you saw two generations or a generation or so ago. Do you agree with that?

Cutler: I think that's true. But even in those programs, if you see a Democratic and a Republican Senator up there, or even a Democratic and a Republican House member, they may disagree sharply on a policy issue, but they're very polite. "My distinguished friend," "My good friend Senator So-and-So, with whom I agree on most issues, but I disagree on this." So it's not quite that bad.

Riley: OK.

Zelikow: Have you already discussed the *Jones v. Clinton* case and the issue of presidential immunity?

Young: The Paula Jones case?

Zelikow: And the constitutional decision on the position of the United States in that lawsuit?

Young: Yes.

Cutler: We talked about it yesterday. Do you want to revisit any part of it?

Zelikow: I just didn't know whether you'd had a chance to talk through the constitutional issues involved. Your view of what you thought the correct position, to work through your position on

the legal issues. But if you've already discussed it—

Cutler: By the time the case got to the Supreme Court, I was out of the White House. I had been involved in the original retention of Bob Bennett to represent the President. I did help on a *pro bono* basis from my law firm on the fashioning of the briefs and the form of the argument, and the position we took. The one that Justice Breyer eventually agreed to, if you remember, was that a lawsuit involving alleged personal misconduct was enormously draining on the time and attention of the President. And that while no man, not even the President, is above the law, a President should be entitled to have either absolute or qualified immunity while he is in office with the tolling of the statute of limitations and the allowing of a limited discovery to preserve evidence during the time that the lawsuit is stayed. And that at the end of the term, or at the end of the President's term in office, the suit would remain alive and any evidence that had to be preserved during the time when the President was President would be recorded in depositions and be available.

Young: You observed also that you expected the Supreme Court decision, although you regretted it.

Cutler: That's right. I thought we were right. But we'd been through a lot of that in the Nixon cases, as you know, and also there had been a case involving JFK, in which Kennedy had hired a limousine—this was before he took office. The limousine, while he was not in it, got into an accident of some sort. The people, the other side in the accident, brought a lawsuit against Kennedy and it was settled out of court. But it was the kind of accident and the kind of lawsuit that would have required minimal attention and would have had no political consequences for the President. Of course, if the President murders his wife, once again, you have a different situation. You don't defer that lawsuit until he's out of office.

Zelikow: Likely that would not be brought as a civil lawsuit.

Riley: Although it could.

Cutler: If it was brought by an alleged ex-girlfriend, it would be a major lawsuit.

Zelikow: Did you discuss your role in the presidential personnel vetting process and your role with respect to FBI files?

Young: I think so.

Cutler: I think we went through a lot of that yesterday, but if you're talking about access of congressional committees to the files?

Zelikow: No, I'm talking about the role of the White House counsel in presidential appointments and your role in having privileged access to the FBI files and confidentially evaluating material in those files.

Cutler: We did have access, both in the Carter years and the Clinton six months that I was there.

What you got was not the raw file but a summary prepared by some FBI investigator of the material, the adverse material in the raw file.

Zelikow: Did you discuss the Filegate affair and the issue of access to FBI files among White House staff and all that?

Riley: No.

Cutler: You mean relating to Travelgate? We did go into Travelgate.

Zelikow: This was a different issue. Travelgate, it's sometimes hard to keep all these separate, but this was an issue in which it was argued that White House staffers had used their position to obtain access to FBI files on Republicans. There were a couple of particular individuals—

Cutler: Yes. No, we did not go into that. It was true that, as I recall, that a list—when the President took office, when any new President takes office, he is presented with a list of the White House personnel who may or may not be retained. He has access to FBI material about those people while he is considering whether to retain them or not to retain them. That function was performed by Craig Livingstone, who we were talking about yesterday, and who at one point I was embarrassed to discover was listed as part of the White House counsel's office, after he had committed a lot of these transgressions. I don't remember the name of his colleague. But in any event, the allegation was that Livingstone and this other guy had taken some of that material and turned it over to some of the President's political people.

Zelikow: Had that allegation already been addressed and disposed of when you became White House counsel, or were you important to the investigation of those issues?

Cutler: It had been addressed. I don't think it had been disposed of.

Zelikow: Did that become an important responsibility for you?

Cutler: Yes.

Zelikow: How did you handle it? What was your approach to it?

Cutler: As I recall, there was no real evidence that the files had been misused. These two people did have access to the files. But I don't think that there was much evidence that any of it was turned over for use in a political way. Then the problem just went away. As I recall, there was no real resolution, was there?

Zelikow: What happened to the people involved? Livingstone and his—

Cutler: Livingstone got pushed way into the background. Livingstone had a number of problems, one of which was the failure to vet new people entering the White House staff offices within the time that they should have been vetted in order to have security clearances. They were given temporary waivers of security clearances and given access to national security information

before they had been fully vetted. That was Livingstone's responsibility and Livingstone's fault, although I dare say in every administration it takes a long time to vet everybody, every new person you bring in.

Zelikow: Were you involved—have you already discussed the crime bill?

Cutler: We just did.

Young: Now, we were going to go into it.

Zelikow: Did you know Phil Heymann?

Cutler: Very well.

Zelikow: I was trying to remember when Heymann resigned, because it seemed to me that it was in '94. But I didn't know whether he resigned—

Cutler: When I was there, he was already back at Harvard.

Zelikow: OK, so he had already resigned.

Cutler: Right.

Zelikow: Because I wanted really to focus on the issue—one of the issues on which Heymann resigned was that he thought that the bill was a dramatic shift in the federal and state allocation of responsibility for criminal law that he thought was fundamentally misguided. I didn't know whether you were involved at all in the substantive work up of the bill or the movement of that bill through Congress, or what you thought of the federal jurisdiction issues involved there.

Cutler: I was involved in the presentation of the bill to Congress, largely with respect to the gun provisions and the augmentation of state and municipal police forces to be financed by the federal government. On the issue of whether we were federalizing too many crimes, I personally agreed with Phil about that.

But Phil and Janet Reno never got along very well. It wasn't any activity on the part of the White House that induced Phil to resign, it was really Janet who wanted to replace him.

Zelikow: Had you been involved, or consulted in the process, that led to the selection of Janet Reno as Attorney General?

Cutler: Yes, in the sense that I had been involved as part of the transition team after the election and the selection of the Cabinet, in particular the legal people. I'd been involved first in the decision to make Zoë Baird the White House counsel. Then the failure to be able to bring in—I think it was Brooksley Born, a former president of the ABA, and at least one other woman (Kimba Wood) whom they wanted to appoint Attorney General. And the decision was to change Zoë from being White House counsel to being the nominee for Attorney General. Then I

helped—

Zelikow: Did you discuss all this yesterday?

Cutler: Yes. And I helped to manage the presentation, Zoë's preparation and testimony before the Senate Judiciary Committee. I was one of the group that reached the conclusion that we should ask Zoë to step down.

Riley: Let me follow up. But then beyond that, I can't recall whether we talked about a specific role that you had in the presentation of Janet Reno's name to the President.

Cutler: Not in the presentation. But after she was picked, one of her former law partners, John Smith, now dead, who was a close friend and colleague of mine, put together an informal committee of former Attorneys General, heads of the criminal division, and others, to advise Janet Reno on some of her initial decisions.

Zelikow: I see.

Cutler: I was one of the people in that group and recommended a few things she didn't do. One was get rid of the Immigration and Naturalization Service, get it out of the Department, get rid of the drug enforcement people, and stay out of Waco. Just wait out the Waco religious group rather than going in to get them.

Zelikow: So you were meeting with her on a regular basis or—

Cutler: We had, oh, two, three, four meetings of this informal committee in the first few months of her administration.

Zelikow: What was the basis for the decision-making about getting the INS [Immigration and Naturalization Service] and, you said, the DEA [Drug Enforcement Administration]?

Cutler: The fact that the Justice Department has over 90,000 people and that the INS is one of our poorest bureaucracies. And that the drug control people were one of our worst behaved bureaucracies. They were just a liability to her. She had enough to do, just enforcing the criminal and civil laws and running her department.

Young: Where would each of these—Drug Enforcement Administration and the Immigration Service—where would they be exported?

Cutler: Either make them independent agencies—we're doing some of this now with respect to the INS, as you know—or, in the case of Drug Enforcement, give it to the Treasury. Get rid of it in one way or another.

Zelikow: Was any of this patched in to the effort that the Vice President was engaged in for reinventing government? Or was this prior to any of his efforts?

Cutler: Well, reinventing government went on throughout, certainly the first four years. I just don't recall whether restructuring the Justice Department was one of the major activities.
Zelikow: And it probably would have postdated anything that you were doing at this stage with Attorney General Reno.

Cutler: Could have. Although when I went in, as counsel, we were already in the second year of the Clinton administration.

Zelikow: But this advisory committee for Attorney General Reno was something that predated—

Cutler: Yes. That would probably have been in the spring of '93.

Zelikow: Right, because Waco was that summer or late spring.

Cutler: Right.

Kassop: You mentioned a number of times that you've been consulted informally for the administration and some of us were wondering whether you had any role in impeachment, whether people came to you to consult you as to where the administration was—

Cutler: I was a kibitzer on impeachment. I worked a good deal with one of my successors as White House counsel and with the Williams & Connolly people, David Kendall, who helped argue the case and prepare the briefs. I've said a number of times that despite my original position that I was only going to stay for six months, if I had known that an impeachment was coming, and if I had had the chance that Chuck Ruff had to represent the President, I would have stuck around.

Young: Expand upon that.

Cutler: I'd probably be dead by now.

Young: Expand upon that. It might have changed your mind if you had that crystal ball. Why would you have changed your mind?

Cutler: It's hard to think of a more exciting and rewarding and responsible position for a lawyer than to defend the President in an impeachment. We've only had two of them in 220 years.

Riley: What kinds of informal consultations were you engaged in?

Cutler: I did a lot of work on negotiating with Henry Hyde on whether or not an impeachment resolution would be sent to the floor of the House. Or alternatively, whether it would simply be a motion to reprimand.

Riley: I see.

Cutler: Then there was a big issue as to if an impeachment resolution was sent to the floor,

whether there would be an opportunity on the floor, allowed under the House rules, to substitute a reprimand motion. We almost made a deal but not quite.

Riley: Can you tell us about the terms of the deal?

Cutler: I'm trying to recall now how much of it is—there were newspaper stories written about it. But since my negotiations with Ruff and with Henry Hyde were confidential negotiations, I don't think I'd better unless you have—if you show me something that's in the newspapers, I'll comment on that.

Riley: Peter Baker's book?

Cutler: Baker interviewed me and there is something about it in Baker's book.

Knott: Would you care to comment on your assessment of Kenneth Starr and his investigation and whether you thought it exceeded the—

Cutler: Well, we did some of this yesterday, on the record and off the record. All I'll say is I think Starr—well, number one, I think an independent counsel always runs the risk of being looked on as a man on a horseback with a political ambition and no real way of checking him. That's one of the difficulties with an independent counsel statute. I thought Starr was an extremely able lawyer, that in his role as Solicitor General and as appellate judge, he'd been very good and really quite liberal for a Republican on First Amendment and related issues.

Above all, I thought it was just suicidal for the President or anyone speaking for the President to attack Starr once he got appointed. I've taken you through the whole appointment process and the fact that we had made it possible, in the statute reviving the independent counsel law, for Fiske to be retained. We were all shocked and disappointed that the three-judge panel decided instead to replace Fiske, for reasons that are really open to very serious question.

Young: That was the International Paper—

Cutler: This was the International Paper thing and the relationship between Judge Sentelle and his wife, who worked for the other North Carolina Senator at the time, who was very interested in lobbying to get Fiske out, because they thought Fiske was being too light on the investigation.

Riley: I'm trying to recall, because this wasn't a part of the specific preparations in these briefing materials: the administration's position, or your position in your negotiations with Congressman Hyde, were supportive of the censure as opposed to impeachment?

Cutler: They related to whether there should or shouldn't be an impeachment resolution within the committee. And whether, if there were to be an impeachment resolution within the committee, whether there could be a separate vote within the committee and on the floor under whatever rule the House adopted to consider it, on whether there should be a substitute reprimand of some sort rather than an actual impeachment.

Riley: I see.

Zelikow: Whom were you representing in these negotiations?

Cutler: Well, I'll fall back on Louis Brandeis. "I was representing the situation," which was Brandeis's remark about the United Shoe case, as you know. I'll answer the question. That is, I knew Hyde, I liked Hyde. Hyde had actually nominated Jimmy Carter for the Nobel Prize and I had worked with him on that. I had represented Hyde in one of the cases related to the term limits issue (the Foley Case in Washington State). We'd filed an amicus brief, which he authorized us to file in his name, supporting Foley. And, of course, I was very close to Chuck Ruff. I was sort of half a volunteer, half an authorized unofficial spokesman to go in and talk to Hyde to see what he could do.

Zelikow: I asked because you have a situation where a number of people have authority of some kind to represent the President. I'm wondering whether there was, on the other side, perhaps some sense of unease. *If he cuts a deal, can he deliver the President for the deal? Can he deliver his side of the deal?* Because if it came leaked, from Hyde's perspective, that they're prepared to compromise in this way and then they can't close the bargain, they've gotten the worst of both worlds. So that's why I was trying to get a better understanding of how Hyde would have perceived your role and who you were representing in those discussions, although I think you've substantially answered that.

Cutler: Yes. You remember Hyde had a counsel from Chicago who wrote a book, in the last year or so I guess, a rather inflammatory book.

Zelikow: David—

Knott: Schippers.

Zelikow: Thank you.

Cutler: And we had at least one meeting with Hyde's staff present. After that, Hyde himself initiated these private discussions without the staff. But the negotiations—

Zelikow: Can I pursue this? Because this is important. This is almost, as we would say in tort law, the last clear chance to avoid a collision, I think, or very close to it. If I understand your description of this, the President's aides have asked you to discuss this issue with Congressman Hyde. In turn, Congressman Hyde is in an awkward position because although he's chairman of House Judiciary, and that's very important in this process, there is also the House Republican leadership behind him.

Cutler: And there's Gingrich.

Zelikow: Right. You might have had concerns on your side, that even if I persuade Hyde, can Hyde bring along the leadership? If there's a deal made about what kind of rule would be adopted in the debate of the impeachment resolution, for example, where Hyde has to

share authority in making a decision like that with the leadership. Did you sense that Hyde himself judged that a deal of this kind was the best way out, but that Hyde was constrained by other views among senior Republicans? And so he was unable to be more forthcoming because he was representing a group of people who had different views than he did? Or did you have a sense that Hyde himself was never really satisfied that this was the way to go?

Cutler: No, I had that sense, but the committee—it was an odd committee in the sense that it had no center. Hyde apart, there was no middle moderate group on the House Judiciary Committee. You had a bunch of the right-wing Republicans and you had a bunch of very liberal [Congressional] Black Caucus members on the committee. There were one or two of the ranking Democrats that Hyde felt he could deal with, but other than that it was a committee that was just destined to split.

Zelikow: Mr. Cutler, do you remember the time frame for this? Was this before or after the midterm elections?

Cutler: It was between—certainly, it began before the midterm elections and it eventually petered out after the midterm elections.

Zelikow: Exactly.

Cutler: Just after the midterm elections. Because there was a problem of the Republicans having lost half of their narrow majority. They were down to a very narrow majority, and if the thing dragged over into the following year, 1999, if it dragged into the following year, the Republicans might lose a few of their own members who would vote with the Democrats. If you didn't get the impeachment resolution on the floor, and passed before the next session of Congress in January, you might have lost the opportunity to do it.

Zelikow: Exactly. My question relates to the political dimension of this and whether your negotiations with Congressman Hyde began and then carried through the midterm election. I think that's what you're saying, that you started consulting with him before. My question is whether you detected a noticeable change in his tenor after the election, given the political realities. This was being read in the press at the time, that the midterm election was a sort of referendum on that effort that the Republicans fared poorly in. Were you picking up those same kinds of signals on Capitol Hill when you were talking with the Congressmen or others?

Cutler: Well, certainly I had the sense then that it had become a much harder problem as a result of the election. The election really meant that if the Republicans were to go forward with an impeachment, they would have to do it before the end of the session.

Zelikow: And that was because of a constitutional issue or a political issue?

Cutler: Political issue. I forget the numbers of these Congresses, but in the 1999 session—the Congress in 1998 had a greater Republican majority than it was going to have in 1999.

Zelikow: Right. But there were also some constitutional questions raised about whether one had

to begin anew an impeachment process that had begun in a previous Congress. Am I mistaken on this count?

Cutler: I don't think that was the issue. One could say because the House rolls over completely and is not a continuing body, that you might have to start again.

Zelikow: Right, that was the argument. But from your perspective—

Cutler: But the central argument was the change in the size of the majority.

Zelikow: And the political dimension of whether—

Cutler: Right.

Zelikow: —whether the Republicans were weakened in their political posture after the American people had voted and had sort of had a referendum on it.

Cutler: Plus the coincidence that Gingrich fell on his sword because of an affair. And that [Robert] Livingston, who was going to be his successor and was really a moderate, fell on his sword because of an affair.

Riley: If I could follow up with one further question on the one that Philip raised, and that is, did you sense that Congressman Hyde was performing as he did in your negotiations largely because of the pressure he was feeling from the more conservative members on his committee?

Cutler: Whether it was the conservative members on his committee—he always had the problem of the conservative members on his committee, but it was much more the leadership.

Zelikow: Were you involved in any of the discussions among people close to Clinton during the low point in the summer of 1998 about whether the President should resign?

Cutler: No. But at least my understanding is it was never—we use the phrase now, "never an option," but it was just not in Clinton's character to resign.

Riley: Maybe we should go back to January and pose the question—

Young: January of which year?

Riley: January of 1998, I'm sorry. Where were you when you first learned of the [Monica] Lewinsky matter?

Cutler: Back in my law firm. I'd never met her. She didn't exist, essentially, while I was in the White House.

Zelikow: Linda Tripp did, though.

Cutler: Yes, Linda Tripp did.

Zelikow: Linda Tripp worked for you.

Cutler: And Kathleen Willey.

Young: Yes, we got that story yesterday, too.

Riley: And wanted to do more work for him. Were you called in by the White House at any time in January or February to consult with the President about how to deal with this problem?

Cutler: Not with the President, but I was in fairly regular communication both with David Kendall and with the White House counsel. That would have included Mikva, Jack Quinn and Chuck Ruff.

Riley: But mostly on the legal questions rather than the politics of that scandal or both?

Cutler: Both.

Riley: There is one question for you: in hindsight there have been those who have suggested that the President could have saved himself an awful lot of trouble if at some point in January or February he had been very forthcoming with the facts of the situation and basically pleaded a public apology for what had transpired. Rather than, following the avenue that he did, of basically keeping this as close to himself as he could and dragging this out. Were you of the opinion at the time, and in retrospect do you believe, that the President did the right thing in handling it as he did? Or were you of the opinion that he should have gone ahead and been very public and forthcoming with the facts on this case?

Cutler: I'm going to take the Fifth on that. You're getting awfully close to the nature of advice to the President.

Zelikow: What was the relationship between Williams & Connelly on the one hand, and the White House counsel's office on the other? It is unusual in this administration, partly because of the President's unusual legal situation. You have a really intense sort of triangular relationship, where the President has official lawyers and his private lawyers, but the official lawyers and the private lawyers need to be in regular consultation with each other. If you haven't already talked about it, did you spend some time yesterday on the issue of kind of how to navigate this potential whirlpool?

Young: I think not with respect to—I wasn't there all yesterday—not with respect to this specific situation. In general, the—

Zelikow: I mean, you dealt personally with this problem as White House counsel, but you had dealt with the situation both before and after your formal tenure as White House counsel. You'll appreciate what to an outsider would be a very complex legal environment, in which the President has his official lawyer, who has obligations to the President but also beyond the

President as a person, but also obligations to the Presidency.

Cutler: We did talk about it at some length yesterday.

Zelikow: Then you have the President's private law firm. Then you actually have sort of additional interested lawyers called in for consultation, perhaps even such as yourself. There is a need to be sure that the White House counsel and the private lawyers don't adopt contradictory positions on critical legal issues. Yet, on the other hand, both the White House counsel and Williams & Connelly have different legal obligations in assessing their duty. I'm just curious if you could shed some light on how the official lawyers during this period, how well you think they did in kind of navigating this whirlpool? What kind of guidance—for later people who are trying to understand this, as they're trying to piece together these complicated legal relationships—how would you urge them to try to understand this?

Cutler: I think it's less of a problem than you're suggesting. It is certainly true that what happened to Clinton and the political fallout of the Paula Jones lawsuit, the Monica Lewinsky affair and so forth and the original Whitewater business meant that he had enormous private legal problems for which he needed counsel and that counsel would have to be paid. He couldn't get it for free from someone in a large law firm whose law firm was presenting matters to various people in the government. We went through that in some detail yesterday.

But it used to be true, in the Carter days, for example, that Charlie Kirbo, who was one of the senior partners of King & Spalding, the Atlanta law firm, was always brought in unofficially by Carter when there was a problem either with his family, like the Billy Carter affair, or just some big substantive issue. In my time in Carter's White House, fairly often when we thought the President ought to do something we weren't able to persuade him to do, we would go to Kirbo and say, "Here's the issue, would you talk to him about it." Or he on his own would listen to us and then talk to Kirbo himself. That relationship went very well and most of us regarded Kirbo as an asset, not a liability at all.

I think the relationships between David Kendall and the various White House counsel were always very good. The big arguments were between the Kendall law firm and Bob Bennett, about how to represent the President in these two private matters.

Zelikow: Because the Kendall law firm had been involved in defending him in Whitewater?

Cutler: Yes.

Zelikow: It seems like they were the ones advising the President on pretty much all of his private legal troubles except for the Paula Jones lawsuit.

Cutler: All of those involving litigation. He had tax counsel, he had other kinds of counsel.

Riley: There was press commentary at the time and many of the pundits in 1998 were suggesting that there was a competition within the White House among the President's legal advisors, who were basically encouraging an abundance of caution in being forthcoming, as opposed to the

political advisors, who were suggesting that he needed to get—

Cutler: I don't think there was controversy among the legal advisors.

Riley: Among the legal advisors, but—

Cutler: There was the advice he was getting from [Richard] Morris, which was in sharp contrast to the advice he was getting from his private lawyers, from the White House Chief of Staff and others.

Riley: But not just Morris, there were I'm sure others who were suggesting that the President was better served by getting more information out rather than less.

Cutler: Morris was on the other side.

Riley: OK. But I guess my question is about your sense, as someone who has been both a lawyer and a political advisor, how this played out in this particular instance. It seems to me to be a good illustration of the intersection of the President's political and legal problems. I'm struggling to frame a question here that you would feel comfortable answering. I suppose what I'm trying to do is to get a sense about whether you felt the President might have been better served listening to political advisors at this point rather than legal advisors. I hear your answer is that Dick Morris was telling him he should follow his legal advice.

Young: So that's the answer.

Cutler: No, Dick Morris was not saying follow the legal advice. Morris was taking polls and saying that if you're more forthcoming, the public will never forgive you.

Riley: Exactly, which effectively reinforced the legal advice which was—

Cutler: No.

Riley: It did not?

Cutler: The legal advice was, be much more forthcoming.

Riley: OK.

Zelikow: As I remember [Robert] Woodward's book, he clearly had access to at least some of the President's lawyers as sources in his account. A couple of them even on the record. Woodward portrays the basic problem as why he couldn't get these things behind him. Clearly part of that was the attitude of the Congressmen who were after him, the kind of, "Nothing you give them will satisfy them." But there was also really this sense in Woodward's portrait that the White House does not want to be forthcoming, and he recounts a huge amount of frustration among the President's lawyers. They feel like they can't seem to get the complete story. They're always pressing to get a complete story, get it out, take the hit, but they can't get the complete

story. It's always coming out in dribs and drabs and they're just getting beat up, month in and month out, with successive new revelations about things that they didn't know about.

That's the image that I got from reading Woodward's book. I don't know whether that's an accurate image or an accurate impression or not, but that's the impression he gives really consistently from about 1993 all the way through both terms, never ending. There's never a point at which Woodward describes Clinton and Mrs. Clinton as really turning a corner and adopting a profoundly different approach in handling these matters.

Cutler: Well, you've got three different episodes really. One is Madison Guaranty in Whitewater. Another is Paula Jones. And the third is Monica and the fallout from Monica. I think reactions and advice were different in each of those cases. It is probably true, that we know from the diaries and from other things, that Hillary in particular didn't want investigations into various things that had happened in Arkansas to continue, particularly the Madison Savings Bank issue.

Zelikow: I remember the way that that then led into the investigation of the Rose Law Firm.

Cutler: So that's one issue. Then you get to the Paula Jones and should it be settled at a very early stage and could we find a way to get rid of it, in which the desire on the part of everybody was to get rid of it. That would have involved, we went through it yesterday, a negotiated public statement by the President saying that Paula Jones's behavior had been perfectly proper, et cetera, et cetera. We were unable to resolve that. But there was no real difference on our side as to conflict in advice as to how to deal with Paula Jones.

Zelikow: When you say no difference on your side, does it mean among the lawyers?

Cutler: Among the public lawyers, the private lawyers, or the White House political advisors.

Zelikow: Right. But there may have been a difference between the views of the lawyers and the views of the client.

Cutler: I suppose there may have been but I don't believe there were.

Riley: Mr. Cutler, can I frame the question this way as a broad question. I think it's unlikely that you'll be writing memoirs on this topic. We have an opportunity to create an historical record here that will be of some use for people, like ourselves, in the future who are trying to make sense of what happened during the last couple of years of the Clinton Presidency, a very historically important time. Is it possible for you to begin in January and sort of give us a narrative of what you were doing through 1998 in very general terms, the role that you were playing, the kinds of things that you were doing with the White House, just so that we'll have a kind of general sense of the part that you were playing in this particular drama?

Zelikow: And/or your perspective on that drama as you can see it. Is there anything about that you think people don't really understand or don't see very clearly but that you see better because of the vantage point you had?

Cutler: I can't say what other people think. First, as you know, I was out of there. It's seven years ago that I left the White House. I did stay in touch both with Jane Sherburne, whom I had brought in and who remained, really, more or less as the member of the White House counsel staff who was dealing with all of the remaining Paula Jones and Monica Lewinsky issues. But it is so close to the borderline of what I thought the President might have done or what he should have done, I just don't want to get into it.

Kassop: Is it fair to say, going back to some of the questions that Russell was posing earlier, that over those three incidents of Whitewater, Paula Jones, and Monica, that there was a fairly consistent tension between the political advice the President was getting and the legal advice he was getting?

Cutler: He was getting political advice on both sides. Be more forthcoming, be less forthcoming. I think the legal advice was pretty consistent all the way through. And as I said, the only real disputes were between the two different groups of private lawyers.

Riley: If we can go back to the impeachment, you talked a little bit about the work that you had done with Congressman Hyde in trying to negotiate something on the House side. Were you further involved in that as it worked its way through?

Cutler: On the Senate side?

Riley: On the Senate side.

Cutler: I was involved in talking constantly to the defense team in the Senate impeachment proceedings. We had a major legal issue there, you know, as well and that was whether in considering whether to vote guilty or not guilty in the Senate on the two impeachment grounds, whether you could introduce in the Senate a vote of censure as a substitute in effect for a verdict of guilty or not guilty on the impeachment. Senator [Dianne] Feinstein was very much in favor of following that sort of procedure. A number of the Republican Senators argued you can't do that, that constitutionally you have to vote guilty or not guilty and censure would have to be considered on its own merits, not as a substitute.

Riley: And your position, that it was—

Cutler: We all worked on the arguments that censure could be introduced as a substitute.

Riley: The historical precedent being [Andrew] Jackson? Was that the only one?

Cutler: I think most of the precedents related to impeachments of judges. We had a number of cases in which an impeachment resolution went to the Senate, ended up with a censure motion instead of an impeachment, or a vote guilty or not guilty.

Riley: Had you, in the interim at some point between the beginning of the Lewinsky thing becoming public and the impeachment, made arguments about the impeachability of the offenses

that the President was accused of?

Cutler: Yes.

Riley: Can you elaborate on that? Was it your position that he was being accused of wrongdoing that was not an impeachable offense?

Cutler: Yes. The issue is the issue of whether the offense has to be committed in an official capacity. You steal money out of the Treasury, or you order troops into action in violation of the War Powers Resolution or whatever. Or, as in [Andrew] Johnson's case, you remove an executive officer from his office even though Congress had passed a law saying you couldn't do it without their consent, which was what Johnson was impeached about. The arguments, once again, we only had two impeachments, but the arguments were pretty strong that you could do that.

Kassop: You said that you had ongoing negotiations with Representative Hyde in the House. When it came to the Senate impeachment trial, certainly for the Democrats, Robert Byrd was pivotal. Did you have any conversations with him?

Cutler: I did not have any conversations with Senator Byrd about the impeachment, no.

Kassop: Were you in contact with the Senate leadership?

Cutler: I was more in contact with Senator Feinstein and some of the other Democratic Senators, yes. And Republican Senators.

Knott: My recollection was that one of the big issues, when it reached the Senate, was the question of whether witnesses could be brought into the well of the Senate. Do I have that correct? And that the Clinton team succeeded in keeping witnesses out of that?

Cutler: I think there were a couple of days of hearings. There was a big argument about the fact that while the House had the Starr report before it, the Ken Starr report, the House had never conducted a proper kind of investigation, calling witnesses, to decide whether to indict or not. If you think of the House as a grand jury, the grand jury never met, or never heard any witnesses, simply took Ken Starr's report and the results of his investigation. There was a big attack, as you recall, on the report and whether it was a brief in favor of impeachment or simply a simple recitation of the facts that Starr's people had found.

Riley: What was your reaction to the decision to make that report public?

Cutler: It was not so much that it was made public, because there was a precedent for that in the Nixon impeachment case, where the [Peter] Rodino Committee had conducted extensive hearings. The Rodino hearing transcripts were made public. The problem was, was it a report, "here are the facts we found," or was it a brief, "you should indict."

Riley: Which was the legal question. I guess my question was more the political question. There

was a lot of vigorous public reaction to having the details of that report published in the daily newspapers where anybody could read it, because of the content of the report. I wondered if you had a reaction to the politics associated with its publication.

Cutler: I'm sure I had reactions but it was not that it was a prurient report or anything like that. If he's going to find the facts, he had to give the facts, especially since they had led to a contempt citation by the judge in Arkansas.

Zelikow: Could I change the subject, off of impeachment?

Cutler: Sure.

Zelikow: Did you talk yesterday about CIA issues?

Cutler: Some.

Zelikow: If you've already answered this question, I don't want to waste your time with it. But I was curious as to your role with respect to presidential findings on covert actions, and whether you had any strong reactions or noticed any significant differences between the process that was being used for presidential approval of covert actions and notifications to Congress when you were counsel in '94, in contrast from the time you had engaged these issues during the Carter Presidency. Any observations that you might have had about the way that process had changed that you thought had changed for the better or changed for the worse? Did you discuss that yesterday?

Knott: No.

Zelikow: Because the formal procedures had changed considerably in how you do a memorandum and notification. There had been a deal cut with Congress in the Intelligence Authorization Act of 1991 about how this would be handled.

Cutler: Right.

Zelikow: You actually worked in handling these sorts of problems in both eras. I was curious as to your reflections on the new processes.

Cutler: My recollection is that it worked well in the Carter era when there were relatively few covert actions that required findings or reporting to the committee. When the procedures were tightened up, it continued to work well because there was good cooperation within the two committees, the two intelligence committees, and because the White House personnel who worked in this area were to a considerable extent graduates of being on the staff of the congressional intelligence committees. They got along well with one another.

By 1994, the Justice Department was much more active in the whole area than it had been in the Carter years. Jamie Gorelick as the Deputy Attorney General was quite active. We went through yesterday the issues relating to U.S. government advice to the Peruvian Air Force or the

Colombian Air Force about planes that seemed to be drug smuggling planes and how they were shot down. We had a big, stand-up fight with Justice and the White House on one side and the Pentagon on the other side as to whether this violated treaties to which we were parties and whether it had to be stopped. And it was stopped. Apparently it has long since resumed, and this is one of the problems about getting rid of the DEA, the drug enforcement people. They're still trying to do it whenever they can, as we saw just a few weeks ago with that Peruvian plane.

Zelikow: You're referring to the shoot down by Peruvian aircraft of a civilian plane carrying Christian missionaries.

Cutler: Right. But all of the civil aeronautics statutes and treaties say that it is illegal to shoot down a civilian plane. You can force it down, you can do those things, but you can't shoot it down.

Zelikow: But in '94, you felt that the presidential congressional relationship as it related to the CIA and covert actions and clandestine activities was still working reasonably well.

Cutler: Well, yes—

Zelikow: And the White House counsel's role in that process was satisfactory to you?

Cutler: Yes, with one theoretical exception that in practice didn't amount to anything. This actually started—it was already true in the Carter years that the National Security Council had its own lawyers who were not part of the White House counsel's office. In practice, in the Carter years, that person was Bob Kimmitt, who had been a West Point graduate and was assigned to the Pentagon. We developed a very good working relationship. So that it really, in theory—

Zelikow: He had the job of executive secretary on the National Security Council staff. He may be also counsel to the NSC—

Cutler: He was counsel to the NSC. In theory the NSC legal counsel ought to be part of the White House counsel's staff. That's now true. John Bellinger, who has that job now for the National Security Council, is part of the White House counsel's office. He has two dotted lines, and that seems to be working quite well.

Knott: Just a follow-up on what Philip was asking you. The whole question of congressional involvement in terms of oversight of the CIA, in some ways this is back on the front burner since the September 11th events. As someone who is a longtime Washington observer, I was wondering if you could just reflect on whether you think that that overall has been a healthy development.

You've already touched on it a bit. But I'm thinking, for instance, President Clinton had some trouble in terms of getting Anthony Lake approved as director the CIA and there was a fairly—I would characterize it a heavy-handed campaign against Lake that ultimately resulted in his withdrawal. Could you just talk in general terms about congressional oversight of the CIA and whether you think it's been a relative plus or minus.

Cutler: I think that it's been on the whole a plus in that, as I said, it's worked very well, in part because the people picked in the White House have been people with prior Senate or House committee experience. I've always thought that it is a mistake to have the head of the CIA involved in policy, the way Allen Dulles was. The role of the CIA ought to be to run its agents, to run its various technical means and report what it finds, but not to get involved in saying you should invade North Korea or you should do this or do that.

And I know, because I was George Tenet's lawyer in his confirmation process, that he felt that way when he took over the job. It was pretty much against his will that he got dragged into the so-called Tenet plan in the Middle East, for example. So in theory, I think it would be much better if the head of the CIA just gave the facts. But Allen Dulles was never that way and it has been more or less traditional, I think, for the head of the CIA to be both a policy advisor and a fact finder. His role goes beyond intelligence in that sense.

Knott: It's your impression that the committees themselves have acted in a responsible manner?

Cutler: I think so, I think so. They vary, of course. It's still a problem to say something in confidence to the committee and keep it out of the newspapers.

Zelikow: Have we talked about pardons yet?

Kassop: Before we get to that could I perhaps just follow up—

Cutler: Talked about what?

Zelikow: Pardons.

Cutler: Oh no, don't get me started on pardons.

Kassop: If I could just follow up a little bit on the foreign policy and White House relations with Congress on those matters. When it came to War Powers Resolutions or when it came to the use of military force, which Clinton did use force even while you were there, could you perhaps walk us through the steps of what the role of the White House counsel's office is in negotiations with Congress over the use of the War Powers Resolution?

Cutler: Yes. It relates mainly to your reporting requirements under the War Powers Resolution and how you handle them. It is the White House counsel's role to deal with it, to give the proper notifications to Congress, to pass on whether the factual circumstances are those described by the War Powers Resolution. At the same time you have to maintain your position, which has been traditional ever since the Nixon days, that the President is not bound by the War Powers Resolution. The ritual language that you use is, not "pursuant to the War Powers Resolution," but "keeping in mind" or "bearing in mind the War Powers Resolution, I notify you of such and so."

In the Carter days, when we did the Desert One raid to rescue our hostages, when the President called me in a few days before the actual raid and said we have to prepare something under the

War Powers Resolution, "I want you to do it and not tell anybody and above all don't tell the Attorney General," I had to persuade the President that we had to bring in the Attorney General. You just couldn't risk leaving him out of something like this. But I had to look up the law myself.

Kassop: Were there negotiations between the counsel's office and the congressional committees about the wording of the authorization from Congress?

Cutler: No. We had to make a full report as to why we didn't notify them before the operation, and it was all based on the theory of surprise. You were allowed to go in and rescue our own people and that surprise was a vital element. If you consulted Congress, whatever consulting Congress means, you had no way of keeping the advantage of surprise. Our real concern in the Carter days was [Thomas P.] Tip O'Neill, because Tip, with all his wonderful qualities, would have mentioned it to the next person that walked into his office or one of his staff.

Kassop: In the Clinton administration though, Walter Dellinger had a particularly novel interpretation of the War Powers Resolution, I think, that he had put forward in a memorandum from the OLC, that the 60-90 day requirement began with each new military act, even after having gone in the first time. Were you in consultation with Dellinger over interpretations about how the Act—?

Cutler: Not on that question. You mean that every day you had to deliver a new report to Congress?

Kassop: Pretty much, yes. So that it would essentially—

Cutler: "Yesterday we bombed three caves?"

Kassop: Yes.

Cutler: That I never heard.
Kassop: Was there consultation between OLC and the White House counsel's office on how to word these things?

Cutler: Certainly with OLC, yes. The big issue was to avoid the requirement on the face of the War Powers Resolution that if Congress within a certain period of time doesn't approve the insertion of the troops, you've got to take them out. The consistent presidential interpretation is that that is unconstitutional.

Kassop: Why was that never litigated?

Cutler: Because the Supreme Court won't take it.

Young: Could we have a brief break? Then when we reconvene we might spend some of our remaining time on Clinton apart from the impeachment issue. Just Clinton as a President and all of the hats the President wears.

[BREAK]

Zelikow: I do want to get you started on pardons, but not start by quizzing you about the pardons of 2000, but just to go and talk a bit about the White House counsel's role with respect to pardons when you were White House counsel in 1994, for instance. If you could describe, when you were White House counsel, what did you think should be the standard operating procedure for handling requested pardons and getting those through the President?

Cutler: Well, there was a standard operating procedure when I got there and it was essentially the same as in the Carter days. Both pardon applications and so-called executive clemency, commuting sentences, shortening terms, et cetera, would go to the pardon attorney in the Department of Justice. They would do their investigation and they would make a recommendation: grant it or deny it. That would come to the White House counsel. We would look it over and decide whether to accept the pardon attorney's recommendation. Sometimes we would be opposed to the pardon attorney's recommendation. We might feel a pardon was not appropriate in a given circumstance. Or if he had recommended denial, we might feel that it was appropriate in a particular circumstance.

Occasionally it would get political, in the sense of people who had clearly committed a serious crime, usually not a physical crime, but a property crime of some sort or another, who had been contributors or in some way had a political claim to a pardon. We would be for or against that. There were other cases in which there was pressure on the White House to grant a pardon to somebody who was not on the pardon attorney's list. The cases of that type included [Leonard] Peltier, the Indian, the Sioux who was involved in the alleged murder of an FBI agent on the reservation, or just off the reservation, in Iowa or wherever it was. The FBI was very much against that. Peter Matthiessen, the author, wrote a book about it, as you know.

Zelikow: *In Search of Crazy Horse.*

Cutler: That's right. I remember dealing with Peter Matthiessen and having to tell him I just didn't think it was possible that that could be granted.

Zelikow: That request must have already come through the office of pardon attorney, maybe years earlier.

Cutler: It had been around for years. These things would always renew themselves, and the same thing was true about Pollard.

Zelikow: Jonathan Pollard.

Cutler: And the American Jewish community was very active in support of Pollard, the Mossad and most Israeli prime ministers got involved trying to save Pollard, who was really, from their point of view, a loyal Jew recruited by the Mossad. But Pollard had done a lot of damage, at least according to the CIA and the FBI, and he was a totally unrepentant person as you remember. Efforts were made while Bernie Nussbaum was there, while I was there, to get a pardon for

Pollard. Bernie, I think, was rather interested but could never get it through.

I was very much against it at the time. I'd been in the intelligence business myself and it would have offended the entire intelligence community if we'd done it. And really, Pollard was just not a deserving case. He was not in the slightest sense repentant for what he'd done. At least while I was there we fought it off. I guess even through the final last days of the Presidency, when another effort was made to get Pollard out, the President felt he couldn't do that, but it may have had some bearing on his decision to pardon Marc Rich.

Zelikow: The procedure then would go from the Office of Pardon Attorney to the White House counsel. Would you present these cases to the President? Would you present all the cases to the President even if both the pardon attorney and you recommended against? Or would you only present those cases to the President where either Justice or you recommended for? What was the threshold at which you—or was this more of a judgment call, just depending on the case, which ones you would forward to the President for final decision?

Cutler: To begin with, it was a rather infrequent process. There are relatively few pardons or commutations of sentences that are granted. My recollection is we would report them all and if there was no controversy we would do in the form of a memo, "These pardons or commutations have been recommended." We'd never have a verbal discussion with the President about it.

Zelikow: So in your tenure, there were no cases in which you actually had extended conversations with the President that gave you insight into how he saw his power of pardon and commutation?

Cutler: That's correct. It wasn't how he saw his power but whether to do it in that case. There was no question about the power.

Zelikow: Right. But you were never able to get a clear insight into what the President thought was his conception of the proper use of his power? Because while you were White House counsel, there were no cases that really rose to that threshold of presidential engagement, personal presidential engagement.

Cutler: That's correct.

Zelikow: Let me then ask whether you were involved in any way in the flurry of pardon requests and pardons and commutations granted in the last weeks and hours of the administration.

Cutler: No, I was not.

Young: Were there any cases in which, such as the Ford pardon of Nixon and the Bush pardons, [Casper] Weinberger, where the President himself—this would presumably not depend on a case being brought up for reference to him—but the President himself would make a decision about an issue of that kind, or would initiate it?

Cutler: While I was working for Clinton, no. Of course many people believe, in retrospect, that

while Ford's pardon of Nixon may have cost him the election, that in retrospect it was a good thing to do. Carter, you remember, gave amnesty to all the so-called draft dodgers who went to Canada or Sweden or elsewhere.

Zelikow: I'm going to move away from the issue of pardons unless there's anything else you wanted to say about that issue. I was looking through the briefing book and I had kind of a big question, which is, looking back, you were White House counsel in the Clinton administration for just under seven months, as I calculate it. You were brought in clearly with an objective, which I'm sure you described yesterday, of restoring a sense of calm, order, and regularity amidst a good bit of turmoil. I'm sure you went into more detail about that.

As you left seven months later, what did you think were your one or two greatest accomplishments? In what did you take the most satisfaction?

Cutler: I think I answered that yesterday, and that was the appointment of Steve Breyer.

Zelikow: But you didn't come to that office to appoint Steve Breyer.

Cutler: No, that just happened.

Zelikow: So thinking back to why you took the job in the first place, as you left it, how do you think you did against the goals that you had in mind when you took it?

Cutler: I think we did very well in defending the President in the various investigations and in conducting our own investigation of the so-called White House-Treasury contacts, the "heads-up" contacts. We filed a report that I think won general public acceptance. We had success before both the Senate and the House Banking Committees.

Within a week, we lost Bob Fiske and the special panel of the court of appeals had appointed Ken Starr. That was a great disappointment, especially since we had made Fiske eligible to be appointed. We had changed the statute when the statute was renewed so that anyone who was an official of the Justice Department—because he had been appointed regulatory counsel, as Fiske had been appointed by the Attorney General—could continue in that job if named by the special panel. What I wish we had done in retrospect, of course, was to provide in the statute that anyone who had been named regulatory counsel would continue with his work. But instead the Justice Department left that up to the three-judge panel to decide and they went ahead and in effect fired Fiske and picked Starr.

Zelikow: How do you think you did with respect to bringing the house in order, in general? As you took the job, it sounds like you do take some satisfaction in having effectively represented the President and the White House on a couple of critical issues. How do you think you did as a whole in adjusting or regularizing the role of the White House counsel and the operation of the White House overall?

Cutler: I thought we'd done quite well on that. Part of it was to not leave a vacuum as it had been left when Bernie Nussbaum had to resign, but to find my own successor. I thought he'd

come up with the ideal successor, Ab Mikva, who had had both legislative experience, judicial experience, and political experience. And Ab was, I think, the perfect choice, but unfortunately he had health problems and other things and he left in about another year or year and a half, as I recall.

Zelikow: Were you involved in the selection of Mikva's successor?

Cutler: Peripherally, yes. He was not my choice, but I was consulted about it, yes.

Zelikow: Let me turn the question around and ask kind of a global question the other way. As you look back on that experience or looked back on it, even a few months after you left and had a chance to reflect, what were your greatest frustrations or concerns as you left the office? What were the things that day in and day out that pained you the most about the way the office worked or about the way you were able to do your job?

Cutler: Again, I talked about this yesterday. The job had shifted, in effect, to less a policy advice job on substantive policy issues, to a more defensive job against personal attacks on the President, or his Cabinet, or members of his family for alleged personal misconduct. So that instead of being mainly a major policy advisor on substantive presidential policies, you had to spend more of your time defending the President against these attacks.

Young: You referred to that yesterday, not in response to the question, to Philip's kind of question, but I remember what you said yesterday, you gave a percentage of offensive work and defensive work. You contrasted the current—

Cutler: It was about 80/20 substantive policy work under Carter, and about 20/80 with Clinton.

Zelikow: If I could just follow that up, and maybe you addressed that yesterday, was there any issue on which you made a strong bid to fix? Or were you basically, there were just such a barrage of things in your inbox while you were there that there was no way to try to redress this balance? There was no issue or opportunity that you could use as a vehicle to persuade the President to reverse this balance, because you had just so much work to do covering your inbox?

Cutler: It wasn't his choice. You had to do the defense. It's always true of that White House counsel position that you have to act on the basis of incomplete information. That's one of the worst parts of the job, because you're thought of as a spokesman, or at least an advisor to the communications people on how to respond to something that happened that morning.

I've described it as coming into your office with a list of ten things you're going to do that day that you wanted to do and by 9:30 or 10 o'clock in the morning, because of something that's in the morning paper, you've got to junk your schedule and spend the whole day investigating the facts about this latest charge, so that by 4:30 or 5 you have something available for the evening news.

Young: Your comments have been in response to how this affected the counsel's job. I'd like you to say something about how it affects in general the work of the President's staff. Would it

also be true that it became 80 percent defensive and 20 percent offensive when you take the whole—?

Cutler: Well, it depends on who you are. If you're the chairman or member of the economic policy group, you work on economic policy. If you're part of the team that responds to personal charges against the President or some close-in advisor of the President, you work on that.

Young: Communications people, press people, would experience the same defensive—

Cutler: Right.

Young: But this has no—what about other policy, other than economic policy?

Cutler: Or national security policy.

Young: Yes, international security matters.

Cutler: Or legislative policy.

Riley: Or the President himself. His time.

Cutler: Yes. His time—no President, that I can remember, has been a full-time CEO or manager. Perhaps half his day he spends on that. The rest of it he has to commit to various kinds of ceremonial functions or political functions. Or taking naps.

Riley: I guess going back to the core question in the *Clinton v. Jones* case, the President's time and attention, I guess, is being drawn away from offense to defense as a result of these things.

Cutler: Yes.

Riley: I don't know whether you care to put a percentage—

Cutler: That's certainly what happened to Clinton. It didn't necessarily happen to Reagan or to Bush, or Bush I, and so far at least it hasn't happened to Bush II.

Kassop: Specifically referring to Clinton, the press has described him as being able to compartmentalize, to put the scandal issues in one box, deal with them when he has to, but then also was able to be a commanding presence and deal with policy as well. Could you perhaps talk a little bit about that? Is that a correct—?

Cutler: That's true, although he himself would get overwhelmed by some of the personal attack issues that he had to deal with for a very substantial part of his day. When he was interviewed by Fiske, for example, we had to prepare him for several days before the interview, just to get his attention focused on the questions he would be asked and whether his answers were good answers or bad answers, the normal kind of preparation you do. There's no substitute for that. But, as you say, he could do that, and then turn to a policy issue or interrupt for a few minutes

and deal with a pressing policy issue with somebody who had to see him. Or a phone call he had to make to a Senator who was returning his call or whatever.

Kassop: Would you characterize the rest of the White House staff also as being able—we talked a little bit yesterday—about the fact that there were people who dealt only with scandal and again, tried to keep the rest of the White House focused on policy matters?

Cutler: Right.

Zelikow: Did you hire Mark Fabiani?

Cutler: I think Mark came on after I had left. Mark originally worked for Jane, I think, and then he became a spokesman on the scandal issues.

Kassop: Was there coordination from the counsel's office and the press office on how to answer some of these legal matters?

Cutler: Yes. Sometimes successful, sometimes not. We went through that yesterday, Dee Dee Meyers.

Young: Can we turn to Bill Clinton as history moves on and there are backward looks, and the successive processes of revision and rethinking about a Presidency as distance becomes greater and as documents, including the transcripts of these oral history interviews, come to light. You knew Clinton first hand. You had working experience with him. You were an observer, an astute observer of Presidents, and a helper, from the outside. I'd like you to talk about the Clinton that you saw and the Clinton you knew. This in aid of helping other people to understand the Presidency, but also this particular President, at this time in history.

I'd like to make that a bit more pointed and resort to one of the standard teachings of my youth about the Presidency, which was that every President wears a number of hats. As a world leader, as a chief legislator as it was called in those days, '50s and '60s, as a party leader, as a chief executive, and so on. We haven't said much yet about your observations about Clinton in the foreign policy area, the national security area. We haven't particularly concentrated on that. That's one area we would like to hear from you. What were his special characteristics, his strengths and his shortcomings, in some of these capacities? What about working in national security matters and as a world leader?

Cutler: Yes, we went through some of this yesterday. There is no question he had an extraordinarily intelligent and grasping mind. Analytically he was very, very good. He could absorb detail very quickly. He is the only President, the only Democratic President since FDR who won a second term. He was interested in presidencies, we all know, from the time he met JFK as a youngster. He had a natural interest in foreign policy deriving out of his own reactions to the Vietnam War. He was very good, I think, in leading the Democratic Party back to the center from being the party of labor and immigrants of one kind or another.

I would assess his foreign policy record really as quite good. He had a somewhat different

situation to deal with. He took part in ending the Cold War, for which I suppose you have to give most of the credit to the whole line of Presidents from Harry Truman on down, in ending the Cold War. But he took us into this new era of being the only superpower, both economically and militarily, and how to adjust to that and how to deal with a world in which you had to maintain collaboration with other countries even though you were much more powerful than they were. And in which the need to use your military strength had to be exercised with a great deal of caution, but it had to be exercised for other reasons like building democracy, protecting human rights, dealing with former dictators who abused the rights of their own people, et cetera. He did all of that really quite well.

He led us into a settlement in Bosnia-Herzegovina and the former Yugoslavia. He led us into a new relationship with the Russians under [Boris] Yeltsin. He maintained, really did a 180-degree shift on China and human rights and the overweening importance of bringing the Chinese into the whole world economy and the whole world trend toward democracy and globalization. He did all of those things very, very well and I think history will judge that very much in his favor.

In domestic affairs, although it took him a long time, he clearly made the right decisions about getting our fiscal house in order and launched us on this ten-year wave of prosperity which finally ran out and which the Bush I people can argue, and still argue, they started. But in any event, it was Clinton who kept it going for eight years, which is the longest period of sustained economic growth and job creation we ever had.

Young: At least say something about the person in the President. But on national security, I'm trying to get at what thought and what ideas lay behind these actions or these accomplishments. Did he have, in your view, a well thought-out view that he would be the first post-Cold War President and that he had a whole agenda deriving from that? Or was there something learned on the job?

Cutler: He had a set of views developed during the campaign that he modified very substantially after winning office, as he was quite right to do. One way to answer the question is to ask yourself, who was really electable who could have managed that eight years better than he did from a foreign policy standpoint?

Kassop: Could you speak perhaps about his role as a peacemaker? I have the impression that he took great pride in the Northern Ireland peace agreement and also being able to resolve the issue in Haiti.

Cutler: Well, I think it is true about Northern Ireland, except we still don't have peace in Ireland. But he contributed a great deal and he had Irish roots, which he exploited to the full. But I would give him more credit for his uses of our military presence and our military force to achieve what you might call humanitarian, or human rights, or environmental or other objectives.

Kassop: Was there also tension, though, with the military over the use of our troops for, as you say, humanitarian and peacekeeping as opposed to actual outright military?

Cutler: Oh yes. And there had been under Reagan, of course, as well. And under Bush there had

been, as to when we should use the forces and for what purpose. But by now I think there is a general consensus across the military and the parties that worldwide human rights and the development of democracy are the only way to eliminate poverty and war. The Republicans share this view just as much as the Democrats today. Think of the Bush administration and all of its people who were firmly against intervention in Yugoslavia ten years ago and where they are today.

Knott: Were there any shortcomings that you'd care to comment on? Anything that you saw that particularly bothered you?

Cutler: I think we're coming at this from different ways. You conceive of the Presidency as an opportunity for a man who has formulated his views to apply those views and carry them out in the one term or two terms. I think of the Presidency as an opportunity to achieve objectives in ways that you have to invent and modify and adjust as you go along, and a lot of it is purely reactive. War breaks out in Palestine, or war breaks out with Saddam [Hussein], how do you react to that? It isn't as if you foresaw before you were President that we will have to deal with Saddam in a particular way and at a particular time. I used this phrase yesterday, but one of the very important qualities of a President is to be able to grasp an opportunity, and you won't know what your opportunities are, things will happen in the world to which you have to respond that probably weren't on your list.

I remember going in—I used to be in the intelligence business, as I said. I remember being part of a group that looked at what we had missed in signals intelligence at the time of the invasion of South Korea by the North Koreans and the later intervention of the Chinese, and I came across a National Intelligence Estimate of the ten greatest danger spots in the world for the year 1950. This was one of the National Intelligence Estimate reports, and the number one problem was Trieste. The risk of an invasion of South Korea wasn't even on the list.

Zelikow: Your answer about the way you think about the Presidency I thought was profound and was helpful to me. In a way I'd like to use that to return to your evaluation of Clinton. What about his working style or habits strongly shaped the way he adapted, reacted, and utilized opportunities, strategically, as they came along? You've already alluded to the fact that he had a strong, grasping intellect that would help him process a lot of information. That's good, that would be a strength. But think back on the organization of the work day and the way that he moved in reaction to events. Is there anything else you'd like to say on either strengths or the shortcoming side or the particular mix of both that just characterizes this President as opposed to another President, in navigating that river, so to speak?

Cutler: He had this enormous range of interests and relatively little sense of organization and delegation. He would get into everything. He would drop down several lines of the food chain to a young person in the State Department or somebody he wanted to talk to in the military, or some friend from Arkansas. He was in many ways the precise opposite of Reagan, who had firm convictions but who functioned as President certainly in the planning or executing sense not more than an hour or two or three a day, max. He was very different from Bush I, who certainly wanted to be President, had all the training you could ask for and enjoyed the job, but didn't do much with it. He really enjoyed being President more than having any vision of how to use the

Presidency when he had it.

They're all different. Clinton is and was a very impulsive person. He is somebody with strong appetites, as we all know. One would have thought that if you'd spent your whole life trying to be President and this billion-to-one shot came in, that you could manage to restrain these other appetites during the period of your time in office. In a way it's kind of a Greek tragedy that he wasn't able to. Or that you can put it the other way around, that other Presidents did the same thing but he got caught.

Zelikow: Do you believe that, by the way? Do you think that's a fair—do you believe that assertion is true?

Cutler: Well I believe that JFK or Johnson, had they done what they did today, would have gotten caught. I think anybody would get caught today.

Zelikow: I've heard that assertion. I know about JFK and Johnson and then there's a particular story about Roosevelt, but I think it implies a degree of cynicism about the licentiousness of modern Presidents, but I think it is more the exception than the rule. It certainly has happened, but it is not the way I would think of Carter, Reagan, Bush, this Bush, Eisenhower, or Truman. In a way it does a disservice to a lot of other Presidents who perhaps—not everybody was like Warren Harding.

Cutler: Think of George Washington, think of Alexander Hamilton, think of Thomas Jefferson. It isn't as if affairs and interest in other women was invented or suddenly began in the 1920s or '30s or '40s or '50s.

Zelikow: No, they're not plaster saints. But, nor is it that Clinton was doing what all the others were doing and he just got caught. That doesn't seem to be a very fair statement about say, Jimmy Carter.

Cutler: I accept that. But Carter talked about "lust in my heart."

Zelikow: Yes, but he kept it in his heart, which makes the job of the White House counsel much easier, since you don't have to police his heart.

Young: In certain respects. [laughter]

Riley: There is a fairly substantial literature among political scientists and other observers about so-called presidential character. There's an argument that character is the biggest variable, it is the biggest determinant of presidential success or failure. Do you subscribe to that notion and if so, how do you view the role of character or define character?

Cutler: I think trust in the President is extremely important and that character, whatever we mean by character, has a great deal to do with that. But as I said yesterday, I think Watergate made an enormous difference. Presidents, just by reason of being *The President,* were given an awful lot of trust and leeway. If the President said something, you believed it. Watergate

destroyed that and the Watergate tapes destroyed that. We got to see that Nixon was not the man we saw in public. Even for those of us who could never stand Nixon, the tapes prove in the end that he was worse than we thought. He was the only President who ever resigned under fire, and trust in the President went with him.

It can be restored. I think Reagan had trust in that sense. But that's always going to be with us and we always have to reckon now with the investigative press and the fact that the road to fame and fortune, if you're a journalist, is going to be to expose some great scandal, whether it is sexual, political, financial, or whatever, rather than simply reporting the news, the substantive policy news.

Kassop: This notion of presidential character that Russell is mentioning, certainly with Clinton one could say that his personal shortcomings, for instance his relations with women, were obviously a serious flaw, but on the other hand, some of the other ways of assessing character in Presidents is in terms of his policies. Certainly with Clinton some of it, the early returns of it, his policies such as his humanitarian policies and domestic policies, as in ending warfare but also in trying to make it possible for people who had been on welfare to get jobs, those sorts of things, are also part of presidential character, the moral basis for many of his policies. Is there anything you could perhaps expand on that?

Cutler: It gets so complicated. It is part of good character not to lie, not to bribe, not to cheat, but we have a whole agency known as the CIA that's in that business, run by the President. Eisenhower denied involvement in the U-2 spy plane. Can a President lie? And the answer seems to be, on occasion.

Young: Turn this a different way. Let me simply ask, what was Clinton good at and not so good at, what was he best at?

Cutler: He was good at getting elected. He was good at "feeling your pain." He was a brilliant shake your hands politician. He was able to look at the person he was talking to, if he was working in an airport line, or at a cocktail party or a reception, he would talk to you and look at you, and engage you and not be looking over your shoulder at who's coming to see him next. He's very good at that. He's a brilliant extemporaneous speaker. He probably handled the press conferences better than any President I recall, when you read the transcripts, except FDR. But once again, that was a different era.

Riley: Had you seen his equal in working a room and this ability to focus?

Cutler: Yes, Johnson had even more extraordinary ability to focus. Johnson was not as attractive, physically, a person as Clinton, but Johnson really knew how to grab you by the lapel, get his face two inches from yours, to manipulate you. He had this wonderful phrase—"I always feel more comfortable with a man if I have his pecker in my pocket."

Young: Yes, yes. [chuckling]

Kassop: Just one other quick question regarding Clinton and his ability to articulate and his use

of language. I mean certainly if you're talking about Clinton and the use of language, you can't overlook the fact that he's also been criticized for parsing and making distinctions that at times are questionable, certainly when it came to issues about reality.

Cutler: And that plagued him from the very beginning, his experience with the draft. Those letters, whether or not he tried to renounce U.S. citizenship and go to Sweden, all of those issues. That is one of the flaws, there's no doubt about it.

Kassop: Did you see that in your interactions with him? Were there things language-wise that you suggested that he try to in some way move away from or make distinctions—?

Cutler: No, and I never had any occasion to. Ninety-nine percent of his appearances before the public, there was nothing you could criticize in the language.

Young: He was equally good as a politician, in public, outside the beltway as inside the beltway? He was very effective in Washington. He was, after all, an outsider coming to Washington as Jimmy Carter was. But he connected very differently, you're saying, from Carter, and very effectively?

Cutler: Right.

Young: Dealing with—?

Cutler: We went through this again yesterday, too. Carter is quite a different personality. He's another Governor of a southern state, that much is true. He has the same populist background and instincts, although Carter was a much more conservative person on fiscal and related issues, I think, than Clinton was, in those days.

Young: In those days, yes.

Cutler: Clinton made the right fiscal decisions once he took office but they were quite different than what he was saying during the campaign. Carter, as we said the other day, had small stature, he didn't look presidential. He was plagued by the second oil shock and the gas lines from the first day of his administration.

Young: Another one of my mentors, Dick Neustadt, once would contrast Presidents. He contrasted Kennedy and Johnson as to what they really had sensitive fingertips about and how they differed. This is an oversimplification, but one of the contrasts he pointed out between the two was that Johnson had extremely sensitive fingertips on Congress, legislative politics and all that that went into, and not good fingertips on executive politics or dealing with executives. Kennedy was just the reverse. If that's a valid way to think, one of the ways to think about a President, how would you put Clinton in to those boxes? Or would you invent a new box for him?

Cutler: I guess I'd invent a new box for him.

Young: Which would be?

Cutler: That he combined both of those qualities. Although he was much less "hands on" in the managerial sense.

Riley: As someone who has had a long career in dealing with Democratic Party politics, how do you judge his legacy for the Democratic Party?

Cutler: Well, he brought them from the left to the center. Whether they'll stay in the center remains to be seen. But that's his main legacy, I think, and he brought us out of the Cold War into this new period very successfully.

Zelikow: Was he a hardworking man, Clinton? Did he work hard at mastering his brief? Some of the accounts that you read you get a sense of a person who is so quick and gifted that like some quick and gifted people, they really don't feel like they need to work very hard. "I can size this up in thirty seconds, I can glance at this memo and get it."

Cutler: Yes.

Zelikow: Very real contrast with Carter. Carter you really do have the sense from accounts—and maybe that's a distortion on both sides that you can correct—but the impression on Carter, which I have even from my own work with him, is that Carter does work hard, that Carter will just sit and he will go line by line through things.

Cutler: Yes. And he's a manager and he's organized and he had a Naval Academy background that gave him all of that.

Young: And a Naval career.

Cutler: And a Naval career.

Zelikow: Could you comment on Clinton's approach to his job in that sense? Did he work hard at it?

Cutler: As we know, he was always working at something. He was awake at least 18 hours a day. I mentioned yesterday that in formal meetings at the Oval Office, when a presentation was being made to him, he would sit there doing the crossword puzzle while he was listening to the presentation. He had that kind of a mind; he could absorb what was being said and do the puzzle on the side.

Zelikow: But would paper that would go into him, would you often see paper coming back out with marginal notations or—?

Cutler: Yes, and those little left-handed check marks that he'd put up in the upper left hand corner of the paper, that he'd read it or agreed with it.

Young: Did he return it quickly once he got a piece of paper?

Cutler: Very quickly.

Young: So at least some of that 18 hours was well spent.

Cutler: Oh yes. He literally, every President has to go out and perform ceremonial functions, but he was doing something related to his job the full 18 hours every day.

Riley: Was it a frequent occurrence that he would pick your brain about past Presidents? You also get the impression—

Cutler: We swapped stories but he knew a lot more about it than I did. He is very well read about the Presidency.

Young: Did he ask you a lot about Lyndon Johnson? We've had other people whom he asked a lot about Lyndon Johnson. I just wondered if—

Cutler: No. I probably had too short a time with him, and I never had a full-time job in the Johnson administration.

Kassop: Did he ask you a lot about Kennedy?

Cutler: No, other than what he said to everybody about how Kennedy was his inspiration about running himself.

Kassop: Did he have a conception of the Presidency in grand terms as to what he felt—

Cutler: I think so, I think so. Anybody who thinks when he's 10 or 11 or 15 or 18, anybody who makes decisions taking into account that he'd like to be the President some day, certainly has a grand conception.

Kassop: But did you get a sense of what his was in more detail?

Cutler: He wanted to be President and do all the great things that a President could do. But did he know exactly what it is he wanted to do? I don't think so. I don't think anybody does.

Zelikow: But your conception of a President in a way is different from Clinton's. In a way you don't really hold the President accountable for knowing everything they're going to do before they start.

Cutler: No. I never ran for elective office, I never would, I never thought of it. I was happy enough to be what Dean Acheson in one of his books called "present at the creation."

Zelikow: It's not in this briefing book, but I remember it from an earlier generation, from the '70s, didn't you once advocate changing the presidential term to a single six-year term?

Cutler: I was part of the group that advocated six years, but I changed my mind.

Zelikow: When did you change your mind?

Cutler: Milton Eisenhower was the real formulator of that.

Young: Yes.

Zelikow: When did you change your mind?

Cutler: When it became clear you couldn't get it passed in any event and you had all the lame-duck problems with a single six-year term. The world wouldn't have come to an end. I think the U.S. would have gone on more or less the way that it has if we had had a six-year term instead of a four-year term, but probably it was a good thing, looking back on World War II, that we didn't have a two-term rule at the time.

Young: Russell, this is really your question, I think, and Clinton—and correct me if I'm wrong—it goes to the question of Clinton's own expectations, not about the Presidency, about what he could accomplish in the light of what actually happened. Didn't he say once, "I'm a President out of my time," expressing a degree of frustration that he did not have the great moments that he was hoping to have in his time?

Cutler: Well, I'm sure he would have loved to have 9/11 occur a year or two years before.

Riley: Yes.

Cutler: And yet, I noticed in one of those timelines, I guess we mentioned this yesterday also, that the first attack on the World Trade Center was while Clinton was President.

Riley: That's correct.

Zelikow: And the East Africa bombings.

Cutler: And Somalia.

Riley: Did you get a sense of frustration on his part then that the times didn't permit him to be as big as he wanted to be?

Cutler: Not really. I mean, nobody would have wanted 9/11 to happen, in fact most of us thought it wouldn't happen.

Riley: Sure. I don't want to—I mean that's sort of a crass way of interpreting the question and my question is more one of having—the comment that he made about being a President out of his time was made in the context of his looking for a kind of epoch-making moment that he could fill in an expansive way, in the way that a Franklin Roosevelt had governed or John

Kennedy had governed with respect to civil rights. There are at least bits and pieces of evidence that he felt this frustration. I just didn't know whether—

Cutler: Well, he almost certainly would have liked to have had a third term, probably a fourth term.

Young: The health care, was that a big disappointment to him or was it expected?

Cutler: I think it was a disappointment. I think he recognized in the end that it was a tactical mistake to put Hillary in charge of it, to give her that much of an up-front policy role dealing with Congress.

Kassop: To try to frame this view of the Presidency that he might have had in somewhat more specific terms, did he ever express to you his view of presidential power, or simply the scope of presidential power? Certainly, George Bush and his White House counsel Boyden Gray came in with a very clear, defined objective of trying to, in a sense, take back some of the power that Congress had taken after Watergate. Did Clinton ever express or talk to you about his view of presidential powers per se?

Cutler: Not in that sense, not in comparison to what you say about the Bushes, although I am skeptical as to how clear a view Bush I had about that. As I said, I think he wanted the job and enjoyed the job, but he was not noted for resisting demands for documents or asserting executive privilege.

Kassop: Except that I think that Boyden Gray wanted to run the counsel's office as a policy shop and had pretty clearly defined objectives there. So it may not have, whether he took it from Bush or whether that was more his view of his role, maybe is the question. But you didn't get any sense from Clinton that he had any sort of vision about—?

Cutler: Boyden came out of our law firm, as you know. We've talked about this an endless number of times, but I think Boyden was content with, I would say, a lesser role for the White House counsel than I would have been content with. Because I think Boyden tended to stick more to, "You can do this," rather than, "Maybe you can do it but you really shouldn't."

Young: Do you still have occasion to meet with or talk with former President Clinton?

Cutler: I see him occasionally, usually at some large gathering. Occasionally at a small dinner.

Young: Not often.

Cutler: He's hardly in Washington at all these days, as you know.

Knott: I have a question that's a little bit off the track that we've been going down, but as a longtime participant and observer of the Washington scene, I was wondering if you could just comment on the whole Newt Gingrich phenomenon, the so-called Gingrich revolution? Media coverage at the time talked about what a dramatic change this was in the character of the

Congress. I don't just mean the party switch, but there was a different tone and a different tenor in Congress. Do you have any—

Cutler: Well, we talked about this a little bit I think earlier. Gingrich came into power by the recovery of the majority in the House by the Republicans. Clearly he saw himself as a future presidential candidate, next time around. He developed the "Contract with America" in part for that purpose, but he became the central Republican figure and the man to beat and the man to worry about.

I'm told actually, I think by Justice [Sandra Day] O'Connor, who was sent to Mongolia by the State Department, as they send Supreme Court Justices around the world to make speeches and take part in panels. She got there and she found a document called the "Contract with Mongolia." There's some unit called the Office of Public Diplomacy in the USIA [U.S. Information Agency] and they had printed up a version of the "Contract with America" for Mongolians, which they actually handed out in Mongolia to the yak drivers and others.

Gingrich, as I say, was the man to beat. Then he stumbled on his own personal life, and then Livingstone stumbled on his personal life. Then we got to the group we now have.

Kassop: How much of that do you also attribute to Tom DeLay? I mean certainly he is one of the chief foes of President Clinton. DeLay played, even if it was perhaps a behind the scenes role, an extraordinarily large role.

Cutler: I'm not a DeLay fan, but he actually made speeches saying that we've got to stop these radical judges from interpreting our laws differently than the way we meant them when we wrote them. And the power we should use for that purpose is impeachment, and we ought to be able to impeach judges for writing opinions that misconstrue our statutes or that misconstrue the Constitution. That's pretty bad.

Young: Do you have a final question?

Riley: No.

Young: Thank you very much, Lloyd.

Cutler: Well, I thank you.

Young: This has been enlightening.

Cutler: I'm surprised we used up this much time.

Young: You won't be when you see the transcript. At least those of us who asked the questions won't be, nor do I think will people in the future who read it. They'll think it's time pretty well spent.

Cutler: Thank you, Professor Young.

Young: Sometimes when people call me professor, I cringe.

Cutler: When I taught a sabbatical at the Yale Law School and one of my students would come up and call me professor I would give him high honors. Flattery never fails.